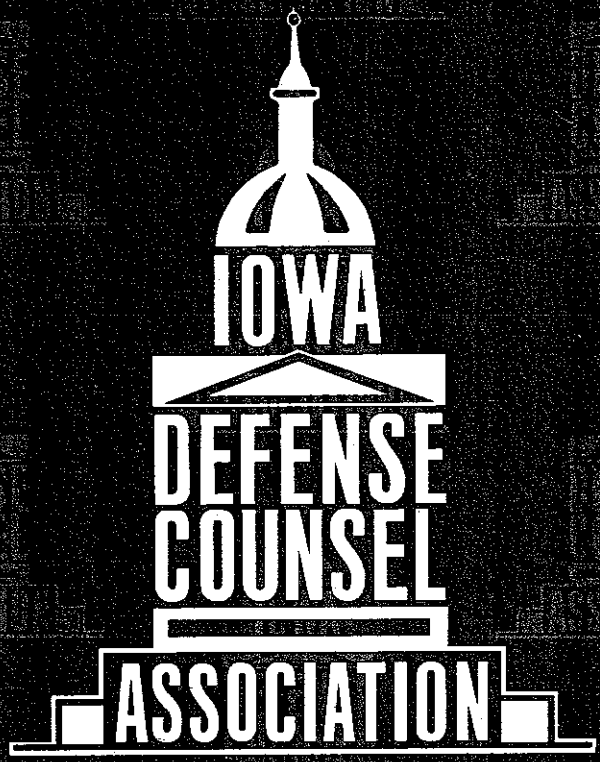


1997 Annual Meeting September 24, 25, & 26

Embassy Suites Hotel
101 East Locust Street
Des Moines, Iowa 50309

1997 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 24

9:00 a.m. Registration

11:00 a.m. Board of Directors Meeting

1:00 p.m. Welcome and Report of Association
IDCA President, Robert Engberg
Aspelmeier, Fisch, Power, Warner & Engberg, P.L.C., Burlington, IA

1:15 - 2:00 p.m. Appellate Update, Part I
Richard Kirschman
Whitfield & Eddy, P.L.C., Des Moines, IA

2:00 - 3:00 p.m. Pretrial Practice, the Judicial Perspective
Honorable Patrick Grady
Judge, 6th Judicial District
Honorable Linda Reade
Judge, 5th Judicial District
Honorable Stephen P. Carroll
Judge, 2nd Judicial District

3:00 - 3:15 p.m. BREAK

3:15 - 4:00 p.m. Maximizing Jury Effectiveness: Innovations & Communications
Honorable Celeste Bremer
United States Magistrate Judge
United States District Court,
Southern District of Iowa

4:00 - 4:30 p.m. Legislative Update
Robert Kreamer
IDCA Legislative Lobbyist
Des Moines, IA

4:30 - 4:45 p.m. DRI - What's New
Robert L. Fanter
President, Defense Research Institute
Whitfield & Eddy, P.L.C., Des Moines, IA

4:45 - 5:15 p.m. Non-Competition Agreements
Mark Zaiger
Shuttleworth & Ingersoll
Cedar Rapids, IA

5:15 - 8:00 p.m. COCKTAILS - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 25

8:30 - 9:00 a.m. Ethical Responsibilities and Legal Malpractice
Mariclare Thinnes Culver
Duncan, Green, Brown, Langeness & Eckley, P.L.C., Des Moines, IA

9:00 - 9:30 a.m. Discovery and Evidentiary Use of Journalistic Evidence
R. Todd Gaffney
Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, IA

9:30 - 10:00 a.m. Protecting Your Client When the Civil Case Has Criminal Ramifications
William B. Serangeli
Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney, Schindler & Scalise, P.C., Des Moines, IA

10:00 - 10:15 a.m. BREAK

10:15 - 11:00 a.m. Workers' Compensation Issues: Penalty, Benefits, Interest and Attorneys Fees
Maureen Tobin
Whitfield & Eddy, P.L.C., Des Moines, IA

11:00 - 11:45 a.m. Defending the Governmental Entity
Eliza J. Ovrum
First Assistant Polk County Attorney,
Civil Bureau, Des Moines, IA

11:45 - 12:30 p.m. Appellate Update, Part II
Webb Wassner
Simmons, Perrine, Albright, & Ellwood
Cedar Rapids, IA

12:30 - 1:00 p.m. Supreme Court Report
Honorable Marsha K. Ternus
Justice, Iowa Supreme Court

1:00 - 2:00 p.m. LUNCH

2:00 - 2:30 p.m. Strategic Use of Summary Judgment Motions
Michael J. Coyle
Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, IA

2:30 - 3:15 p.m. Effective Use of Video Deposition
Guy R. Cook
Grefe & Sidney
Des Moines, IA

3:13 - 3:30 p.m. BREAK

3:30 - 4:00 p.m. Ethical Responsibilities in Dealing With the Uncooperative Client
John D. Stonebraker
McDonald, Stonebraker & Cepican, P.C.
Davenport, IA

4:00 - 4:30 p.m. Protecting Your "Middleman" Client in Product Liability Cases
W. Curtis Hewett
Smith, Peterson Law Firm,
Council Bluffs, IA

4:30 - 5:00 p.m. Election of Officers and Directors and Annual Meeting of IDCA

6:30 - 9:00 p.m. Reception and Banquet
GLEN OAKS COUNTRY CLUB
6:30 - 7:30 Reception 7:30 - Banquet

FRIDAY, SEPTEMBER 26

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:00 a.m. Workers' Compensation Update
Honorable Iris Post
Iowa Industrial Commissioner

9:00 - 10:00 a.m. The Tripartite Relationship: Update on Ethical Issues
- Insurance Company Perspective
David O. Narigon
Employers Mutual Companies
Des Moines, IA
- Private Defense Counsel Perspective
Mark S. Lagomarcino
Hanson, Bjork & Russell, Des Moines, IA

10:00 - 10:15 a.m. BREAK

10:15 - 11:00 a.m. Emerging Medical Technologies - New Liability Issues
L.W. Rosebrook
Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA

11:00 - 11:45 p.m. Recent Issues in Environmental Law
Lawrence P. McLellan
Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

11:45 - 12:30 p.m. LUNCH 12:30 - 1:00 p.m. Federal Court Report
Hon. Ronald E. Longstaff
Judge, United States District Court
Southern District of Iowa

1:00 - 1:30 p.m. Family and Medical Leave Act Issues and Defenses
Patricia J. Martin
Counsel, Maytag Corp., Newton, IA

1:30 - 2:15 p.m. Defending the Age Discrimination Case
Helen C. Adams
Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, IA

2:15 - 3:00 p.m. Appellate Update, Part III
Sean O'Brien
Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

OFFICERS AND DIRECTORS
1996 - 1997

PRESIDENT

Robert A Engberg
321 N 3rd Street
Burlington, IA 52601

PRESIDENT-ELECT

Jaki K. Samuelson
1300 First Interstate Bank Bldg
Des Moines, IA 50309

SECRETARY

Mark L Tripp
801 Grand Ave , Suite 3700
Des Moines, IA 50309

TREASURER

James A. Pugh
5400 University Ave.
West Des Moines, IA 50266

BOARD OF DIRECTORS
(DATE IS TERM EXPIRATION DATE)

DISTRICT I

Marion L Beatty - 1999
301 W Broadway
Decorah, IA 52101

DISTRICT II

Stephen G. Kersten - 1997
P O Box 957
Fort Dodge, IA 50501

DISTRICT III

Emmanuel S Bikakis - 1999
Suite 340, Insurance Exchange Bldg
Sioux City, IA 51101

DISTRICT IV

Gregory G Barntsen - 1997
P.O Box 249
Council Bluffs, IA 51502

DISTRICT V

Richard G Santi - 1999
100 Court Ave., Suite 600
Des Moines, IA 50309

DISTRICT VI

Robert D Houghton - 1997
P.O. Box 2107
Cedar Rapids, IA 52406

DISTRICT VII

John D. Stonebraker - 1998
3432 Jersey Ridge Road
Davenport, IA 52809

DISTRICT VIII

Wendy N. Munyon - 1998
P O Box 790
Grinnell, IA 50112

AT LARGE

J. Michael Weston - 1999
2720 First Avenue
Cedar Rapids, IA 52406

Michael W. Ellwanger - 1998
Suite 300, Toy National Bank Bldg.
Sioux City, IA 51101

Michael W. Thrall - 1997
699 Walnut Street, Suite 1900
Des Moines, IA 50309

David L. Brown - 1999
803 Fleming Bldg
Des Moines, IA 50309

David L. Riley - 1998
327 E 4th Street, Suite 300
Waterloo, IA 50704

PAST PRESIDENTS

* Edward F. Seitzinger 1964 - 1965
* Frank W. Davis 1965 - 1966
Donald J Goode 1966 - 1967
Harry Druker 1967 - 1968
* Phillip H Cless 1968 - 1969
Phillip J Willson 1969 - 1970
Dudley Weible 1970 - 1971
Kenneth L. Keith 1971 - 1972
Robert G. Allbee 1972 - 1973
Craig H Mosier 1973 - 1974
* Ralph W Gearhart 1974 - 1975
Robert V P Waterman, Sr 1975 - 1976
* Stewart H M Lund 1976 - 1977
* Edward J. Kelly 1977 - 1978
Don N Kersten 1978 - 1979
Marvin F. Heidman 1979 - 1980
Herbert S Selby 1980 - 1981
L.R. Voigts 1981 - 1982
Alanson K. Elgar 1982 - 1983
* Albert D. Vasey (Honorary) 1983
Harold R. Grigg 1983 - 1984
Raymond R. Stefani 1984 - 1985
Claire F Carlson 1985 - 1986
David L Phipps 1986 - 1987
Thomas D Hanson 1987 - 1988
Patrick M. Roby 1988 - 1989
Craig D. Warner 1989 - 1990
Alan E. Fredregill 1990 - 1991
David L Hammer 1991 - 1992
John B. Grier 1992 - 1993
Richard J Sapp 1993 - 1994
Gregory M Lederer 1994-1995
Charles E Miller 1995-1996

IOWA DEFENSE COUNCIL FOUNDERS AND OFFICERS

* Edward F. Seitzinger
President

* D.J Fairgrave
Vice-President

* Frank W Davis
Secretary

Mike McCrary
Treasurer

William J Hancock

* Edward J Kelly

Paul D Wilson

ANNUAL MEETING CHAIRPERSONS

General Program - James A. Pugh
Ginger Plummer

Program Chair - Jaki K. Samuelson

* Deceased

1997 ANNUAL MEETING

TABLE OF CONTENTS

A

IOWA
APPELLATE COURT UPDATE
PART I

Richard J. Kirschman
Whitfield & Eddy, P.L.C.
Des Moines, Iowa

The author would like to gratefully acknowledge Mindy Trotter, a third year law student at Drake Law School, for her assistance on the Iowa Appellate Court Update, Part I.

A

EMPLOYMENT

Wilson v. IBP, Inc.,
558 N.W.2d 132 (Iowa 1996)

Wilson injured his back while working at IBP. Defendant Diane Arndt, the Occupational Health Services Manager for IBP, coordinated medical care, monitored recovery and handled related matters for injured IBP employees. IBP had a policy of seeking "conservative" medical treatment for injured employees. Pursuant to this goal, a physician advised Wilson to rest his back and later assigned him to light duty. A second physician prescribed bed rest. At that time, IBP began conducting surveillance and concluded that Wilson continued to engage in normal activities. After obtaining this report, Arndt advised the second physician that Wilson was not following the prescribed treatment and that there was a videotape proving this fact. The physician met with Wilson and, after confronting him regarding his activities, recommended a return to light duty. Wilson requested a referral to a neurological surgeon who performed surgery to correct his condition. Wilson filed suit alleging that Arndt had committed slander and violated her fiduciary responsibility as an occupational health nurse. A jury awarded Wilson $4,000 in compensatory and $15,000,000 in punitive damages. The trial court found that the punitive damages were "grossly excessive" and ordered a remitter of all punitive damages in excess of $100,000.

Claims for slander and breach of fiduciary duty are independent tort claims outside the scope of chapter 85 (Iowa's Workers' Compensation Statute). Based upon her duty to coordinate the medical care, course of treatment and return to work of Wilson, there was sufficient evidence to raise a jury question regarding the existence of fiduciary relationship or responsibilities on behalf of Arndt.

With respect to the finding of slander per se, recovery is permitted for damages which are a natural result of the original slander or its repetition. Testimony that Wilson sustained a loss of self esteem, damage to his reputation and distrusted his employer as a result of Arndt's statements presented sufficient evidence for the damage award. While the court recognized that "substantial truth," raised as a defense, would preclude damages on the slander claim, Arndt's statements did not satisfy the substantial truth requirement.

The court must, pursuant to constitutional dictates, review the "size" of an exemplary damage award regardless of whether a constitutional challenge is raised. While there is no mathematical formula to determine whether a punitive damage award is constitutionally infirm, several general guidelines direct this inquiry. When awarding punitive damages, the jury must evaluate the character the wrongful act, degree of wrongful conduct established and desire to deter similar conduct in the future. Due process requirements are satisfied if the jury's discretion is exercised within reasonable constraints. When reviewing a punitive damage award, the supreme court will consider all surrounding circumstances and the relationship between the parties. It is also appropriate to examine the correlation between the punitive damage award and actual damages awarded in conjunction with the potential harm that could result from the acts involved. Applying the foregoing standards, the court found that the punitive damage award was warranted, but the amount, even in consideration of IBP's financial standing, was excessive.

A

The court affirmed a punitive damage award in the amount of $2 million if Plaintiff would agree to remittitur.

Pollman v. Belle Plaine Livestock Auction, Inc.,
___ N.W.2d ___ (Iowa 1997)

After losing money for several years, Defendant determined that a new livestock auction manager was needed and hired Pollman, a former employee. In June 1993, Pollman, who left a position with a livestock business in Wisconsin where he had been offered a promotion, signed a contract as Belle Plaine's livestock auction manager. Though Pollman extended his best efforts, Belle Plaine continued losing money and was dissolved in June 1994. Roughly one month later, Pollman's employment was terminated. While the written employment agreement did not specify the length of his employment, Pollman argued that he had been hired for a three-year term. Pollman filed suit alleging breach of an oral employment contract and negligent misrepresentation.

Pursuant to the "partial performance" doctrine, a real estate contract may be exempted from the statute of fraud requirements. The partial performance doctrine, however, is only applicable if the actions alleged to have been performed as part of the contract are intrinsically and wholly related to the alleged underlying contract. While the court questioned whether the partial performance doctrine would be applicable to an alleged oral employment contract, Defendant did not argue that partial performance was inapplicable. As actions, such as leaving one job and taking a position with a new company are equally applicable to at will employment, the partial performance doctrine was not satisfied.

To recover for negligent misrepresentation, a claimant must demonstrate that he or she justifiably relied upon representations and the reliance was reasonable. Generally, negligent misrepresentation claims are inapplicable to long-term employment contracts because the employer has no duty respecting representations made to an at-will employee. In this instance, as Defendant had not contested this issue, a jury issue had been created on whether Plaintiff's reliance on a three-year period of employment was reasonable.

U.S. West Communications, Inc. v. Overholser,
566 N.W.2d 873 (Iowa 1997)

In October 1987, Overholser injured her back while working for U.S. West. Overholser missed only one day of work and continued working in the same position. In 1989, she was transferred to a new position which was less strenuous, did not require repetitive use of her upper extremities and provided a 35% raise. The transfer was recommended as treatment for an unrelated injury. Ms. Overholser continued working without any restrictions on her back. In December 1991, Overholser settled her workers' compensation claim for the 1987 injury. In 1993, Overholser lost her job as a result of downsizing and her lack of seniority. She then filed a petition to reopen the settlement, seeking additional benefits because her wages had decreased as a result of the layoff.

To reopen a workers' compensation settlement, the claimant must establish that, subsequent to the agreement, he or she sustained an impairment or reduction to earning capacity caused by the

original injury. It is not necessary to establish a change in a physical condition. The court indicated that, when resolving a workers' compensation claim, accommodations offered by the employer should not be considered. The award must be premised upon the worker's loss of earning capacity based upon present ability and the existing job market. The award should not be decreased because the worker receives sheltered employment or the employer modifies job requirements to suit the employee's disability. There was no evidence that Overholser's disability rating was reduced or "adjusted downward" because of an accommodation by U S. West. Because the claimant's physical condition did not change and her earning capacity was reduced because of factors extrinsic to the settlement, the initial award should not have been reconsidered.

Audus v. Sabre Communications Corp.,
554 N.W.2d 868 (Iowa 1996)

Plaintiff accepted an oral employment agreement with the defendant under which he would receive a base salary of $30,000 annually plus a three percent commission on sales. The parties did not discuss the timing of commission payments and, at the time of the dispute, disagreed whether commissions were paid on all sales or sales exceeding $500,000. During the course of his employment, Plaintiff received his base salary in weekly installments, but commission payments were received sporadically and usually not until requested by Plaintiff. In 1992, after working with the defendant for more than seven years, Plaintiff quit his employment and requested payment of all outstanding commissions. Plaintiff filed suit for breach of the oral employment agreement and alleged that Defendant violated Iowa's wage payment collection law

The existence of an oral contract, its terms and whether the terms were breached are issues for the factfinder. To find that an oral contact existed, there must be sufficient evidence of its terms to establish the duties and responsibilities under the alleged agreement. An oral agreement for the payment of commissions is enforceable. Defendant argued that under section 91A.3(1) of the Iowa Code, commissions earned more than twelve months prior to filing suit could not be recovered. The court found that sections 91A.3 and 91A.10 merely establish a time frame for the commissioner to intervene in an employee's claim rather than a statute of limitations.

While Iowa Code section 614.1(a) establishes a two year limitations period for wage claims, the appropriate statute of limitations is found in section 614.5 for breach of contract. Audus' commission claims are a "continuous, open, current account." The commissions accrued continuously and payments were not allocated to any particular sales, but instead based upon the accumulated balance. The statute of limitations does not commence on an open account because the debtor is obligated to pay the entire balance, rather than each item as it is incurred. The fluctuating balance, rather than its individual components, constitutes the debt. It is not until the account is closed, that it becomes an account stated and the statute of limitations commences.

The court also determined that Audus should have been awarded attorney fees. Although attorney fees are only awarded if specifically authorized by statute or agreement, section 91A.8 of the Wage Act entitles a claimant to attorney fees. "Commissions" are included within the definition of wages contained in section 91A.2(7)(a).

A

Fry v. Mount,
554 N.W.2d 263 (Iowa 1996)

Fry was offered a job as a "blow mold operator/trainer" by defendants Reel-Core and Iowa Roto-Cast. He was hesitant because the defendants were new businesses, he had a position with an established company and stable insurance benefits were necessary to care for his handicapped child. Upon accepting the job, Fry advised Defendants of these concerns. He did not execute a written employment agreement nor receive any employment manuals or regulations. Upon commencing employment with Defendants, Fry was the only experienced worker and spent time training other employees. Within four months, Fry was terminated. He filed suit claiming breach of implied contract, negligent misrepresentation, fraudulent misrepresentation and intentional infliction of emotional distress. Fry argued that Defendants promised he would be a valuable part of their operation and could expect long-term employment.

Absent two exceptions, discharge in violation of public policy and discharge in contravention of a policy established in an employee handbook or policy manual, Iowa law is firmly committed to the employment at will doctrine.

Generally, negligent misrepresentation claims apply only to professional providers of information. Although the language contained in section 552 of the Restatement (Second) of Torts, governing negligent misrepresentation claims, is broader than this standard, Iowa courts have held that the duty to use reasonable care when supplying information only applies to those engaged in the business or profession of supplying information to others. Plaintiff and Defendants were engaged in an "adversarial" relationship. Defendant's representations were intended to "encourage" Fry to join their company, not provide guidance.

City of Hampton v. Iowa Civil Rights Comm'n,
554 N.W.2d 532 (Iowa 1996)

In 1987, Dorothy Abbas filed a sexual discrimination complaint against city officials. The complaint was dismissed in 1989 after a finding of no probable cause. While the initial complaint was pending, Abbas file a second complaint alleging retaliation as a result of her original claim. Probable cause was found on the second complaint.

A prima facie retaliation claim requires that the claimant demonstrate that: he or she was engaged in a statutorily protected activity; the claimant suffered adverse treatment relating to employment; and a causal connection between a protected activity and the adverse treatment. While claimants must be protected against retaliation for exercising their rights, the required causal connection must be a "significant factor" which motivates the retaliation.

The city contended that the $50,000 damage award for alleged emotional distress was excessive. Emotional distress damages may be awarded in a civil rights case without demonstrating outrageous conduct, severe distress or that a physical injury occurred. The court determined that there was a paucity of evidence supporting a damage award in this amount, based solely on the testimony of the claimant and her daughter, without benefit of any medical evidence and reduced the damage award to $20,000 for emotional distress.

A

Phipps v. ISAD Health Serv. Corp., 558 N.W.2d 198 (Iowa 1997)

When hired as a claims examiner in 1986, Plaintiff signed a statement recognizing his at will employment status. He also received a handbook stating that he was an employee at will and that the handbook did not create a contractual relationship between the parties. In 1987, after being promoted to a supervisory position, Plaintiff received an a new handbook and a human resources manual, both of which contained similar disclaimers. The handbook and manual also contained a "step" procedure for disciplining and terminating employees. The manual stated that the step procedures are not always followed and an employee may be subject to immediate termination without notice. Between March 6, 1992 and November 3, 1993, Plaintiff was disciplined under the "step" procedures. On November 3, 1993, he was placed on sixty-day performance probation which precluded him from receiving gainsharing payments. Blue Cross employees received gainsharing payments as part of their normal compensation. On February 10, 1994, Plaintiff filed a grievance, arguing that the suspension should have commenced in late October, immediately after the incidents which instigated his probation. On March 31, 1994, Plaintiff was discharged for unacceptable performance. He filed suit alleging wrongful discharge, breach of contract, breach of implied contract or implied covenant of good faith and fair dealing and violation of the Wage Payment Collection Law.

Despite the fact that the gainsharing payments were considered "wages," Plaintiff was not "owed" or entitled to those payments because of his probationary status on December 31, 1993, in violation of company requirements for receiving gainsharing payments.

Plaintiff argued that he was terminated, contrary to the public policy exception to the employment at-will doctrine, because he filed a grievance. The court, however, found ample evidence demonstrating that Plaintiff's performance was inadequate. Merely because an employee is discharged after alleging a violation of or attempting to enforce his or her rights does not establish that the discharge was retaliatory

Plaintiff also alleged that his discharge violated the "step" discipline procedures contained in the employment manual. An employment manual creates a unilateral contract only when three elements are established: the handbook contains definite terms which create an offer; the handbook is provided to and accepted by the employee; and the employee provides consideration, such as continued service. The handbook did not contain a definite offer. To the contrary, the manual contained numerous disclaimers and specifically stated that "step" procedures are not followed in all instances. When evaluating disclaimers contained in an employee handbook, two factors are important: whether the terms of the disclaimer are clear and whether the extent of the disclaimer is unambiguous. In this instance, the disclaimers were unambiguous. Finally, the court held that the tort of breach of good faith and fair dealing is not recognized in the employment context in Iowa.

Hornby v. State, 559 N.W.2d 23 (Iowa 1997)

Plaintiff, a tenured position at the University of Northern Iowa, had an employment contract which included long-term disability coverage. After an injury which kept her from returning to full-time employment, the University gave Plaintiff the option of returning to her tenured

position or taking early retirement. She was not apprised of the option of taking long-term disability under Iowa Code section 70A.20. Plaintiff chose early retirement and received lower income than if she had taken long-term disability. Plaintiff claimed Defendants breached the employment contract by not providing long-term disability coverage and sought damages under Iowa Code chapter 91A for failure to pay long-term disability benefits.

The Regents have no administrative program for disability benefits and no rules for dealing with complaints for wrongful denial of benefits. Plaintiff should not be faulted for failing to exhaust a procedure not provided for by rule. Thus, Plaintiff's contract suit is not barred for failing to exhaust administrative remedies. Further, Plaintiff's long-term disability benefits are considered "wages" under Iowa Code section 91A.2(7)(c) because they are payments to the employee, for the employee's benefit, for health, hospital or welfare and are due under an agreement with the employer.

Alderson v. Rockwell Int'l Corp.,
561 N.W.2d (Iowa 1997)

Plaintiffs, forty-three employees, were hired by Defendant and discharged after two years. Plaintiffs claim Defendant represented they would be employed for three to five years. Although a jury found there was negligent misrepresentation, disclaimers in the employment applications precluded recovery.

At-will employment may be terminated by either party at any time and for any lawful reason. There was no tortious conduct by Defendant The tort of negligent misrepresentation applies only to those who are in the business of supplying information to others. The defendant is not in this category.

Smith v. Des Moines Civil Service Commission, 561 N.W.2d 75 (Iowa 1997)

After scoring below standards established by the fire chief and a pulmonary specialist on respiratory and maximum exercise stress tests, Plaintiff, a firefighter, was placed on medical leave Although another doctor examined Plaintiff and found he could return to work, the chief did not allow Plaintiff to work. An application was made on Plaintiff's behalf for retirement benefits, but was denied when doctors at the University of Iowa found that Plaintiff was fit to work as a firefighter. Plaintiff did not retire and was discharged.

There is no evidence that the standards established by the pulmonary specialist for the tests were adopted by the city as a standardized personnel policy to be applied in lieu of individual determinations In the absence of formally adopting these standards, the evidence must be considered in totality. After examining all of the evidence, the opinions of four separate doctors finding that Plaintiff was physically capable of performing his work are persuasive. Remanded for an order reinstating Plaintiff to his position before the discharge.

Butts v. University of Osteopathic Medicine & Health Sciences,
561 N.W.2d 838 (Iowa Ct. App. 1997)

While Plaintiff was working as director of purchasing, the chancellor requested information

about the president's purchasing requests, including personal items. After the president was placed on administrative leave, the University investigated allegations in the chancellor's report. Pursuant to the investigation, a letter was sent to University employees seeking their cooperation with the investigation and promising no adverse employment actions. Plaintiff discussed the president's purchasing practices with investigators.

Five months later, Plaintiff's supervisor recommended reorganizing the department and the creation of a director of materials management position. Plaintiff, however, did not have a master's degree which was required for the new position. Though Plaintiff interviewed for the position, it was given to an applicant with a master's degree. Plaintiff had a strained relationship with the new director who was also her new supervisor. Subsequently, the University eliminated Plaintiff's position and she was terminated.

Plaintiff sued for breach of contract not to retaliate against employees who cooperated with the investigation. Plaintiff alleged she was terminated because she objected to employees' personal purchases from University vendors to avoid payment of sales taxes. She also alleged that the University's actions were outrageous and caused emotional distress.

Plaintiff was an employee at will. While it is against public policy to discharge an employee for refusing to participate in sales tax violations or reporting those violations, Plaintiff did not produce specific facts supporting her claims. Plaintiff also failed to produce facts supporting the breach of contract claim connecting her termination to cooperation with the investigation. There is no evidence demonstrating that the University's conduct was outrageous to allow Plaintiff to prevail on her emotional distress claim.

Cole v. Staff Temps,
554 N.W.2d 699 (Iowa 1996)

Janet Cole made claims against Animal House Day Care & Preschool, Inc., her former employer, and Staff Temps, which had assumed the staffing responsibilities for Animal House, under the Americans With Disabilities Act (ADA). While employed as a child care worker at Animal House, Ms. Cole suffered a back injury which resulted in temporary restrictions as well as fibromyalgia, which she treated with medication. Approximately one month after her injury, Ms. Cole returned to work. Although her physician ultimately released her from any physical restrictions, Animal House continued to provide accommodations for her, including having another employee available for situations where children may have to be lifted. Ms. Cole was placed on probation for excessive absences and tardiness both before and after her back injury. Ms. Cole conceded that the absences after her injury were not related to the back condition. When Animal House retained Staff Temps to handle staffing for the child care center, a Staff Temps representative met with Ms. Cole, along with a representative of Animal House, to discuss her ability to perform the duties of child care work. Staff Temps, however, advised Ms. Cole that she would not be hired to work at Animal House because of her history of excessive absenteeism.

The court found that the state court has jurisdiction over claims under the Federal Americans With Disabilities Act. Applying the burden shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, the court first evaluated whether Ms. Cole had a disability. While Ms.

Cole did have a physical impairment, that the impairment did not, in fact, substantially limit her daily activities since her doctor had lifted all physical restrictions. The court, however, found that because Animal House and Staff Temps viewed Ms Cole as having a disability, she was disabled under the ADA definition. The court went on to find that Ms. Cole was not qualified to do her job since, although she met the necessary prerequisites of education, experience and training, she was unable to perform the essential function of coming to work on a regular basis. The court found that in Iowa, "chronic absenteeism prevents a person from performing the essential function of regularly attending work." The court also found that the inquiries by Staff Temps and Animal House in the Staff Temps interview that related to Ms. Cole's ability to perform the duties of a child care worker did not violate the ADA.

Haberer v. Woodbury County,
560 N.W.2d 571 (Iowa 1997)

Plaintiff Howard Haberer was a former deputy sheriff in Woodbury County. He claimed his resignation was actually a constructive discharge and appealed the county's refusal to allow him to withdraw his resignation as a civil service matter under Iowa Code Chapter 341A, which specifically pertains to deputy sheriffs.

Haberer had been the subject of criminal complaints filed by a female acquaintance. The sheriff requested the Iowa Division of Criminal Investigation to conduct an independent investigation of the complaint, which resulted in criminal charges unrelated to the initial complaint. The district court dismissed the charges and the special prosecutor appealed. Haberer was placed on paid suspension during the pendency of the criminal case and appeal. While on paid suspension, Haberer was prohibited from accepting any outside law enforcement jobs. After 18 months, while the appeal was still pending, the sheriff allowed Haberer to return to work subject to accepting a 30-day unpaid suspension and a "last chance agreement" pertaining to his performance. After serving the unpaid suspension, Haberer was assigned to an administrative desk job rather than the patrol job he believed was appropriate. Subsequently, Haberer was advised that his wages would be garnished because of unpaid child support. The next day, Haberer submitted his resignation which was accepted on the same date by the sheriff. Four days later, when Haberer attempted to withdraw his resignation, the sheriff refused to allow the withdrawal. Haberer appealed to the Civil Service Commission. Haberer claimed that he was constructively discharged as a result of a chain of events that began with the criminal investigation, proceeded with his need to defend against criminal charges, his 18-month paid suspension, his 30-day unpaid suspension, his assignment to an administrative job, and the stress and financial problems that resulted in his inability to pay his child support. The commission found that the sheriff's office had not engaged in conduct amounting to a constructive discharge The commission did not address whether Haberer should have been allowed, by custom in the sheriff's department, to withdraw his resignation Upon Haberer's appeal to the district court, the court found that there was substantial evidence to support the commission's decision It also found that Iowa law does not provide a right to withdraw a resignation once it has become effective.

The supreme court found that both its own and the district court's review of the commission's decision was to determine whether the commission's action complied with the standard of good faith prompted solely by "cause." Good faith was defined as honesty of intention "Cause"

addresses the ability and fitness of an employee to discharge the duties of his or her position. The commission's decision should be reviewed by both the district and appellate court under a "substantial evidence" standard.

The court noted the constructive discharge occurs only when the employer deliberately makes an employee's working condition so intolerable that a reasonable person would feel compelled to resign. The conditions must be "unusually aggravated" or a "continuous pattern" of egregious conditions in order to arise to the level of constructive discharge. The court found that the facts, as alleged by Haberer, failed to meet that standard. Under Iowa Code Chapter 341A Civil Service Cases, an employee is allowed to withdraw his or her resignation before it is accepted, but loses the right to withdraw the resignation once it has been accepted.

Thompson v. City of Des Moines,
564 N.W.2d 839 (Iowa 1997)

When Thompson's job as employee relations director for the City of Des Moines was eliminated in a reorganization, he declined reassignment to a position with lesser pay and responsibilities. Thompson contended that the reorganization was a sham to circumvent his rights. He claimed that the mayor, city manager and city council members bowed to pressure from labor unions with whom he negotiated to remove him from his position in contravention of his contractual and constitutional rights. Thompson alleged a variety of theories including breach of contract, tortious interference with contractual relations, conspiracy and violation of due process. All of Thompson's claims, except a narrow claim involving contractual rights to bump other employees from their positions in the event of a layoff, were dismissed on a motion for summary judgment. The "bumping" claim was submitted to a jury that found in favor of the city.

Thompson claimed there was extensive support for his contract with the city. First, he relied on promises allegedly made by the former city manager in 1974 when he left his job in Michigan to become the employee relations director. Second, he claimed to have received an assurance of long term job security. The documents in existence at the time, however, including the employee handbook and the appointment letter to Thompson, described his appointment as a "permanent appointment," which was defined in the handbook and letter of appointment as employment for a "indefinite" duration. Under those circumstances, Thompson's employment was terminable at will by either party. Any statements made by the city manager regarding "long term employment" were not contractual promises, but statements to "sell" the position to a prospective employee that did not change the actual status of employment. Further, the handbook contained provisions for layoff that were inconsistent with Thompson's argument that he could only be dismissed for "cause." The court found that, because Thompson had failed to establish an enforceable contract, his dependent claims of intentional interference with contract and conspiracy were properly dismissed. Finally, Thompson's claim for violation of his due process rights failed because he had no property right in his employment, both because no existing contract established such a right and his position was not protected by Civil Service Statute procedures.

A

ATTORNEYS

Iowa Supreme Court Board of Professional Ethics & Conduct v. Hansel, 558 N.W.2d 186 (Iowa 1997)

Respondent was charged with improprieties in dealing with his lender bank and in handling client funds. First, it was alleged that Respondent made false representations to his lender bank regarding the bank's security interests in his farming property and repayment of the bank. Second, Respondent improperly deposited funds received from a client to settle a lawsuit in his personal account. Respondent also failed to respond to official inquiries from the Grievance Commission. Respondent argued that his actions were the result of emotional and physical distress caused by suffering from and treatment for cancer. The Commission recommended a three month suspension of Respondent's license.

The suspension was inadequate. While the Commission's recommendations are respectfully considered, the court determines the appropriate discipline based upon the facts of each case. Though Respondent was not acting as an attorney in his dealings with the lender bank, attorneys are subject to ethical guidelines in the conduct of their personal lives. In addition, ethical violations are not excused "because of an attorney's ill health, emotional problems, personality disorders, or the general stress of a busy law practice." Finally, although the recommended three month suspension was based in part on Respondent's claim that he did not intend to practice law unless he recovered from cancer, the sanction must be based upon the nature, number and seriousness of the ethical violations.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Ronwin, 557 N.W.2d 515 (Iowa 1996)

It was alleged that Respondent engaged in numerous instances of improper conduct, including filing a frivolous lawsuit solely to harass or injure others, making false accusations against judicial officers, engaging in conduct which was inappropriate to the administration of justice and adversely reflected on Respondent's ability to practice of law, failing to properly respect judicial officers and related conduct. The charges related to a lawsuit against several defendants, a subsequent federal suit against the same defendants, their attorneys and members of the judiciary, and subsequent appeal to the United States Court of Appeals for the Eighth Circuit. The federal suit was filed after dismissal of the underlying state court action and an affirmance of that dismissal by the Iowa Court of Appeals.

When ruling on a motion for directed verdict, the trial court found that Respondent did not have any legal basis for the underlying suit and awarded sanctions pursuant to Rule 80. The federal action alleged that the state trial court's finding, that there was no support for the underlying action, was deliberately false. After the federal district court dismissed the complaint, Respondent appealed to the Eighth Circuit Court of Appeals. In his appellate brief, Respondent argued that the underlying state court action had been "rigged" and that the judge engaged in deliberate and fraudulent misconduct. The appeal was dismissed.

Respondent repeatedly accused the trial judge, other judges and attorneys of improper and

fraudulent conduct and attempting to violate his civil rights. He made additional accusations regarding the Iowa Court of Appeals and chief justice of the supreme court. Disciplinary proceedings for statements and allegations contained in pleadings or briefs do not infringe upon an attorney's constitutional right to freedom of speech. While acting in a professional capacity, attorneys have fewer free speech rights than a private citizen. A lawyer's right to free speech does not protect against violations of ethical rules.

When determining the appropriate discipline for an attorney, the court must consider the improper acts, the attorney's fitness to continue practicing law, the deterrence of other attorneys from committing similar conduct and assuring the public that the court will uphold professional ethics in the legal profession. Disbarment was an appropriate sanction for repeated "grossly disrespectful allegations" regarding judicial honesty and integrity. The court stated that "harsh punishment" was required for attorneys who make frivolous and unsupported allegations of criminal conduct against judges.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Beckman,
557 N.W.2d 94 (Iowa 1996)

Respondent was employed by Hyatt Legal Services to provide legal services for John Deere employees. In 1994, Respondent sent marketing letters to select Deere employees stating that Hyatt had expanded its legal insurance coverage program and that Respondent would be happy to answer any questions. The letter did not, as required by the Iowa ethical rules, indicate that it was "advertising only." Respondent argued that he was not subject to the advertising rule, contained in DR 2-101(B)(4)(d), because the letter was sent only to current clients.

While many of the persons receiving the letter may have been clients at one time, letters were also sent to persons who were not current clients. Respondent's representations to the contrary were "false statements" to the commission. The fact that Respondent had been publicly reprimanded on two prior occasions for violating disciplinary rules governing advertising demonstrated that a three month suspension was appropriate.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Mattson,
558 N.W.2d 193 (Iowa 1997)

The Board alleged that Respondent mishandled his client trust account. In particular, Respondent improperly deposited client funds into his personal account and used other client funds to replace monies deposited in personal accounts. Respondent had previously been warned that his handling of trust accounts was improper.

While the Commission recommended a ninety day suspension and Respondent did not appeal, it is the court's responsibility to review the matter and "impose any appropriate discipline," whether lesser or greater than the sanction recommended by the Commission. Despite the fact that there was no apparent harm to clients or loss of funds, the court noted the importance of properly handling client trust funds and that Mattson had previously been cited, publicly reprimanded and had his license suspended. The court converted the suggested ninety day suspension to six months.

A

Iowa Supreme Court Board of Professional Ethics & Conduct v. Parker, 558 N.W.2d 183 (Iowa 1997)

The Board alleged that Respondent had been negligent in handling two estates, had improperly sought the withdrawal of an ethical complaint and made false representations to the court in a report on an estate. The court agreed with the first two charges but found insufficient evidence to conclude that Respondent had made false statements to the court. The court agreed with the Commission's recommendation of a public reprimand.

After a lengthy delay in handling and closing two estates, a personal representative of one of the estates retained new counsel. Shortly after the retention of new counsel, Respondent sent a letter to counsel seeking withdrawal of an ethical complaint filed as a result of his lack of diligence. While requesting or attempting to negotiate withdrawal of a complaint was inappropriate, the court credited Respondent for not making further attempts after the initial request was rejected.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Postma, 555 N.W.2d 680 (Iowa 1996)

Respondent was charged with numerous ethical violations including failure to comply with a court order, failure to file income tax returns, malicious filing of unfounded criminal charges and the neglect of two estates.

Based upon the facts of the alleged offenses, each of which have constituted violations of ethical directives, and that Postma was currently under suspension for other violations, the court revoked Respondent's license to practice law.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Hohnbaum, 554 N.W.2d 550 (Iowa 1996)

Respondent was charged with misleading the district court and opposing counsel regarding the facts of an automobile accident. After an October 1990 automobile accident, Respondent was retained by State Farm Insurance Company to defend its insured. The Petition alleged that Defendant's vehicle struck the rear of Plaintiff's auto. Defendant admitted this in her accident report and during discussions with Respondent. As a result, Respondent admitted this allegation when answering the Petition. After filing the Answer, Respondent realized that the investigating officer's report mistakenly stated that the plaintiff's vehicle struck the defendant's auto. Respondent amended Defendant's Answer, explaining that he did not have all of the facts when answering the Petition. Respondent had, however, spoken with his client and reviewed her accident report. When the defendant did not appear at trial, counsel for the plaintiff attempted, unsuccessfully, to subpoena the defendant. It was later learned that Respondent encouraged his client's absence from the trial. Despite these actions, Plaintiff prevailed. In a post-trial report to State Farm, Respondent attributed the adverse jury verdict to the court improperly admitting Defendant's Department of Transportation accident report and State Farm's computerized report containing Defendant's version of the accident. This evidence was contrary to the defense, established in the police report, that the plaintiff had actually struck the defendant.

While the defense is entitled to require that the plaintiff prove her case, counsel was not justified

in advancing misleading statements to the court or persisting in a position that was frivolous. The court found that the misleading statements to the trial court and dogged adherence to the frivolous defense violated ethical guidelines.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Romeo, 554 N.W.2d 552 (Iowa 1996)

Respondent was charged with and found guilty of two counts of record tampering. As a result of the conviction, Respondent was charged with violating ethical rules. Respondent conceded that his actions violated ethical cannons, but provided evidence to reduce the proposed sanction. Respondent's client was the primary suspect in a criminal investigation. As a result, he agreed to meet with his client, and two men who had stolen skid loaders, to prepare receipts which would "get the heat off of his client." Respondent claimed the documents were drafted to protect his client. Respondent had a divorce client sign the receipts as a witness though she did not actually witness the signature nor was she fully apprised of the purpose for signing.

Upon conviction of a misdemeanor involving moral turpitude, a lawyer's license to practice law may be revoked or suspended. Moral turpitude is behavior involving "fraudulent or dishonest intent." Respondent was convicted of a crime which required proof that a writing or record was falsified with an intent to deceive or conceal wrongful acts. Consequently, the conviction involved moral turpitude. Further, a recent amendment which applies issue preclusion to attorney disciplinary actions respecting issues resolved in a prior civil proceeding where the burden of proof was greater than a "preponderance of the evidence," was found to be applicable.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Sullins, 556 N.W.2d 456 (Iowa 1996)

After meeting with a potential client, Respondent believed that sexual abuse charges were imminent and that prosecutors would gather information by filing a ChINA (Child in Need of Assistance Proceeding). After determining that a ChINA petition had been filed and an attorney would be appointed for the child, Respondent requested that his client's wife visit with their daughter and take notes of the conversation. The wife, however, did not feel she was capable of properly phrasing the questions and invited Respondent to the house to personally interview the child. Though interviewing the child provided important defense evidence, Respondent was disqualified and became a potential trial witness. Respondent successfully defended the claim that he had improper contact with a witness represented by counsel, but, during the process, failed to answer inquiries advanced by the Ethics Committee of the local bar association.

The court noted that failure to respond to an ethics committee's inquiries is a serious offense, even if the charges prove unfounded. Attorneys are expected to cooperate with disciplinary investigations. Local ethics boards or committees are considered an arm of the court. Respondent received a public reprimand.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Hughes, 557 N.W.2d 890 (Iowa 1996)

Respondent's client was arrested on a charge on of operating a motor vehicle while intoxicated

A

and ordered to undergo a substance abuse evaluation at the client's expense. Respondent argued that the court was without authority to require that the client pay the expense for an evaluation and advised the client to disregard the order. Although the client ultimately complied with the order, Respondent's instruction to his client, without appealing the order, was considered an ethics violation.

Attorneys are obligated to obey court orders and counsel clients accordingly. While any order entered by a court without subject matter jurisdiction is void and violations of void orders cannot be punished, violating an order that is merely erroneous can be punished as contempt. Though attorneys are entitled to challenge orders or decrees entered by a court; while an order or decree is in effect, counsel must abide the ruling and counsel clients to do likewise. The efficient administration of justice requires prompt compliance with an order issued by a court unless and until it has been reversed or set aside through proper procedures. While attorneys are obligated to protect the rights and interests of their clients, the duty to uphold the law is preeminent. Despite a good faith belief that the order was erroneous, counseling a client to disobey the order was an ethical violation.

Aspelmeier, Fisch, Power, Warner & Engberg v. Allied Group Insurance Co., 556 N.W.2d 805 (Iowa 1996)

After paying policy proceeds for property damage and medical expense, Allied intervened in its insured's action to protect its subrogation interests. After a successful suit, Allied had the judgment amended to recover in its own name against the tortfeasors for money paid by Allied. The insured and her attorneys commenced this action for a pro rata share of attorney fees. The district court awarded the insured's attorneys one-third of Allied's recovery minus a reduction for work done by Allied's own attorney.

Allied's only role in the litigation was to protect its subrogation rights in any recovery obtained by the insured. Work done by Allied's attorney should not have been considered and the insured's attorneys should have received the full one-third. As this issue was not appealed, the insured's attorneys will only receive the amount awarded by the district court.

In Interest of J.C., 560 N.W.2d 33 (Iowa Ct. App. 1996)

Barry and Cyra are parents of young children and represented by the same attorney. During the course of proceedings, the parents separated and Barry requested his own attorney. The court denied his motion stating it was unpersuaded that the parties had sufficiently separate interests to warrant the appointment. Barry's second request for separate counsel was also denied. The attorney for the parents also argued that there was a conflict in the parents' interests.

A lawyer cannot after full disclosure represent clients with conflicting interests absent consent. As there was a conflict, a separate attorney should have been appointed for Barry.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Herrera, 560 N.W.2d 592 (Iowa 1997)

Respondent was publicly reprimanded for commingling client assets with personal office

accounts and failing to maintain appropriate books and records respecting client trust funds. The supreme court's opinion focused on the propriety of a reprimand rather than a suspension. The court found that the relatively lenient sanction of reprimand was appropriate since many of the problems in Herrera's office arose out of his entrusting record keeping responsibilities to his office manager and the office manager's demonstrated ill will toward Respondent. The court also cited Herrera's honesty and complete cooperation, as well as his retention of a CPA to correct deficient practices after the problems were brought to his attention. Finally, the court pointed out that no client funds had been converted to his personal use. While the court clearly found it inexplicable that Herrera had such limited knowledge concerning his books, records and accounting practices, it accepted the Grievance Commission's recommendation of a reprimand.

Iowa Supreme Court Board of Professional Ethics & Conduct v. Gottschalk,
553 N.W.2d 322 (Iowa 1996)

Respondent's license to practice law was suspended for one year. Gottschalk took $1,000 from his client's trust account and deposited it into an operating account to pay wages and office expenses. Gottschalk reimbursed the $1,000 to the client trust fund approximately four months later. In the meantime, Gottschalk filed his annual statement with the Client Security and Attorney Disciplinary Commission claiming that he reconciled his trust account check book balances with bank statement balances and client ledger balances on a monthly basis. Subsequent to Respondent's reimbursement of the client trust account, a Client Security auditor who was engaged in an audit for another purpose discovered the withdrawal as well as the failure to reconcile his trust account as he had certified in his filing with the Client Security and Attorney Disciplinary Commission.

Gottschalk argued that a lesser sanction was warranted because of his reputation for honesty, the fact that no client was damaged and no funds were actually lost because of his repayment, his long history of properly maintaining his client trust account and his cooperation with the board. Pointing out that Gottschalk had two prior public reprimands for unrelated ethical violations and the fact that, in the past, it had routinely revoked the licenses of attorneys who misappropriated client funds, the court found that the one year suspension already considered the mitigating factors advocated by the respondent

Iowa Supreme Court Board of Professional Ethics and Conduct v. Palmer,
563 N.W.2d 635 (Iowa 1997)

The Board alleged Respondent had stolen two credit cards and used them without authorization to obtain funds which he used for his own purposes. He was indicted on two counts of fraudulent use of an unauthorized access device to obtain monies from a federally insured bank. Both crimes are felonies. He entered a plea of guilty to one charge and the other charge was dismissed. Subsequently, Respondent failed to respond to the complaint and requests for admissions and failed to appear for a hearing regarding his involvement in the crimes.

Conviction of a felony is grounds for revocation of a lawyer's license to practice law. In addition, Respondent's absolute indifference to the disciplinary proceeding demonstrated that a sanction of revocation was warranted.

A

Iowa Supreme Court Board of Professional Ethics & Conduct v. Isaacson, 565 N.W.2d 315 (Iowa 1997)

After a non-jury trial in 1991, the court concluded that Respondent had committed fraudulent acts and violated professional conduct guidelines. The verdict arose from business dealings involving the respondent and several clients wherein it was found that Respondent had made material misrepresentations, failed to disclose material facts and provided false information to the clients respecting business opportunities. Pursuant to this finding, Respondent was ordered to pay actual and punitive damages. In 1995, an ethics complaint raising these issues was filed against Respondent. To support the allegations, the Board relied upon the 1991 findings and a 1994 amendment to Iowa Court Rules which applied issue preclusion to attorney disciplinary proceedings for matters determined in civil suits where the evidence had been judged under a "greater than a mere preponderance of the evidence" standard.

The court rejected Respondent's argument that application of issue preclusion violated his procedural due process rights. Despite the Commission's recommendation of a private reprimand, the court believed that ethical violations involving fraud in failing to disclose conflicts of interests were sufficiently serious to justify a six month suspension.

A

COMMERCIAL LAW

Hartford-Carlisle Savings Bank v. Shivers, 566 N.W.2d 877 (Iowa 1997)

Defendant Shivers granted Hartford-Carlisle Savings Bank security interests in livestock, machinery and equipment. After Shivers filed for bankruptcy, the trustee abandoned livestock which was subject to the security interest. The bank also sought relief from the automatic stay so that it could proceed against machinery and equipment that was subject to the security interest. The trustee abandoned the machinery and equipment. After providing Shivers with the opportunity to redeem any non-exempt items, the bank took possession of and sold the remaining items. Shivers was not notified of the sale. The equipment sale proceeds were initially applied to a purchase money security interest and second to partially satisfy the bank's note. When the bank contested Shiver's discharge, Shivers argued that the failure to provide notice of the sale was commercially unreasonable and precluded an action seeking the deficiency.

Sections 554.9403 and 554.9504 of Iowa's Uniform Commercial Code entitle a creditor to repossess and dispose of secured collateral upon a debtor's default. Every aspect of the disposition, however, must be commercially reasonable. Under the commercially reasonable requirement, the debtor must receive reasonable notification of the time and place of the public sale. A creditor's failure to provide proper notice has two potential results. First, the absolute bar rule precludes a deficiency judgment if the creditor fails to provide proper notice to the debtor. Alternatively, the rebuttable presumption rule creates a presumption, when a creditor fails to provide proper notice, that the collateral was of equal value to the unpaid balance of the debt.

The commercially reasonable and notice requirements are to ensure that debtors receive a fair price for and an opportunity to redeem collateral. While the court had previously applied the absolute bar rule, the rule is unfair when only a small portion of the collateral is sold without notice. Consequently, the facts of each individual case should be examined to determine if the absolute bar rule applies. The court noted that many jurisdictions have abrogated the absolute bar rule and that it may be appropriate to revisit its continued viability in the future.

A

CONSTITUTIONAL LAW

Lewis v. Iowa Dist. Ct.,
555 N.W.2d 216 (Iowa 1996)

Plaintiffs challenged compensation guidelines for court-appointed counsel. Plaintiffs argued that the minimal rates established by the guidelines violate equal protection and due process rights and deprive indigent persons of the assistance of counsel by restricting their legal representation. Suit was filed by two attorneys who were paid under the guidelines.

After finding that Plaintiffs had standing, because that the right to effective representation and the right of counsel to receive compensation are "inextricably linked," the court focused on the constitutional challenges. First, there was no showing that any particular persons were harmed by the guidelines. Second, based upon ethical guidelines, counsel is required to provide zealous representation regardless of whether compensation is adequate. In related cases, courts had typically found that due process and equal protection rights were not violated unless there was no provision for the compensation for counsel. In addition, attorneys are not required to sign up for court appointments, but voluntarily do so with advance notice of the fee structure. Moreover, the guidelines do not absolutely limit compensation, but instead establish an amount which cannot be exceeded absent court approval.

Kulish v. Ellsworth,
566 N.W.2d 885 (Iowa 1997)

After an automobile collision, a highway patrolman at the scene requested two helicopter transports. Because of poor weather conditions, only one helicopter ambulance reached the site. Of the two accident victims, David Kulish and Francis Ellsworth, Ellsworth's injuries appeared more serious. Ellsworth was transported via helicopter ambulance and Kulish was taken to the hospital in a standard ambulance. Upon arriving at Howard County Hospital, physicians ordered the transfer of Mr. Kulish to the Mayo Clinic. While in transit, Kulish went into cardiac arrest, requiring additional emergency treatment. Plaintiffs raised medical malpractice claims against the county, county hospital, county ambulance service and county employees who provided emergency care.

While governmental entities are typically subject to tort liability for the acts or omissions of employees, Iowa Code section 670.4(11) provides immunity for claims arising in connection with emergency response. Plaintiffs claimed that this limitation violated equal protection rights. Based upon the governmental interest in providing emergency services for citizens who are injured in accidents require immediate assistance, the immunity granted by section 670.4(11) is reasonably related to a legitimate governmental interest.

Lubben v. Chicago Central & Pacific R.R. Co.,
563 N.W.2d 596 (Iowa 1997)

Plaintiff's decedent was fatally injured when he drove his automobile into the middle of Defendant's freight train at a rural crossing when it was dark outside. Reflectorized crossbucks

were located at the crossing. Plaintiff claims Defendant was negligent in failing to provide adequate lighting and signals at the crossing and to warn of the train's presence. Defendant filed a motion for summary judgment, arguing that the estate's claims were preempted by federal funding of railroad warning devices under the Federal Railroad Safety Act (FRSA). The district court granted summary judgment.

The United States Supreme Court has found that state tort law is explicitly preempted when 23 C.F.R. §§ 646.214(b)(3) and (4) apply. (These sections mandate the types of warnings placed at railroad crossings). The expenditure of federal funds is the key to preemption. Expenditure of federal funds for warning devices at a particular crossing triggers preemption of state law. Plaintiffs, however, may allege other types of claims such as failure to sound the train's whistle or that the speed of the train exceeded federal limits.

A

CONTRACTS

Kerndt v. Rolling Hills Nat'l Bank, 558 N.W.2d 410 (Iowa 1997)

The suit arose out of Kerndt's dismissal as president of Rolling Hills National Bank. After being hired as president and chief executive officer of the bank, the parties entered a one year written employment agreement in March 1991. In September 1991, the parties extended Kerndt's employment until December 31, 1994. This agreement contained specific provisions for Kerndt's compensation and procedures for and grounds upon which he could be dismissed. Though the bank's financial condition improved, Kerndt had difficulties in his relationships with the board of directors and bank employees. After a special meeting, the board provided instructions for remedying the problems with bank employees. When Kerndt failed to follow those procedures, the board voted to dismiss Kerndt. During this time period, a board member discussed his reservations respecting Kerndt with multiple persons who were not bank employees or board members. Kerndt filed suit alleging breach of the employment contract and defamation of character. Kerndt was awarded $14,000 in damages on the breach of contract claim while Defendants prevailed on the defamation claim.

While the National Bank Act provides that a national bank cannot be liable under a wrongful termination claim for dismissing an officer without cause, the Act does not preclude enforcement of a contract term providing severance pay to a terminated officer. Despite the fact that the employment contract did not specifically provide for severance pay upon termination without cause, the agreement stated that compensation would end only upon termination for specified grounds. As a result, Kerndt was entitled to receive compensation if terminated for any other reason. Any other interpretation would render the stated grounds for termination meaningless.

On cross appeal, Kerndt argued that the damage award was inadequate. Kerndt contended that he should have received $33,229.51, the difference between his compensation under the agreement with the bank and the amount earned from other employment. The court found there was no reasonable relationship between Kerndt's loss and the $14,000 awarded by the jury. As a result, the court would reverse the trial court's erroneous denial of Kerndt's motion for a new trial unless the bank accepted additur of the damage award to $33,229.51.

Dickson v. Hubbell Realty Co., ___ N.W.2d ___ (Iowa 1997)

In September 1918, the Hubbell estate entered into a sixty-year commercial lease for a vacant lot in Des Moines. During the succeeding forty-eight years, two buildings were constructed on the property and the lease was assigned four times. In 1966, a new lease was entered between the Hubbell Trustees and Arthur D. Dickson. This lease was scheduled to expire upon the termination of the Hubbell Trust in 1983. To extend the lease, the parties cancelled the 1966 lease and entered a new agreement in 1978. The 1978 lease was due to expire in 1998. Upon expiration of the 1978 lease, all buildings or improvements on the premises became the property of the lessor or the lessor could demand that the lessee remove any buildings or improvements. In March 1995, Dickson filed a petition for declaratory judgment seeking a declaration that, upon termination of the lease agreement, there was no obligation to remove buildings that were

A

not constructed by the current lessee.

The court found that while the 1978 lease and cancellation agreement cancelled all previous agreements, the 1978 lease provided that the term "lessee" would be construed broadly. As a result, the lessee, upon request by the lessor, would be responsible for removing any structures or improvements on the leased premises.

Rogers v. Webb,
558 N.W.2d 155 (Iowa 1997)

When Plaintiff met Defendant in October 1994, she was distraught because of the breakdown of her marital relationship. Defendant later filed a dissolution petition and Plaintiff became her advisor during the proceedings. As Plaintiff spent all of his time advising and consulting with Defendant's attorneys in the dissolution matter, Plaintiff and Defendant entered a written agreement providing that Plaintiff would receive twenty-five percent of any marital assets received by Defendant. Out of concern that the contract might be found unenforceable because of the contingent fee, the parties added an addendum stating that Defendant had retained Plaintiff "as her personal and business consultant" for the dissolution, he would be compensated at a rate of $150 per hour and total compensation would not exceed twenty-five percent of the dissolution recovery. The dissolution was effective in April 1986 and Plaintiff worked on the appeal until its resolution in 1988. During the course of their relationship, Plaintiff used automobiles and resided in homes owned by the defendant and Defendant spent approximately $185,000 either paid directly to or for the benefit of Plaintiff. In 1988 the parties terminated their relationship and Plaintiff brought suit for breach of contract.

The power to invalidate a contract on public policy grounds must be exercised only in cases which are free from doubt. While freedom to contract is an overriding policy, courts should not, enforce contracts which are "injurious to the public or contrary to the public good." Before striking a contract on public policy grounds, the court must determine that general public welfare under the circumstances outweighs the importance of freedom to contract. Preservation of marital relationships is a fundamental public policy and the court has long disapproved of contracts which promote separation or dissolution of marriage. Despite the fact that Mr. Rogers was a lay person rather than an attorney, the public policy ground for refusing to enforce contingent contracts for dissolution of marriage was equally applicable.

Plaintiff also advanced a claim for quantum meruit damages. While pleading an express contract generally precludes recovery under an implied contract or quantum meruit theory, an exception provides the quantum meruit damages may be recovered when a contract is invalid not because of the illegality of the subject matter but because public policy disapproves of the manner in which the fee was calculated. After finding that the circumstances fit within the exception, the court noted that the $195,000, either received by or paid for the benefit of Plaintiff, far exceeded the value of any services provided.

Lemmon v. Hendrickson,
559 N.W.2d 278 (Iowa 1997)

While working for Lemmon, the owner of a Do-Rite Pest Control, Hendrickson received a

special tool for baiting birds in rafters. After leaving the company and pursuing other interests for two years, Hendrickson started a pest control company, Revenge Hendrickson initially tried to replicate the bird tool, but abandoned the effort. Revenge did, however, service seven former Do-Rite customers. Lemmon claims Hendrickson violated an agreement, signed while working at Do-Rite, prohibiting use of trade secrets and customer information after termination of employment.

There are three elements for misappropriation of a trade secret: existence of a trade secret, acquisition of the secret through a confidential relationship and unauthorized use of the secret. As there was no evidence that Hendrickson used the bird tool, there was no unauthorized use of a trade secret. There was also no evidence that Hendrickson took a customer list from Do-Rite. The employment contract prohibited Hendrickson from disclosing customer lists to competitors, but did not forbid Hendrickson from servicing the customers after the two-year no compete period expired. Restrictive covenants are unreasonably restrictive if not strictly limited as to time and area. Construing the agreement as prohibiting all solicitation and servicing of Do-Rite customers indefinitely would be an impermissible restriction

Clinton National Bank v. Kirk Gross Co., 559 N.W.2d 282 (Iowa 1997)

Gross' contract to perform renovation work for the bank included an arbitration clause covering "all disputes" between the parties. After a dispute regarding the quality of the carpet, the bank refused to pay the remaining contract balance Gross filed a mechanic's lien and the bank filed suit for breach of warranty. Gross withdrew the mechanic's lien and sought dismissal of the warranty claim on the ground that arbitration was mandatory The bank resisted, arguing that Gross waived the right to arbitration by filing the lien.

Because Arbitration is favored by the courts, evidence that a party waived arbitration must be compelling. While other jurisdictions hold that active participation in litigation can waive a litigant's right to arbitration, the bank failed to present any authority that filing a mechanic's lien constitutes "court action" sufficient to waive arbitration rights.

Arthur v. Brick,
565 N.W.2d 623 (Iowa Ct. App. 1997)

After Buyers entered into a purchase agreement and moved into a house, the basement flooded with water and sewage. Buyers discovered that a drain in the backyard was illegally connected to the sanitary sewer. Though seller offered to fix the problem, buyers refused and stopped making payments on the real estate contract. Seller filed a notice of forfeiture, which buyers sought to enjoin. Buyers wanted to rescind the contract and recover damages

Buyers advanced a fraudulent misrepresentation claim. The district court found that the seller was required to disclose only known sewer problems. There was no evidence that seller knew the drain connection was improper. Further, the connection was in plain view and buyers did not seek any professional advice. There was also evidence that the problem was caused by tree roots, rather than the illegal connection. The district court ordered the buyers to make payments which they failed to do. Therefore, the court allowed a second notice of forfeiture

There was no evidence that seller affirmatively misrepresented any facts or falsely asserted any conditions on the premises which were calculated to induce the buyers into the purchase agreement.

Finish Line, Inc. v. Jakobitz, 557 N.W.2d 914 (Iowa Ct. App. 1996)

In 1984, C.K. of Council Bluffs, Iowa and Finish Line entered into a lease agreement. The Jakobitzes, owners of C.K., personally guaranteed performance of the lease. After operating a Country Kitchen store in the building for three years, the Jakobitzes assigned the operating rights to another couple who later assigned the lease to a third company. Finish Line, the landlord, objected to each assignment unless the Jakobitzes remained personally liable. In 1990, the landlord gave all parties notice of default and took over the property. From 1990 to 1993, the landlord allowed others to operate restaurants in the building, but collected only minimal rent. The Jakobitzes contend the landlord failed to mitigate damages by renting to businesses that paid rent.

When a lessee abandons leased premises prior to termination of the lease, the landlord has a duty to mitigate damages by using reasonable diligence to relet the property at the best obtainable rent. The lessor has the burden of showing due diligence. The Jakobitzes had the burden to demonstrate that the landlord did not use reasonable efforts to mitigate losses.

***In re* Estate of Baessler v. James, 561 N.W.2d 88 (Iowa Ct. App. 1997)**

Decedent's grandchildren brought an action to set aside various transfers made during his life to his daughter, claiming they were the result of undue influence.

There was clear and convincing proof that the daughter had a confidential relationship with decedent. Decedent lived with his daughter before his death and she was involved in his daily life and financial affairs. When there is a confidential relationship, a transaction in which one person benefits at the other's expense will be held presumptively fraudulent and voidable. The daughter was not able to rebut the presumption of undue influence. In fact, she was handling all of decedent's financial affairs, including: transfer of over $75,000 in CDs to joint ownership with the daughter, almost $15,000 paid to the daughter from decedent's checking account over a three year period and decedent's execution of a Warranty Deed giving his share of farm real estate to daughter. The daughter did not show by clear, satisfactory and convincing evidence that she acted in "entire good faith" or that decedent's actions were "free, voluntary, and intelligent." As a result, transfers made prior to decedent's death were the result of undue influence.

Clock v. Larson,
564 N.W.2d 436 (Iowa 1997)

Betty Naber was injured when she fell from a catwalk located in a barn on property she was renting from Merlin Clock. Although Naber was rendered a paraplegic from the accident, Clock had only $100,000 in liability insurance coverage. Clock filed suit against his insurance agent, the insurance agency and IMT Insurance Company alleging that they were negligent in failing to provide sufficient liability coverage. Subsequently, Naber accepted $110,000 ($100,000 from

A

IMT and $10,000 from Clock) to release her tort claims against Clock. As part of the settlement agreement, Clock assigned his interests in the negligence suit against his agent, the insurance agency and IMT to Naber.

Based upon the full and complete release provided to Clock by Naber, the liability of the insurance agent, the agency and IMT was limited to the $10,000 personally paid by Clock. Although the supreme court had previously ruled to the contrary in a similar matter, Red Giant Oil Co. v. Lawlor, 528 N.W 2d 524 (Iowa 1995), in that matter the plaintiff had agreed not to execute on a judgment by confession rather than fully releasing the inadequately insured defendant. As the liability of the insured had been fully and finally established, there could be no further liability on the part of the insurer.

Magnusson Agency v. Public Entity Nat'l Company-Midwest, 560 N.W.2d 20 (Iowa 1997)

The Magnusson Agency provided insurance for Webster County for a number of years. In 1992, Webster County sought new bids for its insurance. Magnusson submitted a bid on behalf of the Northwestern National Casualty Company, the county's current insurer, and also wanted to submit a bid for Penco. Magnusson contacted Penco to determine the requirements for submitting a bid on behalf of Penco. Barb Dale, Penco's representative, stated that the first agent to provide a completed application, including certain information from the county, would be allowed to present Penco's bid. This was in accord with Penco's policies and procedures. Magnusson gathered the requested information and forwarded it to Penco. Several days later, Magnusson was advised by Penco representative Curtis Weible that another agent had submitted a prior application and had been authorized to present the bid. Webster County accepted the Penco bid and the other agent was paid commissions in excess of $55,000. Magnusson later determined that he had, in fact, submitted the first application on behalf of the county, that the agent who presented the bid on behalf of Penco had submitted an incomplete application and that Penco had apparently copied materials from Magnusson's application for use in conjunction with the other agent's application. Magnusson sued Penco for breach of contract and fraudulent misrepresentation. The jury awarded damages in the amounts of $25,000 for breach of contract, $30,000 for fraudulent misrepresentation and $125,000 in punitive damages. The court granted the defendant's motion for JNOV

There was a unilateral contract, pursuant to which the offeror (Penco) made a promise and the offeree (Magnusson) rendered performance as acceptance. Magnusson met his burden to prove the existence of an oral contract by showing that Dale was an agent of and authorized to speak for Penco, that Penco had made an offer and that Magnusson reasonably believed that by performing in compliance with the offer Penco would be bound. Magnusson provided consideration by completing the application and gathering the requisite materials requested by Penco. Finally, because Magnusson was the first to submit an application, there had been a breach of the oral contract and Magnusson had been damaged in the amount of lost commissions. Accordingly, the court reversed the district court's JNOV on the contract claim.

With respect to the fraudulent misrepresentation claim, the court found that there was no evidence of scienter. In particular, there was no evidence that Penco did not intend to perform its oral promise to Magnusson at the time the promise was made by Dale. Further, there was

not substantial evidence that Dale made the promise recklessly. The later representations by Weible, though false, did not amount to a fraudulent misrepresentation since Magnusson did not rely on them. As there was insufficient evidence to support the fraudulent misrepresentation claim, the court upheld the district court's JNOV on the issue of punitive damages. A breach of contract, even if intentional, does not support a punitive damage award absent some independent tort

In re Integrated Resources Life Ins. Co.,
562 N.W.2d 179 (Iowa 1997)

Fidelity Bankers Life Insurance Company ("Fidelity") contracted with Integrated Resources Life Insurance Company ("Integrated") for reinsurance of certain risks insured by Fidelity policies. During the course of that relationship, North American Reassurance ("NARe") became Integrated's delegate, assuming Integrated's obligations to Fidelity. After NARe advised Fidelity of the arrangement, Fidelity regularly dealt with NARe on administrative matters. Fidelity did not, however, sign the assumption agreement presented by Integrated and NARe that formally recognized NARe's assumption of Integrated's responsibilities. In a separate transaction, NARe agreed to guarantee certain of Fidelity's risks above a certain "stop loss" level on a block of life insurance business sold to a separate insurance carrier. NARe's agreement was subject to Fidelity's agreement to indemnify it for such stop loss payments.

Fidelity went into a receivership and Integrated went into liquidation proceedings under Iowa Code Chapter 507C. The receiver for Fidelity made claims for reinsurance payments to NARe. NARe declined to pay the full amount of reinsurance claimed, arguing that it was entitled to a set-off against the reinsurance for amounts Fidelity owed under the stop loss indemnification agreement. Fidelity's receiver filed a claim against Integrated in the liquidation proceeding, claiming that Integrated remained obligated under its reinsurance agreement with Fidelity. Integrated sought to avoid liability by claiming that NARe's assumption of its obligations to Fidelity absolved it of responsibility. Integrated claimed that by dealing with NARe on a regular basis and recognizing NARe's assumption of Integrated's responsibilities, Fidelity had agreed to a "novation." The court found that Integrated failed to prove the requisite elements of a novation, which is never presumed. To escape responsibility, Integrated would have to show "(1) a previous valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) validity of the new contract." Integrated failed to satisfy elements (2) and (3) and remained responsible for its reinsurance obligations to Fidelity. The court also found that a decision by the Virginia court finding that NARe was not entitled to set off the indemnification owed to it by Fidelity against any reinsurance obligations because of lack of mutuality between the two agreements, defeated Integrated's claim for a set-off.

City of Cedar Rapids v. Insurance Co. of N. Am.,
562 N.W.2d 156 (Iowa 1997)

The City of Cedar Rapids sought coverage for an accident that occurred in a portion of the skywalk system owned and maintained by the city from the Insurance Company of North America (INA). INA provided insurance to a hotel owned by Aetna Life Insurance Company. The city was afforded certain coverage as an additional insured under the INA policy which

provided coverage to the hotel for a ballroom that was leased from the city and airspace over a city-owned arena. The policy terms provided for "additional insureds" to whom the insured was contractually obligated to provide insurance coverage and that the additional insured endorsement "shall apply only to the designated premises being insured by this policy, which are directly connected with the real estate and investment operations conducted by [the hotel owner]." The accident for which the city sought coverage occurred when a ballroom patron was walking through the adjacent city-owned skywalk segment and pushed against and through a plate glass wall.

The policy did not provide coverage for the city-owned and operated skywalk. The court rejected the city's argument that, because there is a substantial nexus between the city-owned access to the ballroom and the covered activities within the ballroom, coverage should be extended to the skywalk access. The court found that the skywalk was not among the designated premises insured by the policy nor directly connected with the insured's real estate and investment operations.

The city's reasonable expectations, if they had such expectations with respect to coverage for the skywalk, could not be enforced against the insurer. The reasonable expectation doctrine addresses the expectations of an insured rather than a third party additional insured who was not a party to the negotiations. To the extent that the city's reasonable expectations were not fulfilled, its remedy was against the hotel owner, not the insurance company

DAMAGES

Weinhold v. Wolff,
555 N.W.2d 454 (Iowa 1996)

Plaintiffs lived on a four acre tract in Buena Vista County. Beginning in 1990, Norman and Pam Wolff, who owned property approximately one-half mile south of the Weinholds, began operating a commercial hog feeding and confinement facility. The facility contained a 500,000 gallon waste collection basin which was emptied twice annually. Plaintiffs alleged that the operation was a nuisance creating noxious and offensive odors and that the nuisance was the result of the Wolffs' negligence.

The appropriate measure of damages for a permanent nuisance is the diminution in market value for any use to which the affected property might be placed, not merely the purpose for which it is currently being or has been used. When a nuisance is permanent, a land owner may recover special damages for deprivation of the use and enjoyment of the property, inconvenience, annoyance and discomfort. Similar to intangible damages awarded in personal injury matters, the amount of special damages awarded for permanent nuisance is committed to the discretion of the factfinder. It is not necessary that the special damages be attributable to a medical condition or physical injury.

Nichols v. Sukaro Kennels,
555 N.W.2d 689 (Iowa 1996)

While Plaintiffs boarded their toy poodle at Defendant's kennel, the kennel owner's dog "tore off" the left front leg and shoulder blade of the poodle. The poodle was treated and veterinary expenses in the amount of $326.24 were incurred. After treatment, the poodle was able to continue functioning as the plaintiffs' pet. Plaintiffs filed suit seeking damages for emotional and mental suffering and for loss of aesthetic value of the dog.

Although a dog owner may suffer mental or emotional distress as a result of an injury to a pet, those damages are not compensable. Generally, the sentimental or emotional attachment of a pet owner is not compensable. The appropriate measure of damages for injury to or destruction of an animal is the amount necessary to compensate the owner for any monetary loss. When awarding damages, the market value of the dog may be considered. When determining market value, the purchase price, expected life span, training, usefulness and desirable traits may all be considered. The owner may also recover damages for the expense of treatment and the temporary loss of use of the dog. Damages awarded cannot, however, exceed the value of the dog prior to the accident.

Danamere Farms, Inc. v. Iowa Dep't of Transp.,
___ N.W.2d ___ (Iowa 1997)

The Department of Transportation instituted condemnation proceedings to obtain a 5.75 acre tract of a 233 acre parcel owned by Danamere Farms. After receiving an award of $48,000 from the County Compensation Commission, Danamere appealed and received a jury award of

A

$188,000. The Department appealed, arguing that the trial court improperly admitted evidence of a previous purchase offer. During trial, the court admitted evidence that Danamere had been offered $31,580 for a two acre tract of land. That sale, however, was not completed because the parties were unable to obtain the necessary zoning variance.

Unaccepted offers to purchase real property are unreliable for evaluation purposes and generally should not be permitted as evidence. This rule is equally applicable when a sale is contemplated under the mistaken belief that a particular use may be made of the property. Accordingly, the evidence was improperly admitted.

When a portion of a large tract of land is taken in a condemnation proceeding, the value should be determined by the difference between the fair market value of the entire tract prior to condemnation and the value of the remaining land subsequent to the taking. It is not appropriate, during a condemnation proceeding, to consider any advantages the property owner may receive as a result of a taking. It is not, however, improper to present evidence demonstrating that the development potential of the remaining land has not been affected.

Papenheim v. Lovell,
553 N.W.2d 329 (Iowa 1996)

In a prior appeal at 530 N.W.2d 668 (Iowa 1995), the Iowa Supreme Court held that when an automobile is damaged in an accident and cannot be placed in the same condition as prior to the accident, even after repair, the proper measure of damages is the difference between the vehicle's reasonable market value before and after the accident, plus the reasonable value of the use of the vehicle for the time reasonably required to repair or replace it. Papenheim's car was worth $22,000 before the accident and the value after the accident, before repairs, was $11,000. Rather than awarding Papenheim $11,000, the district court set damages by subtracting from the prior value ($22,000), the value of the vehicle after repair, which an automobile dealer testified was $17,500, and adding the difference ($4,500) to the cost of repairs ($4,158.23), resulting in a total judgment of $8,658.23. When setting damages in this manner, the district court improperly took into account the "dealer profit" included in the $17,500 value testified to by the automobile dealer. Mr. Papenheim should have been awarded $11,000. The cost of repairs and the value of the vehicle after the repairs were irrelevant under the circumstances.

GOVERNMENT

Boham v. City of Sioux City, ___ N.W.2d ___ (Iowa 1997)

Heidi Thompson, a second-grade student, was crossing the street with the assistance of a crossing guard employed by the Sioux City Community School District. After activating the "walk" light, the crossing guard advised Heidi and another student that it was safe to cross. Heidi immediately ran across the street, remaining in the crosswalk, while looking straight ahead. At that time, a pickup truck was approaching. The crossing guard, however, had focused her attention on the children and did not see the approaching truck. When the truck driver noticed the children, he applied the brakes and, after getting no response, swerved to avoid the children. The crossing guard yelled to warn Heidi who turned and was struck by the pickup. She was pronounced dead approximately thirty minutes later. A jury assessed twenty percent of the fault to the school district and crossing guard and eighty percent to the driver and owner of the pickup.

The school district and crossing guard argued that they were legally entitled to assume that the driver would obey traffic rules. Plaintiffs, however, presented specific evidence which enabled the jury to determine that a crossing guard is subject to a higher standard of care than the average motorist or pedestrian. Despite the right to assume that motorists will adhere to traffic regulations, the jury was entitled to find that the crossing guard was required to anticipate the possibility that motorists will not obey those rules. The jury could reasonably conclude that the crossing guard should not have released the children until determining that approaching traffic would stop.

Schriver v. City of Okoboji, ___ N.W.2d ___ (Iowa 1997)

During the early 1980's, the Lauridsens purchased a lakeside lot between the Schriver's home and West Okoboji Lake. In 1983, the Lauridsens wanted to add a garage to their home but were unable because of a twenty-five foot setback requirement. In 1994, when preparing to sell their property, the Lauridsens sought a change in the setback requirement. Ultimately, the zoning board recommended and the city counsel approved an amendment to the zoning ordinance which modified the setback requirement. The Schriver's challenged the city counsel action.

Zoning decisions are within police powers exercised by municipalities. Zoning ordinances may be amended if the amendment is not unreasonable or capricious. Moreover, both zoning ordinances and amendments are presumptively valid. A person challenging an ordinance or amendment must rebut that presumption, demonstrating that the ordinance is unreasonable, arbitrary, capricious or discriminatory with no reasonable relationship to the promotion of public health, safety or welfare. The court will not interfere with an ordinance or amendment if it is "facially valid and the reasonableness is fairly debatable." An ordinance is valid if it is substantially related to public health, safety or welfare, including the improvement or maintenance of property values. Specifically, when an ordinance is challenged, the court must evaluate the primary purpose of the ordinance rather than any hardships which may be caused

to an individual. Courts will not focus on individual hardships because property owners have no vested interest in the continued existence of current zoning regulations. An amendment is appropriate if the current zoning ordinance creates an "arbitrary and unreasonable restraint" on property currently within the zone.

Plaintiffs also contended that construction of the garage, which would block their view of the lake, effected a taking of their property. The court held that land use regulation which advances a legitimate state interest does not constitute a "taking." There is, however, an exception requiring payment of compensation, even if the land use regulation advances a legitimate state interest, if the regulation entails a permanent physical invasion of the property or denies all economically beneficial or productive use of the land. That exception was not applicable in this instance. The court found "no compelling reason to recognize an enforceable right of view over private property."

Iowa Coal Mining Co. v. Monroe County,
555 N.W.2d 418 (Iowa 1996)

Iowa Coal Mining Company and Star Coal Mining Company conducted strip mining operations in Monroe County. In 1984, Iowa Coal obtained a landfill permit from the Department of Natural Resources. Landfill operations are compatible with strip mining because both activities require the same equipment. Monroe County officials were opposed to combining the operations and passed an ordinance which prevented Iowa Coal from adding landfill operations but permitted continuation of the strip mining.

While the government is entitled to regulate property and its use, if a regulation is too extensive, it is considered a "taking." A taking does not require that the governmental entity acquire the entire property, but includes any regulation which substantially deprives an owner of the beneficial use or enjoyment of property or a portion thereof. Land use regulations which substantially advance legitimate governmental interests do not effect a taking unless: the regulation entails a permanent physical invasion or denies the owner all economically beneficial or productive use. When a property owners contends that property has been taken without due process or just compensation, it is necessary that the property owner exhaust any available administrative remedies. No constitutional violation occurs until the owner has been denied just compensation.

Plaintiff also contended that the county, through the zoning ordinance, tortiously interfered with a prospective contractual relationship. Chapter 670 of the Iowa Code, governing tort liability of governmental units, eliminated common law immunity for torts unless specifically excepted by the statute. As tortious interference with contract claim was not excluded by section 670.4, it is a cognizable claim against a governmental entity. The claim is governed by a five year statute of limitations.

Primm v. Iowa Dep't of Transportation, 561 N.W.2d 80 (Iowa 1997)

Plaintiff was arrested for OWI and taken to the Johnson County jail. The Department revoked Plaintiff's license for failing to submit to sobriety testing following his arrest. The district court found that Plaintiff had not been adequately informed concerning the revocation of his license

if he refused. The Department appealed.

Section 321J.8 requires that the driver be advised of the period of revocation, but does not require advice concerning the period of ineligibility for a temporary license.

Burton v. University of Iowa Hospitals & Clinics, 566 N.W.2d 182 (Iowa 1997)

The University of Iowa Hospital collects data on nosocomial infections (infections contracted while a patient) that occur at the hospital. Access to this data is controlled by the hospital's Infection Control Subcommittee. Plaintiff requested access to the records from the hospital under Iowa Code chapter 22, the Open Records Act. The request was denied as being strictly confidential under Iowa Code sections 135.40-135.42. Plaintiff made another request which was also denied. Plaintiff filed suit and the hospital was ordered to disclose the records under chapter 22.

Requiring disclosure would frustrate the purpose behind collecting nosocomial information, the reduction of morbidity or mortality. Disclosure would have a chilling effect on the voluntary reporting of such data. The hospital has discretion on whether or not to disclose the data under section 135.41. A specific statute, such as sections 135.40-135.42, prevails over the general language in chapter 22.

Gabrilson v. Flynn,
554 N.W.2d 267 (Iowa 1996)

Plaintiff, a school board member, requested copies of a performance assessment test given to students. The district had copyrighted the test and Defendant, the superintendent, refused to disclose the test, claiming the tests were trade secrets and statutorily protected examinations.

Disclosure of the test could jeopardize its integrity and be detrimental to the objectives of the assessment. It is unnecessary to employ a balancing test to see if the public's right to know is outweighed by the interest in confidentiality. Plaintiff, as a school board member with policy making power, should be allowed to access both public and private records which are necessary to discharge her duties. She cannot, however, make the content of such records public. A board policy which curtails the rights of its members to access records necessary to determine the legality of school board actions is invalid.

Deer Creek Homeowners Ass'n v. City Development Board,
556 N.W.2d 155 (Iowa Ct. App. 1996)

The City of Urbandale filed a petition for the involuntary annexation of Deer Creek, an area completely surrounded by Urbandale. After the three member city development board formed a committee to review the annexation, a new law required that the board expand to five members. Though the annexation petition was approved by the original committee, the decision was remanded to be heard before the expanded board. The expanded board also approved the petition within ninety days of the public hearing as required by Iowa Code section 368.19 (1991).

A

There was evidence that Urbandale would be able to provide Deer Creek with municipal services not previously enjoyed by its residents including: sewer service, greater water capacity, and more efficient police, fire and emergency personnel. These increased services negate any argument that the annexation is motivated solely to increase tax revenues. Deer Creek was surrounded by Urbandale and Urbandale was in a position to provide substantial services and benefits not previously enjoyed by residents. The record contains substantial evidence supporting the committee's finding that Urbandale's motivation was not solely to increase tax revenues.

City of Fort Dodge v. Civil Service Commission,
562 N.W.2d 438 (Iowa Ct. App. 1997)

A police officer was fired after making derogatory public comments to a newspaper regarding the police chief and the police department in general. The officer appealed to the Civil Service Commission which concluded that termination was not justified and reduced the penalty to a sixty day suspension without pay.

The supreme court found that termination was an appropriate penalty. Prior rule violations may be considered when determining if an officer's conduct warrants discharge. The officer had been suspended on three prior occasions, with the last suspension pending at the time he was terminated. The officer's problematic disciplinary history is sufficiently detrimental to the public interest to warrant and justify his discharge.

Grains of Iowa v. Iowa Dep't of Agric. & Land Stewardship,
562 N.W.2d 441 (Iowa Ct. App. 1997)

Grains of Iowa filed a declaratory judgment action asking the court to construe and confirm the legal standards of Iowa Code section 203.9. The district court ruled that Plaintiff was requesting a determination regarding which records pertain to grain purchases. On this basis, the district court dismissed the action. The Department is an agency and its actions are reviewed under the Iowa Administrative Procedures Act (IAPA). Plaintiff failed to exhaust its administrative remedies under the IAPA.

This case, which requests a ruling on abstract questions not resting upon existing or determinable facts or rights, is not justiciable or fully ripened. In many respects it is "advisory" because the judgment sought would not constitute specific relief to a litigant or effect legal relations, nor would the judgment be sufficiently conclusive.

Magers-Fionof v. State of Iowa,
555 N.W.2d 672 (Iowa 1996)

Plaintiffs filed a class action lawsuit against the State of Iowa under the Iowa Tort Claims Act seeking monetary damages arising out of the State's allowance of commercial harvesting of trees on State owned property. They premised their claim on Iowa Code section 658.4 that allows payment of treble damages to any person entitled to protect or enjoy property upon which trees are willfully injured.

The court found that Iowa Code section 658.4 does not create the cause of action alleged by Plaintiffs. That section is intended to furnish relief to property owners against trespassers who come onto their property and injure or harvest trees As owner of the park lands, the State is not liable for its own management practices respecting trees contained in the parks.

Estate of Voss v. State of Iowa,
553 N.W.2d 878 (Iowa 1996)

Brian Voss was killed in an automobile accident in February 1993. His mother, Alicia Voss, submitted a claim for her son's wrongful death against the Department of Transportation to the State Appeal Board. The claim was denied. Subsequently, Mrs. Voss was appointed the administrator of her son's estate. She did not file a claim on behalf of the estate with the State Appeal Board. Instead, she filed a lawsuit on behalf of the estate of her son against the State of Iowa, alleging entitlement to damages for her son's wrongful death.

The estate's claim should be dismissed for failure to exhaust administrative remedies. Exhausting the administrative remedy of presenting a tort claim to the State Appeal Board, as provided in Chapter 669 of the Iowa Code, is jurisdictional. The claim must be filed by a party entitled to recover the damages sought. Since Mrs. Voss, in her individual capacity, was not entitled to wrongful death damages arising out of her son's death, her individual claim with the State Appeal Board did not exhaust administrative remedies. The estate, which was the real party in interest, would have had to file a own claim under the Tort Claims Act to preserve its wrongful death action against the Department of Transportation.

McClain v. State,
563 N.W.2d 600 (Iowa 1997)

Plaintiff was injured, while traveling in a construction zone, when his vehicle collided with the vehicle in front of him. The other vehicle stopped abruptly due to traffic congestion caused by merging two lanes of traffic into one lane. At the time, Department of Transportation warning signs were in place and complied with State requirements. Plaintiff filed a petition against the State and the construction companies working on the road, alleging that the signs inadequately warned motorists of the traffic congestion. The State claimed immunity under Iowa Code section 668.10(1). The remaining defendants argued that compliance with state regulations entitled them to immunity. The district court granted summary judgment and dismissed the case.

Plaintiff's claims relate to the State's failure to place, erect or install traffic control devices. Iowa Code section 668.10(1) immunizes the State for decisions regarding the placement of traffic signs and control devices. This immunity cannot be overcome by claiming that the State should have taken additional action. There are three exception to the State's immunity: failure to maintain a device, installation of a misleading sign and where, because of exigencies, ordinary care requires that the State warn against dangerous conditions other than inanimate objects. There was no evidence that any of the exceptions applied.

Immunity extended to the State under section 668.10(1) also extends to State contractors that comply with State plans and specifications. If there is independent negligence on the part of the contractors, immunity will not apply. There was no evidence that the contractors were

negligent.

Riley v. City of Hartley,
565 N.W.2d 344 (Iowa 1997)

In 1987, Plaintiff purchased a building and leased a vacant lot from the City of Hartley. The lease contained an option or a right of first refusal which permitted the Plaintiff to purchase the lot. On August 29, 1994, the City advised Plaintiff that it was terminating the lease. At that time, Plaintiff indicated his intention to exercise the purchase option. Approximately two weeks later, a third party submitted a written offer to purchase the property for $13,409 and, pursuant to that offer, promised to construct a $150,000 building and employee four people. Plaintiff matched the $13,409 offer. The City rejected Plaintiff's proposal.

Iowa Code sections 364.3 and 364.7 restrict a city's power to dispose of or act respecting real estate. Section 364.3 states that a city may only act pursuant to ordinance or resolution. Under section 364.7, prior to selling or disposing of an interest in real estate, the City must publish a resolution setting forth its proposal and hold a public hearing prior to making a final determination. When entering the original lease with Plaintiff, however, the City had not followed these requisites. As a result, the purchase rights contained in the original lease were of no effect.

Baker v. City of Ottumwa,
560 N.W.2d 578 (Iowa 1997)

Plaintiff Joe Baker was injured by another patron while using a water slide owned by the City of Ottumwa. Baker sued the other patron, Aaron Dannull, and the City as a result of his injuries. The district court granted the city's motion for summary judgment based on the immunity granted by Iowa Code section 670.4(12). The jury entered a verdict in favor of Baker against Dannull for $10,229.21.

Baker alleged that the immunity conferred by 670.4(12) did not apply his claims that the City was responsible for negligent supervision of the lifeguards stationed at the pool or that by immunizing the City, the statute violated his constitutional rights to due process and equal protection. In rejecting Baker's arguments, the court found that Iowa Code section 670.4(12) provides an exception to the general rule stated in Chapter 670 that governmental subdivisions are liable for the torts of their employees. The exception pertains to any claim relating to a swimming pool (which is defined to include water slides) unless the claim is based on a malicious or criminal offense by a municipal employee. Moreover, there was a rational basis to exempt the city from liability related to its operation of the water slide since the statute served the legitimate state interest of fostering community recreational activities and water safety training. Further, Baker had no "right" to sue the city of which he was deprived in violation of his rights to due process. His interest in suing the city was economic, rather than a fundamental constitutional interest.

Baker also argued that it was inappropriate for Dannull to argue that the City's negligence was the sole proximate cause of the accident. The court rejected that argument, finding that by asserting the defense of sole proximate cause, Dannull assumed the burden of proving that the

City was solely responsible for the accident and, if he had been successful, the defendant would have been insulated from liability. The court also rejected Dannull's argument that fault should have been apportioned to the City, even though it was immune from liability. The immunity that protected the City from Baker's claim, also precluded Dannull from reducing his liability by any fault attributable to the City.

Finally, Baker argued that the verdict was inadequate as a matter of law because it did not provide any compensation for permanent scarring or future pain and suffering. Although the plaintiff introduced medical evidence to support future damages, the jury had not abused its discretion in determining that there should be no award for future injuries.

Christenson v. Iowa District Court for Polk County,
557 N.W.2d 259 (Iowa 1996)

As part of its procedure to condemn land for road construction, the City of Johnston needed to perform environmental testing on Christenson's property. Iowa Code section 314.9 requires certain notice to property holders prior to entry on the land for environmental testing. Further, section 314.9 (which has since been amended) prohibited drilling of test bores within 20 rods of a dwelling house or building without the owner's written consent. When Christenson insisted on compliance with the terms of section 314.9, the city circumvented his refusal by obtaining an administrative warrant pursuant to Iowa Code section 808.14 which provides for the issuance of warrants to facilitate governmental entities in carrying out their authority.

After the district court denied Christenson's request to set aside the administrative warrant, the supreme court combined Christenson's certiorari action with the appeal of the denial of the motion to quash the warrant. When the matter was finally heard by the supreme court, the test bores had been drilled and Christenson's land had been condemned. The court determined, however, that while the appeal might appear to be moot, it would address the issues because (1) Christenson might have a claim against the city for trespass and (2) the appeal contained questions of substantial public interest that justified appellate action.

Section 314.9 was a specific statute that covered the situation presented by Christenson. As a matter of statutory construction, the terms of a special statute supersede the terms of a general statute. Though, because of the distances involved, the terms of section 314.9 which restricted drilling within 20 rods of a dwelling house or building would have little practical effect in an urban setting, the statutory language was controlling and Christenson was entitled to its protection. The court, however, found that the only relief available was the declaratory ruling that the specific statute took precedence over the general administrative warrant. The court declined to restrict the city's use of the wrongfully obtained soil samples.

A

IOWA
APPELLATE COURT UPDATE
PART II

Webb Wassner
Simmons, Perrine, Albright & Ellwood
Cedar Rapids, Iowa

INDEMNITY

Indemnity - Contractual

Campbell v. Mid-America Construction Company of Iowa, No. 7-030/96-0398 (Iowa Ct. App. April 30, 1997)

Campbell, an employee of subcontractor Larry Graf, d/b/a Hawkeye Erection Co., was injured when he climbed a fence installed two months earlier by another subcontractor, Lifetime Fence Company. Mid-America was the general contractor. Campbell sued Mid-America and Lifetime. Mid-America settled. A jury found Lifetime faultless, Mid-America 25% at fault and Campbell 75% at fault. Mid-America then sought indemnity from Graf, who sought indemnity from Lifetime based on the indemnification clause in the subcontracts. The District Court granted summary judgment in favor of Lifetime on Graf's indemnification claim. Affirmed.

HELD: The contractual obligation of indemnity is limited to damages and injuries "arising out of . . ., resulting from or in any manner connected with, the execution of work provided for in this Subcontract." The Court interpreted this language to be limited in time to when the subcontractor is actually performing the work. It does not provide for long term liability after the subcontractor's work is finished. In this case, Lifetime completed the installation of the fence and left the site two months before Campbell was injured. Therefore, Graf cannot obtain indemnity from Lifetime.

Indemnity - From Consortium Claim

Estate of Sylvester, 559 N.W.2d 285 (Iowa 1997)

Employee Sylvester was killed in auto accident with third-party, Lauer. Lauer's estate sued Sylvester's estate. Sylvester's wife and son sued Lauer's estate for loss of consortium. Employer's insurer, Cincinnati, sued Lauer's estate for subrogation for workers' compensation benefits paid. A global settlement was entered, including a payment of $35,000 to Sylvester's wife and son by Lauer's estate for the consortium claims. Cincinnati objected to the settlement and claimed that it was entitled to indemnification out of the consortium settlement. The District Court denied indemnification. Affirmed.

HELD: Consortium recovery is not subject to workers compensation insurer's right of indemnity pursuant to Iowa Code § 85.22(1). The right of indemnity is against the worker's recovery. A loss of consortium claim is an independent claim brought by the deprived spouse or child. Further, denying indemnification from the consortium recovery does not allow double recovery. Consortium benefits are not payable pursuant to Iowa's workers' compensation scheme.

NEGLIGENCE

Collateral Source

Ray v. Paul, 563 N.W.2d 635 (Iowa Ct. App. 1997)

Plaintiffs filed medical malpractice claim against physician for medical malpractice in treating son's broken leg, the result of being hit by a truck. The truck driver was uninsured. Plaintiffs settled with their insurance carrier under the uninsured motorist provisions of their policy. As part of that settlement, plaintiffs signed a release which physician asserted released any claims against him. After jury trial, jury found physician was not negligent. Affirmed.

HELD: Plaintiffs argue that settlement with their insurance carrier should not have been admitted under the collateral source rule. However, to the extent that that rule remains viable, "its application is limited to those cases wherein the underlying purpose of the rule is advanced." In this case, the release was admitted to allow the jury to determine whether the plaintiffs intended to release the physician and whether the settlement compensated the plaintiffs for any malpractice which accompanied the treatment of the original injury. Accordingly, the collateral source rule is not implicated and the release was properly admitted.

Contribution

Allison v. L.E. Allison Estate, 560 N.W.2d 333 (Iowa 1997)

Father left farm to two sons (John and L.E.) in 1961, subject to father's wife's life estate. Brothers farmed for several years. In 1988, brothers took out mortgage. L.E. died in 1989. John retired in 1990 and his son-in-law, Dan, took

over management of farm. Dan made the mortgage payments for 1990, 1991, and 1992.

John sued L.E.'s estate for contribution for one-half of the mortgage payments made by Dan, asserting that he was liable to Dan for that amount. District Court dismissed. Affirmed.

HELD: Contribution rests on equity, on the idea that burdens should be equally shared. However, a party's right to contribution does not accrue until a disproportionate payment has been made. The facts demonstrated that the parties always intended that the mortgage debt would be paid by proceeds generated by the farming operation. From 1990-92, Dan retained all of the farming revenue and paid all of the farming debts, including the mortgage. As there was no evidence that John paid any of the mortgage debt or that John was obligated to Dan for any of that debt, the contribution action was properly dismissed.

Emotional Distress - Injury to Pet

Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996)

Plaintiffs boarded their poodle at defendant kennel. Another dog attacked and injured poodle, tearing off a leg. Plaintiffs sued for vets bills, emotional distress, and loss of aesthetic intrinsic value of the poodle. After bench trial, District Court awarded vets bills and no other damages. Affirmed.

HELD: Plaintiffs argue that their bond with the poodle was so strong that the poodle was considered a member of the family and, thus, they are entitled to emotional distress damages. Supreme Court follows majority of jurisdictions and allows no such claim.

HELD: Claim for damages for loss of intrinsic value of the poodle also rejected. There was no evidence that the dog had any special purpose, other than as a family pet. Even though dog lost a leg, there was no showing that his value as a pet, which primarily consists of companionship, had been diminished.

A

Intervening/Superseding Cause

Scoggins v. Wal-Mart, 560 N.W.2d 564 (Iowa 1997)

Wal-Mart sold ammunition to minor, in violation of federal law. Later that day, minor committed suicide. District Court directed a verdict for Wal-Mart. Affirmed.

HELD: Suicide was not foreseeable to Wal-Mart when it sold the ammunition. The suicide was not a normal consequence of the sale of the ammunition. The intervening act of suicide relieved Wal-Mart from liability as a matter of law.

Liability, Municipal - Iowa Code § 670.4(11)

Kulish v. Ellsworth, No. 106/95-1837 (Iowa Supreme Court July 23, 1997)

David Kulish and Francis Ellsworth were involved in an automobile collision. Kulish was taken by ambulance to Howard County Hospital. Upon his arrival at the emergency room, the attending physician directed his immediate transfer to the Mayo Clinic. While en route, Kulish went into cardiac arrest and died. Kulish's administrator brought a medical malpractice action against the county, the county hospital, the ambulance service, and various emergency personnel. The District Court granted summary judgment for defendants based on Iowa Code § 670.4(11), which provides that a municipality is immune from liability for a "claim based upon or arising out of an act or omission in connection with an emergency response." Affirmed.

HELD: Iowa Code § 670.4(11) does not violate equal protection. Municipalities have a strong interest in providing emergency accident response and to allow the responders to render necessary aid free from distractions or concerns over potential lawsuits.

HELD: A county hospital is a "municipality" entitled to immunity.

HELD: The county hospital and its employees were clearly engaged in an "emergency response" within the meaning of the statute.

HELD: The individual defendants are also entitled to immunity. Although officers and employees of a county entity

are liable for "reckless misconduct," there is no evidence that the individual defendants acted with anything less than exemplary effort in providing emergency care to Kulish.

Liability, Municipal - Iowa Code § 670.4(12)

Baker v. City of Ottumwa, 560 N.W.2d 578 (Iowa 1997)

Municipal water slide patron sued city and another patron on claim that he was injured when other patron stuck his foot over the slide's side wall and injured plaintiff as he descended slide. District Court dismissed city on basis that city was immune from liability pursuant to Iowa Code § 670.4(12), which immunizes municipalities from liability relating to swimming pools. Affirmed.

HELD: Section 670.4(12) is broadly worded and applies to claim that lifeguard was negligent.

HELD: Statute does not violate equal protection (vis-a-vis other persons injured at recreational facilities) as statute has rational purpose to foster community recreational activities and water safety training. Statute also does not violate due process.

HELD: Court also rejected argument of the other defendant patron that fault of city, even though immune, should be included on verdict form. Even though defendant patron was disadvantaged, Iowa Code Chapter 668 requires that when special defenses shield a co-defendant from judgment, the fault of that co-defendant must be borne by the remaining defendant, not the plaintiff.

Proximate Cause

Scoggins v. Wal-Mart, 560 N.W.2d 564 (Iowa 1997)

Wal-Mart sold ammunition to minor, in violation of federal law. Later that day, minor committed suicide. District Court directed a verdict for Wal-Mart. Affirmed.

HELD: Wal-Mart was negligent and "but-for" causation was clearly established. Issue is whether Wal-Mart's conduct was a "substantial factor" in bringing about minor's death and, if so, whether public policy demands imposing liability on Wal-

Mart. In order to hold Wal-Mart liable, the suicide must have been foreseeable to Wal-Mart when it sold the ammunition.

There was no evidence that the clerk who sold the ammunition had any reason to believe that the minor was suicidal. Therefore, the sale of the ammunition was not the proximate cause of the minor's death.

Ten Hagen v. DeNooy, 563 N.W.2d 4 (Iowa Ct. App. 1997)

Plaintiff collided with a tractor and cultivator on rural gravel road. The jury found that the defendant was at fault (the submitted specifications were failing to maintain a proper lookout and failing to maintain control), but that the defendant's fault had not proximately caused any damage to plaintiff. The District Court granted a new trial, finding that the jury's finding of fault but not proximate cause was inconsistent. Reversed.

HELD: Even if fault is established, it does not necessarily follow that proximate cause exists. In this case, it is reasonable to conclude that the jury found that defendant's fault was not a substantial factor in causing harm to plaintiff. The trial court abused its discretion in granting a new trial.

NOTE: Plaintiff's comparative fault (there was evidence that she was speeding) was apparently submitted to the jury. Even though apparently not specifically so instructed, the jury may have found that plaintiff's fault was the sole proximate cause of the accident.

Delaney v. Gansemer, No. 7-060/95-2151 (Iowa Ct. App. April 30, 1997)

Plaintiff Delaney was involved in an automobile accident with Defendant Gansemer. Delaney was stopped at an intersection and was rear-ended by Gansemer, causing minimal vehicle damage. Delaney also contended that she suffered injuries to her back and foot. Defendant introduced evidence that Delaney had pre-accident back and foot injuries. The jury found defendant was at fault but that Defendant had not proximately caused any of Delaney's claimed injuries. The District Court sua sponte entered JNOV for plaintiff on the vehicle damage claim of $617.72 (which was not appealed) and denied plaintiff's motion for a new trial on personal injury damages. Affirmed.

HELD: Even if a jury finds that the defendant is at fault, the jury is not required to find that the fault proximately caused the injuries claimed by the plaintiff. The evidence was in conflict as to whether Plaintiff had suffered any personal injuries related to the accident. The jury could have found that all of her claimed personal injuries existed prior to the accident. Jury's failure to award property damage is not inconsistent as plaintiff's requested damages instruction, which was given, did not seek property damage.

Sole Proximate Cause

Baker v. City of Ottumwa, 560 N.W.2d 578 (Iowa 1997)

Municipal water slide patron sued city and another patron on claim that he was injured when other patron stuck his foot over the slide's side wall and injured plaintiff as he descended slide. District Court dismissed city on basis that city was immune from liability pursuant to Iowa Code § 670.4(12), which immunizes municipalities from liability relating to swimming pools. District Court instructed jury that if it found the negligence of the city's lifeguards to be the sole proximate cause of injury, it was required to find that other patron's fault, if any, was not a proximate cause of plaintiff's injuries. Jury returned verdict for plaintiff against other patron in small amount. Plaintiff argued that instruction unfairly prejudiced plaintiff as it allowed other patron to shift blame to immune city. Affirmed.

HELD: Sole proximate cause instruction properly given. Defense of sole proximate cause applies whether or not the allegedly culpable party is joined in the action. Instruction was also supported by the evidence.

Standard of Care - Expert

Hartig v. Francois, 562 N.W.2d 427 (Iowa 1997)

Plaintiff Hartig contracted with Curt Francois to build a retaining wall. Part of the work was done by Curt's father, Thomas. The retaining wall subsequently collapsed and Hartig sued for defective design and construction. After a bench trial, the District Court found Thomas liable for failure to exercise the skill and knowledge normally possessed by those engaged in the trade of retaining wall construction. Reversed.

HELD: There was no evidence that Thomas was a "stone mason" who would have known that the design and construction of the wall was unsafe due to an improper selection of the size of stone to be used. There was no evidence that Thomas held himself out as an expert. His role was merely to provide the manual labor necessary to complete the retaining wall, which had been designed by Curt. Thomas should be held only to the standard of care of a general laborer. There was no evidence that a reasonable laborer, as opposed to a stone mason, would recognize the defective design. "An employee who carefully carries out the plans, specifications and directions given the employee by the employer is not liable for defects in those plans, specifications or directions unless they are so obviously defective and dangerous that no reasonable man would follow them." Thomas is entitled to judgment in his favor.

TORTS

Abuse of Process

Fuller v. Local Union No. 106, No. 164/96-84
(Supreme Court of Iowa July 23, 1997)

Fuller sued union and other union employees for abuse of process and other claims. Fuller, a candidate for union business agent, was observed drinking beer by Schafer, also a candidate, and Hauck. Hauck later told Schafer that he saw Fuller weaving while driving on the highway. Schafer called the police, who stopped Fuller. The police determined that Fuller was not intoxicated and took no further action. The District Court granted summary judgment for defendants. Affirmed.

HELD: An abuse of process claim requires proof of: (1) the use of legal process, (2) its use in an improper or unauthorized manner; and (3) damages suffered by the plaintiff as a result of the abuse. Fuller alleges that Schafer and Hauck abused legal process by reporting him to the police in an effort to gain an advantage in the union election. The Supreme Court rejected that claim, holding that "the mere report to police of possible criminal activity does not constitute legal process."

A

Civil Rights - Disability

Cole v. Staff Temps, 554 N.W.2d 699 (Iowa 1996)

Plaintiff was employed at Animal House as a child care worker. In August of 1992, she was placed on probation for tardiness and excessive absenteeism. In March of 1993, she suffered a back injury which limited her ability to work. She was again placed on probation in May of 1993 for tardiness and absenteeism.

Because of absenteeism problems with all of its employees, Animal House determined, in July of 1993, to terminate all of its employees and obtain its staff through Staff Temps. All Animal House employees were invited to apply for positions with Staff Temps. Staff Temps interviewed plaintiff. Prior to the interview, Staff Temps had already decided that plaintiff would not be placed at Animal House because of her chronic attendance problem. Staff Temps so informed plaintiff but indicated that they could place her with other employers. Plaintiff refused to complete the Staff Temps application.

After receiving a right to sue letter from the EEOC, plaintiff sued Staff Temps and Animal House. The District Court entered judgment for defendants. Affirmed.

HELD: Iowa district court's have jurisdiction over American With Disabilities Act ("ADA") claims.

HELD: In proving a ADA claim, a plaintiff may use the burden-shifting framework of McDonnell Douglas Corp. v. Green. To prove a prima facie case, plaintiff must show: (1) she has a disability; (2) she is qualified for the position; and (3) she suffered an adverse employment action under circumstances from which an inference of discrimination arises.

Plaintiff proved that she has a disability. Even though her back injury did not actually place a significant restriction on her ability to do the job, Animal House and Staff Temps both perceived plaintiff as having a disability.

Plaintiff failed to prove that she is a qualified individual due to her excessive absenteeism, which the Court found was unrelated to the back injury. Chronic absenteeism prevents a person from performing the essential function of regularly attending work. Irregular attendance renders a

person unqualified from most types of employment and thus susceptible to legitimate termination. Animal House, a child care center, requires regular attendance in order to comply with state laws and have the proper balance between adult workers and children. An employee who cannot meet the attendance requirements of the job, without a showing that the attendance problem could be reasonably accommodated, is not a "qualified" individual protected by the ADA.

Plaintiff also failed to prove that there was a substantial connection between her disability and her termination.

Civil Rights - Pregnancy

Sahai v. Davies, 557 N.W.2d 898 (Iowa 1997)

Iowa Civil Rights Commission determined that physician and medical clinic had sexually discriminated against pregnant job applicant when, following pre-employment physical, they recommended to employer that prospective applicant not be hired. Employer had informed applicant that she was qualified for job at meat packing facility (Nissen Company) and would be hired if she passed physical. Physician determined that employee was not physically capable of performing job due to the pregnancy. Applicant was subsequently hired three months after birth of child. Supreme Court (in en banc 5-4 decision) reversed.

HELD: Although pregnancy may not be used as a general criteria for refusing employment, physical disability caused by pregnancy, if shown to exist, may be considered as a factor in a hiring decision with respect to a particular employee, if the disability affects performance of the job. An employer must be free to seek out expert medical opinions and physicians must be free to make independent medical judgments. An individualized decision was made in this case and, therefore, there is no claim for discrimination.

A

Civil Rights - Retaliatory Discharge

City of Hampton v. Iowa Civil Rights Commission, 554 N.W.2d 532 (Iowa 1996)

Plaintiff was employed in the office of the city clerk of Hampton. She filed a sexual discrimination complaint which was dismissed after a finding of no probable cause. While that complaint was pending, she filed a claim that she had been retaliated against for filing the sexual discrimination complaint. The Civil Rights Commission found for plaintiff on the retaliation complaint. Affirmed as modified.

HELD: To prove retaliation, plaintiff must show: (1) she was engaged in a statutorily protected activity; (2) she suffered adverse employment action; and (3) a causal connection existed between the first two factors. Causation is at dispute in this case. The filing of the sexual discrimination claim must be a substantial factor in the termination. In this case, there was substantial evidence of the causal connection, including evidence that plaintiff's supervisor told her that she was being reduced from full to part time employment because he "didn't like that civil rights mess hanging over his head."

Defamation

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

Plaintiff Wilson injured his back while working for IBP. IBP, as part of its policy of "conservative" treatment, sent Wilson to Dr. Argawal, who initially prescribed rest and then assigned Wilson to light duty. Wilson obtained second opinion from Dr. Hamsa, who prescribed continued bed rest. IBP then began surveillance of Wilson.

Diane Arndt, an IBP nurse, then informed Dr. Hamsa that IBP had a videotape showing Wilson not following his prescribed treatment regimen. Although the surveillance disclosed Wilson performing activities inconsistent with bed rest, no videotape actually existed. Dr. Hamsa then accused Wilson of "lying" and assigned Wilson to light duty.

Wilson sued, alleging that Arndt's statement to Hamsa was defamatory and violated her fiduciary duty to him. The jury awarded Wilson $4,000 in compensatory damages and $15 million

in punitive damages. The Supreme Court affirmed on the liability issues (and ordered remittitur of the punitive damages award to $2 million).

HELD: (1) The jury could find that Arndt's statement constituted slander per se as imputing dishonesty to Wilson and thus as an attack on the moral character and honesty of Wilson.

(2) The jury's rejection of defendants' substantial truth defense was also supported by the evidence. The essence of the defamatory statement was that Wilson was faking the severity of his injury and lying to his doctor, even though the surveillance team had observed Wilson working on a car and driving his children to school.

Defamation - Meaning of Statements for Jury

Kerndt v. Rolling Hills National Bank, 558 N.W.2d 410 (Iowa 1997)

Bank President was dismissed by Board of Directors based on President's poor relationship with bank employees and for failure to follow directives of the Board. President sued for breach of contract and defamation. Defamation claim was based on statements by Board Chairman that: (1) President had not been functioning for two months; (2) Chairman was concerned about President's mental health; (3) President was having mood swings; and (4) nobody trusted President. Jury found for defendants on defamation claim. Affirmed.

HELD: Trial court properly submitted to jury question of whether or not statements were defamatory. If a statement is susceptible to two reasonable constructions, one defamatory and one not, the jury must decide. In this case, the statements could be construed as either defamatory statements regarding the President's banking skills or as non-defamatory statements that the President was going through a difficult time and needed support.

Duty

Mensink v. American Grain, 564 N.W.2d 376 (Iowa 1997)

Plaintiff truck driver was injured when lightning struck elevator to which he was delivering corn. The lightning strike

caused a grain dust explosion. The District Court submitted two theories to the jury: failure to install lightning protection devices and failure to evacuate the elevator when lightning threatened. The jury found for plaintiff. The Supreme Court determined that the failure to evacuate theory was improperly submitted and, because the jury did not specify which theory it found liability upon, remanded for a new trial.

HELD: The defendants had no duty to evacuate the elevator. There is no statute, regulation, or ordinance which requires a grain elevator to evacuate the premises during a threat of lightning. There is no general custom that requires such evacuation. A practice of evacuation during the 40-50 days a year where lightning is possible would be unworkable, particularly since lightning strikes are totally unpredictable.

Duty - Crossing Guard

Boham v. City of Sioux City, No. 122/96-107 (Iowa Supreme Court July 23, 1997)

Eight-year-old Heidi Thompson was killed by a pickup truck after she was allowed to enter a crosswalk by Barbara Marmo, a crossing guard employed by the school district. The jury found Marmo and the school district 20% at fault and the driver 80% at fault. Marmo and the school district appealed. Affirmed.

HELD: Marmo first argues that she had a right to assume that the pickup driver would obey the law and stop at the cross-walk. That argument ignores the limitation of that rule that one may assume that a motorist will obey the law until reasonable care should alert one to the contrary. As a crossing guard, part of Marmo's duty was to anticipate that motorists would not obey the law. Marmo's right to assume that the pickup driver would obey the law was tempered by her duty to the child to use reasonable care in ascertaining whether the driver would stop. As a crossing guard, Marmo has a higher standard of care than the typical motorist or pedestrian in determining whether an approaching motorist will stop.

HELD: Defendants also argue that there was inadequate evidence to submit each of the specifications of negligence. The Court held that each specification was supported by the evidence. Those specifications included: (1) failing to

instruct children that the should walk rather than run across the street because when children run they concentrate on running rather than on approaching vehicles; (2) failing to notify the city that the timing sequence of the lights was too short based on complaints received; (3) inadequately training Marmo and failing to provide her with a florescent vest; (4) Marmo's failure to keep a proper lookout for approaching vehicles; and (5) Marmo's calling of Thompson's name when Marmo saw the truck, which caused Thompson to stop in the path of the truck.

Duty - Good Faith and Fair Dealing in Employment Context

Phipps v. IASD Health Services Corp., 558 N.W.2d 198 (Iowa 1997)

Terminated employee brought suit for, inter alia, breach of duty of good faith and fair dealing, alleging that employer had to follow its employment policies in good faith. District Court granted summary judgment affirmed.

HELD: Court reaffirms that the tort of breach of the implied covenant of good faith and fair dealing is not recognized in the employment context.

Duty - Common Carrier

Wright v. Midwest Old Settlers and Threshers Association, 556 N.W.2d 808 (Iowa 1996)

Plaintiff was injured while riding a train at the Midwest Old Thresher's reunion, which is a five day event run by a non-profit organization. The train, two open cars pulled by a small tractor, is available for patrons during the event to ride around the grounds for a small fee. The jury returned a verdict for defendant. Affirmed.

HELD: Plaintiff objects to the District Court's refusal to submit a jury instruction that a common carrier is held to a higher standard of care. A common carrier "holds itself out as ready to engage in the transportation of goods or persons for hire, as public employment, and not as a casual occupation." In this case, the train's use is limited in scope and duration to a few days per year. The purpose of the train is not only to provide transportation, but to entertain

patrons. The Supreme Court held that "where a person or organization undertakes to conduct an event for a limited period of time and provides a mode of transportation in and around this event for the amusement and comfort of the attendees, that person or organization will not be considered a common carrier subject to the highest degree of care in the operation of the service or facility." The District Court correctly refused the common carrier instruction.

Duncan v. City of Cedar Rapids, 560 N.W.2d 320 (Iowa 1997)

Pedestrian was injured when struck by a city bus. Jury returned verdict finding bus driver not at fault. Affirmed.

HELD: Trial court correctly refused to give plaintiff's requested instructions on heightened duty of care that common carrier owes to a passenger. Passenger rule does not apply until the passenger actually boards the conveyance. Plaintiff's apparent intent to board the bus, even if known to the driver, did not make him a "passenger." The trial court correctly refused the proffered heightened duty of care instructions.

HELD: Trial court also correctly refused to give plaintiff's requested instructions that driver was negligent for violating various driver training manuals provisions regarding potential passengers and pedestrians. The requested instructions were correctly refused because: (1) they did not accurately quote the manuals; and (2) the manuals largely described duties owed to passengers, and plaintiff was not a passenger.

Duty - Possessor of Land

Paul v. Luigi's, Inc., 557 N.W.2d 895 (Iowa 1997)

Police officer investigating suspicious vehicle in alley was injured when he fell into an uncovered window well. After bench trial, District Court found for officer.

HELD: Whether police officer was an invitee or a licensee was irrelevant. For either, possessor of land has duty to warn of hidden dangers known by the owner to be dangerous if the danger is not known to or observable by a person exercising ordinary care.

Estate of Vasquez v. Hepner, 564 N.W.2d 426 (Iowa 1997)

Plaintiff's decedent was killed in fire at duplex rented from defendants. The fire started as a result of faulty wiring located in the ceiling space between the first and second floors of the duplex. The evidence was that neither the decedent or the defendants had any knowledge of the wiring problem, the defendants had never hired an electrician to inspect the wiring, and that the porch light connected to the wiring had worked properly during the defendants' ownership of the duplex. The District Court found for defendants on stipulated facts. Affirmed.

HELD: The first issue is whether the defendants breached the implied warranty of habitability. A landlord is not strictly liable for all defects that injure a tenant. The landlord must either know of the defect or violate his duty to reasonably inspect the premises. In this case, the defendants did not know of the defect. Because there was no problem with the porch light, the defendants also had no duty to inspect. A landlord is not required to inspect all wiring in a structure before leasing it to the tenant. Further, the evidence was that an inspection might not have uncovered the defect.

HELD: The defendants also did not violate Iowa Code § 562A.15 by failing to inspect the wiring. That section requires a landlord to comply with all building codes, make all repairs required to put the premises in a habitable condition, and maintain all electrical facilities in a good and safe working order. In this case, the defendants did not know of the defect and had no reason to know. It would have been unreasonable to require them to tear up the walls and ceilings to inspect the wiring.

Duty - Removal of Snow

Humphries v. Trustees of the Methodist Episcopal Church of Cresco, No. 167/96-923 (Supreme Court of Iowa July 23, 1997)

Plaintiff sued church and city for injuries suffered as a result of slipping and falling on ice and snow on concrete apron immediately abutting the curb. District Court granted summary judgment for defendants. Affirmed.

HELD: Church had no duty to remove snow and ice from the concrete apron as the apron was not a "sidewalk" within the meaning of Iowa Code § 364.12(2)(b). The apron was intended and used as a mere widening of the curb. It was not placed or used as a path for pedestrians.

HELD: City was immune from liability pursuant to Iowa Code § 668.10(2) as city complied with its policy or level of service for removal of snow and ice. The city's policy required plowing two lanes and piling the snow and ice onto the curb, which included the apron. The city had no policy of removing snow and ice from the curb or apron.

Fiduciary Duty

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

Plaintiff Wilson injured his back while working for IBP. IBP, as part of its policy of "conservative" treatment, sent Wilson to Dr. Argawal, who initially prescribed rest and then assigned Wilson to light duty. Wilson obtained second opinion from Dr. Hamsa, who prescribed continued bed rest. IBP then began surveillance of Wilson.

Diane Arndt, an IBP nurse, then informed Dr. Hamsa that IBP had a videotape showing Wilson not following his prescribed treatment regimen. Although the surveillance disclosed Wilson performing activities inconsistent with bed rest, no videotape actually existed. Dr. Hamsa then accused Wilson of "lying" and assigned Wilson to light duty.

Wilson sued, alleging that Arndt's statement to Hamsa was defamatory and violated her fiduciary duty to him. The jury awarded Wilson $4,000 in compensatory damages and $15 million in punitive damages. The Supreme Court affirmed on the liability issues (and ordered remittitur of the punitive damages award to $2 million).

HELD: (1) Wilson's claim for breach of fiduciary duty falls outside of the remedies available under workers' compensation. Accordingly, the claim did not fall within the exclusive jurisdiction of the Industrial Commissioner.

(2) Arndt was responsible for managing Wilson's medical care. Wilson placed his trust in Arndt to properly provide for his medical care. Arndt owed Wilson a fiduciary duty.

A

Firefighter's Rule

Paul v. Luigi's, Inc., 557 N.W.2d 895 (Iowa 1997)

Police officer investigating suspicious vehicle in alley was injured when he fell into an uncovered window well. After bench trial, District Court found for officer. Affirmed.

HELD: Firefighter's rule prohibits firefighters and police officers from recovering damages when the claim is based on the same conduct or act that initially created the need for the person's presence in their official capacity. This rule is narrow.

The rule does not apply in this case. The negligently created risk (the open window well) was not the reason for the officer's presence in the alley. He was not injured by the vehicle or the occupants of the vehicle.

Rennenger v. Pacesetter Co., 558 N.W.2d 419 (Iowa 1997)

Firefighter sued contractor involved in renovation of apartment building for negligence. Firefighter was injured when he fell from unguarded and unrailed fourth floor landing while responding to fire. District Court granted summary judgment for defendant based on firefighter's rule. Reversed.

HELD: Firefighter's rule prohibits firefighters and police officers from recovering damages when the claim is based on the same conduct or act that initially created the need for the person's presence in their official capacity. This rule is narrow.

The rule does not apply in this case. Although the plaintiff's injuries arose from the normal, inherent, and foreseeable risks faced by firefighters, the alleged negligent act (leaving the landing unguarded and unrailed) is independent of the act which created the emergency to which the plaintiff was responding.

Fraudulent Misrepresentation

Magnusson Agency v. Public Entity National Company-Midwest, 560 N.W.2d 20 (Iowa 1997)

Independent insurance agent brought suit against insurer for breach of contract and misrepresentation after insurance company gave contract for County's insurance to another agent. Jury found liability and awarded damages. Trial court granted JNOV and vacated verdict. Supreme Court reversed as to breach of contract claim and affirmed as to fraudulent misrepresentation claim.

HELD: There was insufficient evidence to support the fraudulent misrepresentation claim. Insurance company's representation to insurance agent that he would get the contract if he submitted the first completed application was not false at the time it was made. The representation was a statement that the insurance company would perform a future act. The fact that the promised act was not actually performed does not prove that the promisor did not intend to keep the promise at the time the promise was made. "When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief." There was no substantial evidence that insurance company representative, at time representation was made, knew that company would fail to follow company policy.

In Pari Delicto Doctrine

General Car & Truck Leasing System, Inc. v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1997)

General Car & Truck hired Lane & Waterman for assistance in registering its service mark. As part of the registration, Gene Ehlers, President of General Car & Truck, signed an affidavit that General Car & Truck was using the service mark for, inter alia, the leasing of aircraft, boats, and agricultural equipment, which it was not. General Car & Truck also, in renewing the mark, submitted an affidavit stating that General Car & Truck was using the service mark for, inter alia, the leasing of aircraft and boats, when it was in fact not doing so. Both General Car & Truck and Lane & Waterman knew that the affidavits were not accurate. The Patent and Trademark Office subsequently canceled the service mark based on the

false statements in the affidavits. General Car sued for malpractice. The District Court granted summary judgment for defendant. Affirmed.

HELD: The in pari delicto doctrine focuses on the relative culpability of the parties. The doctrine requires that the plaintiff be guilty of illegal or fraudulent conduct and that the plaintiff is equally or more culpable than the defendant or acted with the same or greater knowledge as to the illegality or wrongfulness of the transaction. The purpose of the doctrine is to deter misconduct by denying relief to one whose losses were substantially caused by his own fraud or illegal actions. The doctrine applies in negligence actions.

The in pari delicto doctrine applies in this case and precludes General Car & Truck's claim against Lane & Waterman. The PTO found that General Car & Truck's false affidavits constituted fraud in the procurement and renewal of the mark. That finding is preclusive in this case. General Car & Truck was equally as culpable as Lane & Waterman in making the false statements. Because General Car & Truck knew that the statements were false, General Car & Truck's argument that it relied in good faith on the advice of Lane & Waterman is rejected.

Intentional Infliction of Emotional Distress

Butts v. University of Osteopathic Medicine & Health Sciences, 561 N.W.2d 838 (Iowa Ct. App. 1997)

Butts was employed by the University of Osteopathic Medicine & Health Sciences as purchasing director. Butts position was eliminated. She sued for breach of contract, wrongful termination in retaliation for her objecting to the practice of employees making personal purchases from University vendors to avoid the payment of sales tax, and intentional infliction of emotional distress. District Court granted summary judgment to defendants. Affirmed.

HELD: There was no evidence of outrageous conduct. The evidence was merely that the University terminated an at-will employee.

A

Fuller v. Local Union No. 106, No. 164/96-84 (Supreme Court of Iowa July 23, 1997)

Fuller sued union and other union employees for intentional infliction of emotional distress and other claims. Fuller, a candidate for union business agent, was observed drinking beer by Schafer, also a candidate, and Hauck. Hauck later told Schafer that he saw Fuller weaving while driving on the highway. Schafer called the police, who stopped Fuller. The police determined that Fuller was not intoxicated and took no further action. The District Court granted summary judgment for defendants. Affirmed.

HELD: There was no evidence of outrageous conduct sufficient to support a claim for emotional distress.

Interference with Contract

Harbit v. Voss Petroleum, Inc., 553 N.W.2d 329 (Iowa 1996)

Plaintiff Harbit sued employer and various co-employees alleging that he was terminated in retaliation for reporting the sexual harassment of employees by the store manager. District Court granted summary judgment for defendants. Affirmed.

HELD: Plaintiff's alleges that all defendants were either his employers or their agents. The tort of interference with contract can be only committed by a third-party, not by a party to the contract.

Iowa Coal Mining Co., Inc. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

Coal mining company sued County when County passed zoning ordinance that prevented company from using two sites as a combined coal mining and landfilling operation. Company alleged, inter alia, that County had interfered with company's prospective business relationship with a utility company to sell coal. District Court found for coal mining company. Affirmed on that issue.

HELD: Interference with a prospective contractual relationship is a viable claim against a governmental subdivision pursuant to the Tort Claims Act.

HELD: There was sufficient evidence to support the finding of interference by the County. The County clearly warned the utility to take its business elsewhere and changed its zoning regulations specifically in response to the proposed use. The County was determined to stop the operation, even if it meant putting plaintiff out of business. There was sufficient evidence that the County's predominant purpose was to financially injure or destroy the coal mining company.

Malpractice (Medical) - Abandonment of Patient

Glenn v. Carlstrom, 556 N.W.2d 800 (Iowa 1996)

Plaintiff was treated by Dr. Carlstrom, a neurosurgeon, for spinal cord problems. Dr. Carlstrom performed spinal cord surgery on December 21st. He then saw the plaintiff after the surgery on December 22nd and 24th. He was then called up for service in the Persian Gulf War. Dr. Spevak, Dr. Boarini, and Dr. Hayne visited plaintiff in the hospital on numerous occasions until her discharge on December 31st. Dr. Spevak, Dr. Boarini, and Dr. Hayne also saw the patient on several occasions until Dr. Carlstrom resumed treatment on April 2nd, after his return from the Gulf War. Plaintiff continued to experience severe pain and was readmitted to the hospital in May. Dr. Carlstrom saw plaintiff each day during that hospital stay. Plaintiff subsequently terminated Dr. Carlstrom's services and had a second surgery by Dr. Menezes. Plaintiff sued Dr. Carlstrom and others for malpractice. The jury found in favor of Dr. Carlstrom. Affirmed.

HELD: Plaintiff asserts that the trial court erred in failing to submit her claim of abandonment to the jury as a separate issue. In this case, plaintiff's claims amount to no more than a claim regarding Dr. Carlstrom's medical judgment as to the frequency of his contacts with the patient throughout a continuing course of treatment. That claim was properly submitted to the jury as a specification under the general claim for negligence.

A

Negligent Misrepresentation

Pollmann v. Belle Plaine Livestock Auction, Inc., No. 181/96-503 (Iowa Supreme Court July 23, 1997)

Plaintiff Pollmann was hired to manage the Belle Plaine Livestock Auction. He was terminated after one year when the Board of Directors voted to dissolve the corporation. He brought suit alleging that the Auction has breached an oral contract for a three year term of employment and had negligently misrepresented that he would be given three years to make the corporation profitable. The jury found for plaintiff on both claims. Affirmed.

HELD: Although the contract claim was barred by the statute of frauds, the jury correctly found for plaintiff on the negligent misrepresentation claim. At issue was whether plaintiff had justifiably relied on the representation. The Auction asserts that Pollmann could not have justifiably relied on the promise that he had three years to make a profit as Pollmann knew that the Auction had serious financial problems. However, there was evidence that, at the time Pollmann was hired, the directors believed that it would take three years to turn the Auction's financial picture around. Accordingly, there was sufficient evidence that Pollmann justifiably relied on the representation.

Nuisance

Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996)

Neighboring landowners sued owners of commercial hog feeding and confinement facility for nuisance due to offensive odors emanating from the manure collection process. The hogs are kept in pens with slatted floors, through which waste drops into pits. Periodically, the pits are drained into an uncovered waste collection basin outside the buildings. The basin is emptied twice a year. The District Court concluded that the operation was a temporary nuisance. Affirmed in part and reversed in part.

HELD: "Whether a lawful business is a nuisance depends on the reasonableness of conducting the business in the manner, at the place, and under the circumstances in question." The "fact finder uses the normal person standard to determine whether a nuisance involving personal discomfort or annoyance

is significant enough to constitute a nuisance." That standard is objective. Based on the detailed evidence of what the plaintiffs' smelled and how often, the District Court correctly concluded that the hog operation constituted a nuisance.

HELD: Defendants rely on Iowa Code § 352.11(1) which provides that a farm operation in an agricultural area will not be found to be a nuisance. Because the defendants started the hog operation before the area was designated as "agricultural," it must be determined whether the nuisance is permanent or temporary. If temporary, plaintiffs are barred from recovering damages incurred after the area was designated "agricultural." If permanent, the plaintiffs' damages were complete at the time the hog lot commenced operation. The District Court held the nuisance temporary. The Supreme Court disagreed, and found that the nuisance is permanent. The evidence demonstrated that, short of shutting down the facility, the defendants could not abate the odor problem. Iowa Code § 352.11(1) specifically allows for damages for nuisances arising before the area is designated as agricultural. Because the nuisance is permanent, the plaintiffs damage was complete before the area was designated agricultural and section 352.11(1) does not take away plaintiffs' nuisance claim.

Owner Liability - All-Terrain Vehicle

Johnson v. Johnson, 564 N.W.2d 414 (Iowa 1997)

Owner of all-terrain vehicle (ATV) allowed twelve-year-old son to use ATV, expressly limited to his yard and school yard across the road. Son gave ride to two friends, which took them several miles from son's home. Son rolled ATV in ditch, killing one friend and injuring other. Jury returned verdict for defendant ATV owner. Reversed and remanded.

HELD: Iowa Code § 321G.18 provides that "The owner and operator of an all-terrain vehicle or snowmobile is liable for any injury or damage occasioned by the negligent operation of the all-terrain vehicle or snowmobile." Trial court's instructions read the "consent" provisions of Iowa Code § 321.493 into Section 321G.18. Supreme Court found that Section 321G.18 (despite its ungrammatical use of "is liable" instead of "are liable") clearly makes ATV owners liable without limitation and that the consent provisions of Section 321.493 do not apply. Because the trial court incorrectly instructed the jury that the ATV owner was relieved of liability if his

son exceeded the scope of the owner's "consent," the case was reversed and remanded for a new trial.

Preemption - Railroad Crossing

Lubben v. Chicago Central & Pacific Railroad Co., 563 N.W.2d 596 (Iowa 1997)

Plaintiffs' decedent was killed when he drove his automobile into the side of a train at a crossing equipped with reflectorized crossbucks. The crossbucks had been installed as part of the Iowa Department of Transportation's railroad sign project in the mid-1980s. Ninety percent of the cost of the project was paid for by the Federal Highway Administration pursuant to the Federal Railroad Safety Act of 1970 ("FRSA"). Plaintiffs sued railroad for failure to install adequate warning devices at crossing. The District Court granted summary judgment for railroad. Affirmed.

HELD: The United States Supreme Court in CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), held that the FRSA preempts state tort claims if federal funds were used in the installation of the warning devices at issue. In this case, plaintiffs' claims regarding the adequacy of the signage are preempted as federal funds were used in the installation of the crossbucks.

NOTE: The Court noted in dicta that such claims, not made here, as "failure to sound the train's whistle, train speed faster than federal limits, failure to use the train's headlights, inadequate maintenance of the warning device, and inadequate maintenance of the crossing surface" would not be preempted.

State Immunity - Traffic Control Devices

McLain v. State of Iowa, 563 N.W.2d 600 (Iowa 1997)

Plaintiff was injured in construction zone accident when traffic ahead of him abruptly stopped and he rear-ended vehicle in front of him. He sued State, general contractors, and signage subcontractor for failure to place adequate warning signs to alert motorists to traffic congestion. The Iowa Department of Transportation developed plans and specifications for type, number, and location of traffic control devices.

Subcontractor placed signs warning of "construction ahead" in accordance with IDOT's plans and specifications. District Court granted summary judgment pursuant to Iowa Code § 668.10(1) which immunizes state against claim of failure to place, erect, or install a traffic control device. Affirmed.

HELD: Plaintiff's claim, however worded, is that the State should have installed additional warning signs. Thus, the State is immune unless one of the exceptions to immunity applies. The exception for failure to maintain a device is not applicable as all signs which were placed were in perfect working order. Plaintiff's argument that the State failed to "monitor the effectiveness" of the signs relates to the decision of whether or not to erect additional signs, for which the State is immune. Second, the signs were not misleading. The signs clearly warned of construction ahead and that delays were possible, which made it clear that traffic could be slowed or stopped. Finally, there were no exigent circumstances which would require the IDOT to install additional signs. There was no evidence that this construction zone was unusual.

HELD: The general contractors and the signage subcontractor are also entitled to immunity. The contractors and subcontractor complied with all plans and specifications supplied by the State. The contractors and subcontractor had no duty to "monitor the effectiveness" of the signs.

Tort Claims Act

Magers-Fionof v. State of Iowa, 555 N.W.2d 672 (Iowa 1996)

Plaintiffs filed class action suit against State seeking monetary damages for personal loss of use and enjoyment of state parks due to logging of trees by the Iowa Department of Natural Resources. Plaintiffs' claim was based on Iowa Code § 658.4 which provides for damages in favor of "any person entitled to protect or enjoy the property" against anyone who willfully injures any tree. District Court dismissed on motion. Affirmed.

HELD: Iowa Code § 658.4 provides a remedy against trespassers who damage trees. It does not prevent the State, which owns the parks, from exercising its right to manage the parks. Plaintiffs possess no cause of action against the State.

Trade Secrets

Lemmon v. Hendrickson, 559 N.W.2d 278 (Iowa 1997)

Employer Do-Rite sued former employee, Hendrickson, for breach of contract and misappropriation of trade secrets. Do-Rite is a pest control firm. One of the specialized tools developed by Do-Rite is a pole used to remove birds from the rafters of farm buildings. Two years after leaving Do-Rite (the time period specified in a contractual non-compete clause), Hendrickson formed a competing business, which serviced seven of Do-Rite's former customers. Hendrickson also attempted to construct a bird pole, but was not successful. After bench trial, District Court dismissed petition. Affirmed.

HELD: Misappropriation of a trade secret requires three elements: (1) existence of a trade secret; (2) acquisition of the secret as a result of a confidential relationship; and (3) unauthorized use of the secret. In this case, Hendrickson did not "misappropriate" the bird pole because he never successfully developed and used a similar pole. Hendrickson also did not misappropriate Do-Rite's customer list. There was no evidence that Hendrickson took a customer list with him. Hendrickson also testified that he solicited the seven customers solely from memory. There was also evidence that Hendrickson's geographical area of service did not significantly overlap with Do-Rite's, thus minimizing any risk that Hendrickson would attempt to solicit any other Do-Rite customers.

Unjust Enrichment

Slade v. M.L.E. Investment Co., No. 186/95-1753 (Iowa Supreme Court July 23, 1997)

Slade obtained a loan from M.L.E. Investment Company to redeem two parcels of real estate (the Ohio Street property and the Clark Street property). Slade gave M.L.E. a mortgage on both properties. Slade made one payment and then defaulted. M.L.E. served a notice of forfeiture on the Ohio Street property. Slade filed an action seeking to enjoin the forfeiture. Slade failed to appeal the District Court's denial of the requested injunction and the Ohio Street property was forfeited. M.L.E. then commenced a mortgage foreclosure action regarding the Clark Street property. The District Court

foreclosed, Slade appealed, but the appeal was dismissed for lack of prosecution.

Slade then filed an action in District Court alleging that the forfeiture of the Ohio Street property extinguished her debt to M.L.E. and that M.L.E. had been unjustly enriched by the foreclosure on the Clark Street property. The District Court dismissed her action after a bench trial. Affirmed.

HELD: There was no unjust enrichment. M.L.E. was entitled to forfeit/foreclose upon both properties to satisfy the debt.

Wrongful Termination - Public Policy Exception

Phipps v. IASD Health Services Corp., 558 N.W.2d 198 (Iowa 1997)

Employee brought suit for wrongful termination, including claim that he had been terminated for a reason that violated public policy. Specifically, the employee claimed that he was terminated for filing a grievance about his employment benefits under the Iowa Wage Payment Collection Law. District Court granted summary judgment for defendant. Affirmed.

HELD: There was insufficient evidence that termination was due to the grievance. The only evidence was that the termination followed one month after the grievance was filed. Without more, and coupled with the evidence that the discharge was for unacceptable performance and repeated disciplinary problems, the timing of the discharge was insufficient to show retaliation for exercising a right.

Butts v. University of Osteopathic Medicine & Health Sciences, 561 N.W.2d 838 (Iowa Ct. App. 1997)

Butts was employed by the University of Osteopathic Medicine & Health Sciences as purchasing director. Butts position was eliminated. She sued for breach of contract, wrongful termination in retaliation for her objecting to the practice of employees making personal purchases from University vendors to avoid the payment of sales tax, and intentional infliction of emotional distress. District Court granted summary judgment for defendants. Affirmed.

HELD: Butts must prove that she engaged in conduct protected by a recognized public policy and that her protected

conduct was a determining decision in the University's decision to fire her. "Proof that adverse employment action occurs after protected employee conduct, without more, is insufficient to generate a fact question on the determining factor issue." Although Butts proved that she engaged in protected conduct, there was insufficient evidence that she was fired because of her protected conduct. She reported the illegal practice more than one year prior to her termination. Further, the University officials who fired her were not involved in the alleged illegal purchasing practices.

A

IOWA
APPELLATE COURT UPDATE
PART III

Sean O'Brien
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

A

APPELLATE PROCEDURE

Tim O'Neill Chevrolet, Inc. v. Forristall, 551 N.W.2d 611 (Iowa 1996).

Action at Law

Substantial Evidence - Findings of Fact

A car dealer sued a customer for repairs to the customer's car, and the customer counterclaimed, seeking damages for the dealer's alleged violations of Iowa's Consumer Credit Code. The district court found against the dealer on its claim and for the customer on its counterclaim. The dealer appealed.

HELD: If a petition is filed at law, the appellate court's review is on error.

HELD: If supported by substantial evidence, the district court's findings are binding on the appellate court. The district court's legal conclusions, however, are not. Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings. When a challenge to the district court's ruling is lack of substantial evidence, an appellate court reviews the evidence in the light most favorable to the judgment. The district court's findings shall be liberally construed in order to uphold, rather than defeat, the result reached. Further, the question faced in not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. Factual disputes relying heavily on the credibility of witnesses are best resolved by the trier of fact--here, the district court.

Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

Action at Law -- Findings of Fact

Standard of Review -- Directed Verdict

Preservation of Error

Plaintiff coal mining company brought an action against the county in which it was located after the county passed a zoning ordinance prohibiting the use of strip-mining property for landfills. The district court awarded damages to the mining company on its takings claim and claim of tortious interference with a prospective contractual relationship. The county appealed.

HELD: In a case filed at law, the district court's findings of fact have the force of a special verdict and are binding on the Supreme Court, unless they are not supported by substantial evidence. In an action filed at law, the district court's conclusions of law are not binding on the appellate court.

A

HELD: When reviewing the trial court's ruling on a motion for directed verdict, the appellate court reviews the evidence in the same light as the district court to determine whether or not a jury question was generated.

HELD: The county could not raise on appeal the issue as to whether the coal lessee's claims against the county regarding certain mining sites should have been dismissed for lack of evidence rather than not ruled on by the district court because only the lessee could have been prejudiced by the court's failure to rule on those claims. Thus, only the lessee had the right to raise those claims.

In Re Marriage of Fox, 559 N.W.2d 26 (Iowa 1997)

Action in Equity - Credibility of Witnesses

Mother petitioned to modify father's child support obligation under dissolution decree. The district court modified the support to conform to the child support guidelines and the father appealed.

HELD: Because child custody and support are matters triable in equity, the review is de novo. The court will give weight to the trial court's fact findings particularly when considering the credibility of witnesses, but the court is not bound by them.

Regent Insurance Co. v. Estes Co., 546 N.W.2d 846 (Iowa 1997)

Appellate Decision Based on Alternative Grounds

A subcontractor's liability insurer sought a declaratory judgment that the general contractor listed as an additional insured on the subcontractor's policy was not insured with respect to liability to the subcontractor's employee for injuries he sustained on the job. The district court entered summary judgment in favor of the insurer. The Supreme Court disagreed with the theory upon which the district court granted summary judgment, but nonetheless affirmed the decision based on an alternative ground that had been presented to the district court.

HELD: When a reason given by the district court for its adjudication is erroneous, the adjudication will nevertheless be sustained if a separate ground, properly urged by the prevailing party before the district court, is correct.

Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608 (Iowa 1997)

Certiorari

Standard of Review - Legal and Constitutional Challenges

A laundry business filed a writ of certiorari to review the Black Hawk County Compensation Commission's compliance with statutory and constitutional requirements for just compensation following a condemnation hearing.

HELD: Certiorari lies wherein an inferior tribunal, such as a compensation commission, has exceeded its jurisdiction or has acted illegally; illegality exists where the finding of the tribunal do not have substantial evidentiary support or when the tribunal does not apply the proper law.

HELD: This certiorari action presents both legal and constitutional issues. Our review of the legal issues is for correction of errors at law, and our review of the evidence bearing on the constitution of claims is *de novo*.

Fisher v. Chickasaw County, 553 N.W.2d 331 (Iowa 1996).

Certiorari

The Chickasaw County Board of Supervisors ordered the transfer of the Plaintiffs, mentally ill adults, from a care center in Floyd County, Iowa to a care center in Chickasaw County, Iowa. Plaintiffs challenged the legality of the Board's action in a certiorari proceeding.

HELD: Certiorari is an action at law which tests whether a lower board, tribunal, or court exceeded its proper jurisdiction or otherwise acted illegally. An appellate court's review of the judgment entered by a district court in a certiorari proceeding is governed by the rules applicable to appeals and ordinary actions. Thus, review is for correction of errors at law, not de novo. An appellate court must sustain a writ of certiorari where the lower board, tribunal, or court has acted beyond its authority or jurisdiction.

Lewis v. Iowa District Court for Des Moines, Iowa, 555 N.W.2d 216 (Iowa 1996)
Haessler v. Iowa District Court for Des Moines, Iowa, 555 N.W.2d 216 (Iowa 1996)

Certiorari

These consolidated cases challenged the constitutionality of the scheme of fees for court-appointed attorneys, arguing that the caps of $60 per hour and the $1600 maximum fee per appeal, without prior authorization for additional fees, violate the Fourteenth Amendment to the U.S. Constitution by denying equal protection of the law to indigents in that the caps effectively deny counsel to indigents, have a chilling effect on counsel's representation of indigents, and tend to deny seasoned counsel to indigents. Plaintiffs further argued that the caps violate the Fifth and Sixth Amendments to the U.S. Constitution, as well as Iowa law.

HELD: Ordinarily, the Supreme Court reviews certiorari actions for correction of errors of law, but the existence of a constitutional issue in this action requires the Supreme Court to review de novo the evidence bearing on that claim.

A

Allied Mutual Ins. Co. v. Costello, 557 N.W.2d 284 (Iowa 1996)

Determination of the Nature of the Action

An employer's liability insurer brought this declaratory judgment action to determine whether the policy's intentional act exclusion barred coverage for the insured's assault of an employee. Although the action was carried on the district court's law calendar, it was a bench trial in which the court reserved rulings. The court ruled the exclusion did not apply because the insured did not intend to cause injury to the employee, and the insurer appealed.

HELD: The nature of the action determines the scope of appellate review; the review here is de novo because this action to construe an insurance policy was tried as an equitable action.

In Re Marriage of Miller, 552 N.W.2d 460 (Iowa App. 1996).

Dissolution of Marriage

Both parties appealed various provisions of the district court's dissolution decree.

HELD: Marriage dissolution is an equity action requiring a de novo review.

In Re Seyler, 559 N.W.2d 7 (Iowa 1997)

Judicial Authority

Dissolution Proceedings

In this dissolution proceeding, one judge presided at trial and second judge entered a decree disposing of the case. The husband appealed, claiming (1) this process deprived him of due process, and (2) the second judge lacked authority to issue a ruling in the case.

HELD: Constitutional challenges to a court's decree are reviewed *de novo*. Questions of a court's authority are reviewed for correction of errors of law.

HELD: A review of the merits of the dissolution decree is made *de novo*.

Anderson v. Miller, 559 N.W.2d 29 (Iowa 1997)

Preservation of Error

Jacobsen and Miller were involved in a one vehicle accident. Both men were intoxicated. Jacobsen died, and his estate sued Miller, as the principal user and alleged driver, and Miller's father, as the owner of the vehicle. The defendants filed a motion for summary judgment on the basis that the estate failed to generate an issue of fact to support the claim that Miller was the driver. The district court entered summary judgment for the defendants and the court of appeals affirmed. On further review, the estate contended,

among other things, that circumstantial evidence along with an inference that the principal user of a vehicle was the driver was sufficient to raise a fact issue as to whether Miller was driving. Defendants contend error was not preserved on this issue.

HELD: The inference was raised, and thus preserved for review, when the estate stated in a memo attached to its resistance to the motion for summary judgment that Defendant was the responsible person for the vehicle and the responsible person is always suspected to be the driver of the vehicle. Moreover, the district court considered the inference in its ruling when it stated the inference would normally be logical, but Defendant offered uncontradicted testimony that he was not the driver due to his intoxication.

City of Fort Dodge v. Civil Service Commission of the City of Fort Dodge, 562 N.W.2d 438 (Iowa App. 1997).

Preservation of Error

Standard of Review - Civil Service Proceedings

A police officer was terminated for "misconduct and disobedience" following public comments made by the officer regarding a confidential survey of department employees concerning the police chief's job performance. The officer appealed his termination to the Civil Service Commission, and argued his innocent reply to immediate inquiry did not constitute misconduct and his termination infringed on his freedom of speech. He also argued termination was disproportionately severe discipline in view of his alleged misconduct. Citing pending disciplinary proceedings against the officer and the police chief's consideration for reappointment by a new Mayor, the commission concluded the officer crossed the line between the mere exercise of free speech and an inappropriate attempt to discredit and ridicule a superior officer. Although the commission agreed with the City of on the propriety of progressive discipline based on the officer' s disciplinary history, it concluded termination was not justified and reduced the officer's termination to a sixty-day suspension without pay. The City appealed the commission's ruling to the district court. The district court concluded the officer's discipline for public criticism of the police chief did not violate his first amendment right to freedom of speech, but, like the commission, it found termination was unjustified and affirmed the sixty-day suspension without pay. On appeal, the City claims the officer's history of progressive disciplinary suspensions necessitates his termination as originally ordered by the City's chief of police. In response, the police officer contends, among other things, that the City failed to preserve error on the progressive discipline issue because the City failed to file an Iowa Rule of Civil Procedure 179(b) Motion to Enlarge the District Court's Findings and Conclusion to specifically address this issue.

HELD: Our review of Civil Service Commission cases such as this is de novo. We examined the entire record and determined from the credible evidence rights anew on those propositions properly presented, provided the issue has been raised and error, if any, preserved in the course of the trial proceedings.

HELD: A Rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, or defense, or other theory properly submitted to it for

A

adjudication. The purpose of a Rule 179(b) motion is to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal. Issues must, therefore, be presented to and passed upon by the trial court before they may be raised upon appeal. If no Rule 179(b) motion is made, or an issue not raised, we will assume as fact an unstated finding necessary to support the trial court's judgment, and any ambiguity in the trial court's findings is decided in favor of the judgment. Here, the City did not need to file a motion to enlarge the district court's findings and conclusions to specifically address the progressive discipline issue because even though there was no express reference to progressive discipline in the district court's imposition of the police officer's suspension, consideration of progressive discipline was implicit in the court's earlier reference to the issue and the severity of the discipline imposed in relation to its findings of misconduct.

Ray v. Paul, 563 N.W.2d 635 (Iowa App. 1997)

Preservation of Error – Motion in Limine

Plaintiff's three year old son was injured in an accident when he was struck by a truck. The Defendant-physician treated the child's broken leg by placing him in a body cast. When the cast was subsequently removed, a number of skin alterations were discovered that necessitated additional treatment. Plaintiff recovered $75,000 from her uninsured motorist insurance policy, and then initiated an action against the Defendant for medical malpractice. Prior to trial, Plaintiff filed a motion in limine seeking exclusion of any evidence or reference to her settlement with her auto insurer. The court denied the Plaintiff's motion, and Plaintiff's application for interlocutory appeal was denied. Plaintiff then introduced the settlement and release as part of her case and made no objection to the admission of this evidence at trial. The jury returned a verdict in favor of the Defendant, and Plaintiff appeals contending, among other things, that evidence of the settlement agreement was inadmissible and it was error for the court to conclude otherwise. Defendant argues Plaintiff has either waived any objection to the admission of this evidence or failed to preserve error for appellate review.

HELD: Ordinarily, any error based on the trial court's disposition of a motion in limine is not preserved unless the record includes a timely objection when the challenged evidence is offered at trial. Contrary to a ruling limited to protection from prejudicial references, however, if the trial court's ruling is dispositive on the issue of admissibility, it is considered final for purposes of appeal and no further objection is necessary. In the present case, the trial court was definitive on the admissibility of evidence of the Plaintiff's settlement, and no additional trial objections were necessary to preserve the issue for appeal.

HELD: Because the trial court's ruling on admissibility was dispositive, the Plaintiff did not waive any resulting error by electing for strategic reasons to introduce this evidence as part of her case.

A

Nichols v. Sukaro Kennels, 555 N.W.2d 689 (Iowa 1996)

Standard of Review - Action at Law

Plaintiffs sued Defendant kennel after the kennel owner's dog tore off one of the plaintiffs' dog's legs during a stay at the kennel. Following a bench trial, the district court awarded damages for medical expenses but refused to award replacement damages, punitive damages, or damages for emotional distress. Plaintiffs appealed.

HELD: The appellate court reviews a case tried at law in trial court on the errors assigned, Iowa R. App. P. 4.

Kerndt v. Rolling Hills National Bank, 558 N.W.2d 410 (Iowa 1997)

Standard of Review - Adequacy of Damage Award

A former bank president sued the bank for defamation and breach of contract following his termination. The district court entered judgment on a jury verdict in favor of the president on the breach of contract claim, and for the bank on the defamation claim. The bank appealed and the president cross-appealed.

HELD: An appellate court reviews the trial court's ruling on a challenge to the adequacy of a damage award for abuse of discretion.

Baker v. Plymouth Appeal Board, 551 N.W.2d 646 (Iowa App. 1996).

Standard of Review – Administrative Agency Decision

The Claimant petitioned for judicial review to challenge the Employment Appeal Board's denial of unemployment benefits, and the district court affirmed.

HELD: Appellate courts review district court's legal determinations for misapplication of the law when a district court has reviewed an administrative agency decision. The district court itself acts in an appellate capacity to review agency determinations for legal error and the appellate court must determine if it agrees with the district court's conclusions.

Zenor v. Iowa Dept. of Transp., 558 N.W.2d 427 (Iowa App. 1996)

Standard of Review - Administrative Agency Findings

Abuse of Discretion

Plaintiff's driver's license was revoked by the Department of Transportation (DOT) based on a finding that Plaintiff had refused to take a breath test. Plaintiff appealed the district court's affirmance of the ruling. One of Plaintiff's contentions on appeal was that the district court erred in failing to remand the case back to the agency to review new evidence.

A

HELD: The scope of review of a district court decision rendered in an appellate capacity encompasses review of the entire record and is not limited to the agency's findings.

HELD: The district court's decision whether or not to remand the case back to the agency to review new evidence is reviewed for abuse of discretion. In order to show abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.

Deer Creek Homeowners Association v. City Development Board, 556 N.W.2d 155 (Iowa App. 1996)

Standard of Review - Annexation Petition

The City of Urbandale's petition for involuntary annexation of a nearby unincorporated area was approved. A homeowners association representing the unincorporated area sought judicial review, but the district court affirmed.

HELD: The scope of review of an appellate court in performing judicial review of an agency action is limited by statute, Iowa Code §368.22 (appeal of city development decisions). With respect to factual questions, review is limited to whether the decision appealed from is without substantial supporting evidence. With respect to questions of law, the court asks only whether the district court correctly applied the law.

Putensen v. Hawkeye Bank of Clay County, 564 N.W.2d 404 (Iowa 1997).

Standard of Review – Constitutional Challenges

A conservator of a mental patient brought this action for damages allegedly caused by a bank in foreclosing on the patient's home. Among other contentions, the conservator claimed the mental patient was denied due process.

HELD: The Supreme Court's review of constitutional challenges is *de novo*.

Craig Foster Ford v. Iowa Department of Transportation, 562 N.W.2d 618 (Iowa 1997)

Standard of Review – Constitutional Issues

After an automobile manufacturer obtained approval from the Department of Transportation to terminate the manufacturer's franchise agreement with a dealership, pursuant to Iowa Code chapter 322A (motor vehicle franchise law), the dealership sought judicial review. Although the dealership's sales exceeded by almost ten fold the estimates projected in the franchise agreement, the owner admitted he submitted falsified sales date information to the manufacturer in order to claim dealer and customer cash incentives. When asked whether he forged endorsements on rebate checks, the owner claimed a fifth amendment privilege not to answer.

HELD: To the extent constitutional issues are raised on appeal, the supreme court's review is *de novo*.

State Ex. Rel. Allee v. Gocha, 555 N.W.2d 683 (Iowa 1996)

Standard of Review -- Constitutionality of a Statute

A child support order submitted for summary approval by a Department of Human Services agent was ruled unconstitutional, in violation of the separation of powers doctrine, by the district court, and the State appealed.

HELD: A challenge to the constitutionality of a statute is reviewed on appeal de novo, and legislative enactments carry a strong presumption of constitutionality.

Washington County, Iowa v. Tama County, Iowa, 555 N.W.2d 834 (Iowa 1996)

Standard of Review - Declaratory Judgment Actions

Washington County filed a declaratory judgment action concerning the legal settlement of a mentally retarded child who was receiving "waiver program" services, and the district court entered summary judgment in favor of Tama County. Washington County appealed.

HELD: Declaratory judgment actions to determine the legal settlement of an individual for purposes of determining which county is responsible for a community-based mentally retarded waiver program are tried in equity, and thus, review would normally be de novo. However, this case only involves a statutory construction issue concerning undisputed facts, so review is therefore at law.

In Interest of A.G., 558 N.W.2d 400 (Iowa 1997)

Standard of Review -- Denial of Motion to Intervene

Grandmother moved to intervene in a child in need of assistance proceeding. The district court denied the motion and the grandmother appealed.

HELD: The supreme court reviews denial of motion to intervene for correction of errors at law, giving some deference to the trial court's discretion.

Mensink v. American Grain, 564 N.W.2d 376 (Iowa 1997).

Standard of Review – Directed Verdict

Standard of Review – Judgment Notwithstanding the Verdict

Plaintiff, a truck driver who was injured after delivering a load of corn to a grain elevator when a lightening strike caused an explosion of accumulated grain dust, brought this action against the Defendant operators of the grain elevator. Defendants moved for a directed verdict, which the trial court denied. The district court submitted two theories of recovery: (1) failure of the Defendants to install lightening protection devices; and (2)

A

failure to evacuate the elevator before the explosion due to the threat of lightening. After the jury returned a verdict in favor of Plaintiff, Defendants motioned for a judgment notwithstanding the verdict. This motion was also denied.

HELD: An appellate court reviews the denial of a motion for a directed verdict for errors at law. The court reviews the evidence in the same light as the district court and determines whether a fact question was generated.

HELD: When reviewing the denial of a motion for a directed verdict or judgment notwithstanding the verdict, an appellate court reviews the evidence in the light most favorable to the nonmoving party.

Griffith v. Moss, 554 N.W.2d 571 (Iowa App. 1996).

Standard of Review – Discovery Rulings

The focal issue in this appeal where both parties sought recovery following automobile accident is whether Plaintiff should have a new trial because the district court denied his motion to compel Defendant to provide a copy of a statement she gave to her liability insurance carrier in the month following the accident.

HELD: An appellate court will reverse the district court's discovery ruling only for abuse of discretion. Such reversal is warranted when the district court's ruling rests upon grounds or reasons clearly untenable or unreasonable, such as a ruling on an erroneous interpretation of a discovery rule.

Wagner v. Miller, 555 N.W.2d 246 (Iowa App. 1996)

Standard of Review - Discovery Sanctions

Two investors brought this action against a securities brokerage firm to recover damages for losses they allegedly sustained, but the district court dismissed the suit after determining that dismissal was the only appropriate sanction for the investors' willful failure to comply with discovery requests. The investors appealed.

HELD: Appellate review of discovery sanctions is for abuse of discretion. Generally, there is abuse of discretion in imposing discovery sanctions only where there is a lack of substantial evidence to support the trial court's ruling. The fact that sanctions less drastic than dismissal are available to the trial court as discovery sanctions does not require the appellate court to find abuse of discretion in dismissing the case.

Olliger v. Bennett, 562 N.W.2d 167 (Iowa 1997).

Standard of Review – Disputed Boundaries

Findings of Fact

A

Landowners brought action under Iowa Code chapter 650 (disputed corners and boundaries) to quiet title in their name to land which was located between the original boundary with the adjoining parcel and a line created by fence and trees, which had allegedly been treated as a boundary and which would increase the size of landowner's property.

HELD: An action brought under Iowa Code chapter 650 is a special action and is heard on appeal as an ordinary action. As an action at law, our review is on assigned errors of law.

HELD: The district court's judgment has the effect of a jury verdict, and we are bound by the district court's finding of fact as supported by substantial evidence.

Matter of Estate of Kelly, 558 N.W.2d 719 (Iowa App. 1996)

Standard of Review - Evidentiary Rulings on Hearsay Evidence

Record on Appeal

Reversal for Prejudice

A medical center, as the residuary beneficiary of a farm under decedent's prior will, objected to the probate of decedent's more recent will based on lack of testamentary capacity and undue influence. The district court ruled in favor of the medical center. The will proponent appealed, asserting that the trial court committed prejudicial error by admitting attorney memorandums into evidence, and that the verdict was not supported by substantial evidence.

HELD: The appellate court reviews the trial court's decision to admit hearsay evidence pursuant to the expert opinion rule (Iowa R. Evid. 703) under the assumption that the trial court was correct, and finds abuse of discretion only when it is unable to find support for the decision in the evidence.

HELD: The appellate court must accept the record made by the parties and cannot consider matters outside of the record, Iowa R. App. P. 10(c).

HELD: A videotaped deposition presented to the jury was evidence and should have been part of the record on appeal.

HELD: A presumption of prejudice arises when the trial court has received inadmissible evidence over proper objection; however, such is insufficient to support reversal if the record demonstrates lack of prejudice.

Doerring v. Kramer, 556 N.W.2d 816 (Iowa App. 1996)

Standard of Review -- Failure to State a Claim

A

A motorist involved in an automobile accident brought an action against the estate of the other driver involved, who was killed in the accident, and the estate filed a combined answer, an affirmative defense, and a counterclaim. Plaintiff filed a motion to dismiss the counterclaim alleging the estate failed to state a claim because it alleged in its affirmative defense that the plaintiff was negligent, the estate failed to affirmatively allege negligence in the counterclaim. The court granted the motion to dismiss, and denied the estate's motion to amend, finding that the amendment was barred by the statute of limitations. The estate appealed.

HELD: Review of a dismissal for failure to state a claim under Rule 104(b) is closely circumscribed. On appeal the court must assess the counterclaim in the light most favorable to the counterclaimant and resolve all doubts and ambiguities in her favor. The court must look to the pleadings to determine if they were so deficient that the opposing party was deprived of notice of the claims made.

Powell v. Grewing, 562 N.W.2d 761 (Iowa 1997).

Standard of Review – Forcible Entry and Detainer Action

The judgment creditor brought a forcible entry and detainer action against the judgment debtor's surviving spouse after the spouse refused to vacate the premises following an execution sale and the expiration of the redemption period. The surviving spouse contended the creditor's sheriff's deed was void and unenforceable.

HELD: Because an action for forcible entry and detainer is triable in equity, our review is *de novo*.

Braunger v. Karrer, 563 N.W.2d 1 (1997).

Standard of Review – Garnishment Proceedings

The judgment creditor brought an action seeking to garnish the proceeds from the sale of the debtors' residential property. In response, the debtors filed notice of a homestead exemption that he had filed in prior chapter 7 bankruptcy proceedings. The district court ruled only a portion of the home sale proceeds were exempt, and the debtor appealed.

HELD: Our review is at law. The district court's findings of fact are binding if supported by substantial evidence.

Matter of Integrated Resources Life Insurance Co., 562 N.W.2d 179 (Iowa 1997).

Standard of Review – Insurance Liquidation Proceedings

Two insurance companies in receivership, Integrated Resources Life Insurance Co. and Fidelity Bankers Life Insurance Co., dispute the impact of an assumption agreement executed between Integrated and its delegee, North American Reassurance. The district court's opinion adopted verbatim the proposed findings of fact and conclusions of law submitted by Integrated's counsel, and North American appealed.

HELD: Because this case involves an equitable proceeding arising out of a claim of assets to an Iowa insurance company in liquidation, *see* Iowa Code § 507C.1(4)(d) (equitable apportionment of unavoidable loss), our review is *de novo*.

Johnson v. Johnson, 564 N.W.2d 414 (Iowa 1997).

Standard of Review – Jury Instructions

Plaintiffs' appeal from an adverse verdict in a negligence action. They contend the district court erroneously instructed the jury that the owner of an all terrain vehicle (ATV) could escape liability by conditioning or restricting the consent he gave to operate the ATV.

HELD: An appellate court reviews jury instructions for corrections of errors at law, and will reverse only if the error in giving or refusing the instruction in question is prejudicial.

Wright v. Midwest Old Settlers and Threshers Association, 556 N.W.2d 808 (Iowa 1996)

Standard of Review - Jury Instructions

A patron who was injured at a public threshing event while stepping down from a passenger train which drove patrons around the fenced in grounds of the event brought an action against the operator of the event. The district court declined to submit an instruction to the jury on the liability of a common carrier, and the jury returned a verdict in favor of the operator.

HELD: Whenever a proffered jury instruction is rejected, the reviewing court's scope of review is for correction of errors at law. In determining whether a jury question was raised, the court must view the evidence in the light most favorable to the party requesting the instruction. Where reasonable minds might draw different conclusions from the evidence, a jury question is engendered.

In Interest of C.W., 554 N.W.2d 279 (Iowa App. 1996).

Standard of Review – Motion for Continuance

In a termination of parental rights hearing, the juvenile court denied a parent's motion for a continuance in order to show how Alcoholics Anonymous and individual therapy helped to make her a better parent.

HELD: The standard of review for a motion for a continuance is abuse of discretion and the appellate court will only reverse if injustice will result to a party desiring the continuance. Denial of a motion for continuance must be unreasonable under the circumstances before an appellate court will reverse.

A

Bredberg v. PepsiCo, Inc., 551 N.W.2d 321 (Iowa 1996)

Standard of Review – Motion for Judgment Notwithstanding the Verdict

Standard of Review – Motion for New Trial

The issue before the court on further review concerned whether plaintiff presented substantial evidence at trial to show defendants were strictly liable for injuries he sustained when a glass bottle of pop shattered. The jury believed so, and the district court denied defendants' motions for judgment notwithstanding the verdict and for a new trial.

HELD: An appellate court reviews a district court's denial of a motion for judgment notwithstanding the verdict for correction of errors at law. The only inquiry in assessing such a motion is to determine whether there is sufficient evidence to justify submitting the case to the jury.

HELD: The appellate court reviews the denial of a motion for new trial for abuse of discretion.

Hagen v. DeNooy, 563 N.W.2d 4 (Iowa App. 1997).

Standard of Review – Motion for New Trial

Standard of Review – Jury Instructions

Plaintiff, a motorist who collided on a gravel road with an oncoming farm tractor and cultivator brought a negligence action against the tractor's operator and owner. The jury returned a verdict finding the Defendants at fault, but also finding that the Defendants' fault was not a proximate cause of Plaintiff's damages. The Plaintiff filed a motion for a new trial on several grounds, including (1) the verdict was inconsistent; and (2) the court erred in failing to instruct the jury that the Defendants were negligent in failing to yield one-half of the roadway. The district court granted a new trial, and the Defendants appealed.

HELD: An appellate court's review of a district court's action on a motion for a new trial is for abuse of discretion, and the court is more reluctant to interfere with the grant of a new trial than it is in a refusal.

HELD: An appellate court finds reversible error when the instructions given to the jury, viewed as a whole, failed to convey the applicable law.

A

General Car & Truck v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996)

Standard of Review - Motion for Summary Judgment

A client sued a law firm for malpractice arising out of alleged advice to knowingly file affidavits containing false information when registering and renewing a service mark. The district court granted summary judgment for the law firm, and the client appealed.

HELD: An appellate court reviews a summary judgment ruling for error by examining the record before the trial court and viewing the facts in the light most favorable to the party opposing the motion to decide if any material fact is in dispute, and if not, whether the trial court correctly applied the law.

Matter of Estate of Voss, 553 N.W.2d 878 (Iowa 1996).

Standard of Review – Motion to Dismiss

Following the death of her adult son in an automobile accident, a mother submitted a claim to the Iowa State Appeal Board for wrongful death. The Board denied her claim. The mother was subsequent appointed administrator of her son's estate, and she brought a wrongful death action against the State in her representative capacity. The district court dismissed the lawsuit for failure to exhaust her administrative remedies under the Iowa Tort Claims Act.

HELD: An appellate court reviews a district court's ruling on a motion to dismiss for correction of errors of law. A decision to sustain or overrule a motion to dismiss must rest on legal grounds.

Hornby v. State, 559 N.W.2d 23 (Iowa 1997)

Standard of Review - Motion to Dismiss

A tenured university employee brought an action against the State and State Board of Regents asserting the State breached her employment contract by not providing her with a long term disability coverage. The district court granted the State's motion to dismiss, and the employee appealed.

HELD: An appellate court's review of a motion to dismiss is for correction of errors at law. Any decision to sustain or overrule a motion to dismiss must rest on legal grounds and all facts alleged in the petition are regarded as true.

A

Smith v. Air Feeds, Inc., 556 N.W.2d 160 (Iowa App. 1996)

Standard of Review - Motion for a New Trial

Standard of Review - Admissibility of Evidence

Preservation of Error

Plaintiff's hand was severed while operating a press at work. In allocating fault in this products liability action, the jury found the manufacturer to be 10% at fault. The trial court denied plaintiff's post-trial motions for a new trial and a judgment notwithstanding the verdict due to the inadequacy of the damages awarded by the jury. Plaintiff contends the court erred in allowing certain evidence pertaining to remedial efforts the manufacturer took after the accident, and in allowing certain jury instructions which, for the first time on appeal, he claimed had a prejudicial effect.

HELD: Appellate review of trial court's refusal to grant a new trial is for an abuse of discretion.

HELD: In determining the admissibility of evidence, the trial court is granted a broad range of discretion, and the appellate court reviews for abuse of discretion.

HELD: An objection to jury instructions must alert the trial court to the error to be preserved. As plaintiff failed to argue at trial that the cumulative effect of the instructions was prejudicial, he did not preserve error on this ground for appellate review.

Davis v. Roberts, 563 N.W.2d 16 (Iowa App. 1997).

Standard of Review – Probate Proceedings

A tenant in common, who allegedly entered into an oral agreement with the other tenant in common to create a joint tenancy with right of survivorship, brought a declaratory judgment action to establish his survivorship interest in the property and resulting entitlement to proceeds of a sale.

HELD: An action in probate to determine the ownership of property is triable in equity; therefore, our review is *de novo*. We give weight to the trial court's findings, but are not bound by them.

General Car & Truck v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996)

Standard of Review - Motion for Summary Judgment

A client sued a law firm for malpractice arising out of alleged advice to knowingly file affidavits containing false information when registering and renewing a service mark. The district court granted summary judgment for the law firm, and the client appealed.

HELD: An appellate court reviews a summary judgment ruling for error by examining the record before the trial court and viewing the facts in the light most favorable to the party opposing the motion to decide if any material fact is in dispute, and if not, whether the trial court correctly applied the law.

Matter of Estate of Voss, 553 N.W.2d 878 (Iowa 1996).

Standard of Review – Motion to Dismiss

Following the death of her adult son in an automobile accident, a mother submitted a claim to the Iowa State Appeal Board for wrongful death. The Board denied her claim. The mother was subsequent appointed administrator of her son's estate, and she brought a wrongful death action against the State in her representative capacity. The district court dismissed the lawsuit for failure to exhaust her administrative remedies under the Iowa Tort Claims Act.

HELD: An appellate court reviews a district court's ruling on a motion to dismiss for correction of errors of law. A decision to sustain or overrule a motion to dismiss must rest on legal grounds.

Hornby v. State, 559 N.W.2d 23 (Iowa 1997)

Standard of Review - Motion to Dismiss

A tenured university employee brought an action against the State and State Board of Regents asserting the State breached her employment contract by not providing her with a long term disability coverage. The district court granted the State's motion to dismiss, and the employee appealed.

HELD: An appellate court's review of a motion to dismiss is for correction of errors at law. Any decision to sustain or overrule a motion to dismiss must rest on legal grounds and all facts alleged in the petition are regarded as true.

A

Smith v. Air Feeds, Inc., 556 N.W.2d 160 (Iowa App. 1996)

Standard of Review - Motion for a New Trial

Standard of Review - Admissibility of Evidence

Preservation of Error

Plaintiff's hand was severed while operating a press at work. In allocating fault in this products liability action, the jury found the manufacturer to be 10% at fault. The trial court denied plaintiff's post-trial motions for a new trial and a judgment notwithstanding the verdict due to the inadequacy of the damages awarded by the jury. Plaintiff contends the court erred in allowing certain evidence pertaining to remedial efforts the manufacturer took after the accident, and in allowing certain jury instructions which, for the first time on appeal, he claimed had a prejudicial effect.

HELD: Appellate review of trial court's refusal to grant a new trial is for an abuse of discretion.

HELD: In determining the admissibility of evidence, the trial court is granted a broad range of discretion, and the appellate court reviews for abuse of discretion.

HELD: An objection to jury instructions must alert the trial court to the error to be preserved. As plaintiff failed to argue at trial that the cumulative effect of the instructions was prejudicial, he did not preserve error on this ground for appellate review.

Davis v. Roberts, 563 N.W.2d 16 (Iowa App. 1997).

Standard of Review – Probate Proceedings

A tenant in common, who allegedly entered into an oral agreement with the other tenant in common to create a joint tenancy with right of survivorship, brought a declaratory judgment action to establish his survivorship interest in the property and resulting entitlement to proceeds of a sale.

HELD: An action in probate to determine the ownership of property is triable in equity; therefore, our review is *de novo*. We give weight to the trial court's findings, but are not bound by them.

A

Magers-Fionof v. State, 555 N.W.2d 672 (Iowa 1996)

Standard of Review - Statutory Interpretation

Standard of Review - Motion to Dismiss

Preservation of Error

Upon learning that the Iowa Department of Natural Resources had been harvesting trees in several Iowa state parks, Plaintiffs commenced a class-action suit under Iowa Code ch. 669 (Tort Claims Act) and Iowa Code § 658.4 (treble damages for injures to trees) seeking money damages to compensate them for their personal loss of the use and enjoyment of the logged trees. The State moved to dismiss, claiming that they had no statutory private cause of action against the state for injury to trees grown in state parks. The district court sustained the motion to dismiss, and Plaintiffs appealed, claiming the court read too narrowly the purpose of the statute, and that their cause of action is supported by the public trust doctrine.

HELD: When reviewing a claim that the court read a statute too narrowly, the court reviews for errors at law.

HELD: When reviewing an order sustaining a motion to dismiss, the appellate court views the allegations of the petition in the light most favorable to the plaintiffs, resolving doubts in the plaintiffs' favor, and upholding the ruling only if the plaintiffs are unable to sustain their cause of action under any state of facts provable under the petition.

HELD: Because Plaintiffs sought no expansion of the trial court's ruling, which did not address the issue of whether their claim for damages would be supported by the public trust doctrine, the issue was not preserved for appeal.

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

Standard of Review - Subject Matter Jurisdiction

Standard of Review - Judgment Notwithstanding the Verdict

Standard of Review - Motion to Set Aside Verdict

Appellate Review of Punitive Damage Awards - Constitutional Obligation

Plaintiff, a former employee who was injured on the job, brought a slander action against his employer and the employer's nurse for statements made by the nurse to an examining physician implying that the former employee was faking his injury. The jury returned a verdict for the former employee, award $4,000 in actual damages and $15 million in punitive damages. Defendants filed a motion for judgment notwithstanding the verdict, and an alternative motion for a new trial. The court ordered a new trial. On appeal, Plaintiff claimed the trial court abused its discretion in ordering a new trial. On cross-appeal, Defendants argued Plaintiff's claim was barred by the exclusive remedy

A

provisions of the Workers' Compensation Act and the punitive damage award was fatally ambiguous and thus void because the jury did not identify against whom the punitive damages were awarded.

HELD: The Supreme Court's review of proceedings concerning subject matter jurisdiction is at law.

HELD: When considering a motion for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed, and an appellate court must view the evidence in the same manner when reviewing the district court's ruling.

HELD: In reviewing the trial court's ruling on a motion to set aside a verdict, an appellate court is obligated to view the evidence in the light most favorable to the jury verdict.

HELD: The Iowa Supreme Court is obligated as a matter of constitutional law to assume responsibility for reviewing the appropriateness of the size of punitive damage awards, regardless of whether a party mounts a constitutional challenge to the award. Our review of punitive damage awards for satisfaction of due process is conducted with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and the plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditional factors, the Supreme Court considers all circumstances surrounding the conduct and relationship between the parties, including any provocation of the conduct by the plaintiff.

Smith v. CRST International, Inc., 553 N.W.2d 890 (Iowa 1996).

Standard of Review – Summary Judgment

Plaintiff, an employee injured in a motor vehicle accident, sought to recover civil damages from the nonemployer owner of the motor vehicle and two other defendants for the negligent act of the co-employee driver of the vehicle. The district court granted summary judgment in favor of the motor vehicle's owner and the two defendants, and Plaintiff appealed.

HELD: In reviewing the propriety of a grant of summary judgment, the moving party is required to show that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. In determining whether the movant has met that burden, the appellate court reviews the record in the light most favorable to the party opposing summary judgment. In this sense, the court reviews the record as it would on a motion for directed verdict, but the nonmoving party is entitled to every legitimate inference that reasonably can be deduced from the evidence. Summary judgment is inappropriate if reasonable minds can differ on how issues should be resolved.

A

In Re Adoption of B. J. H., 564 N.W.2d 387 (Iowa 1997).

Standard of Review – Vacated Judgments

In this case, the district court found a woman had fraudulently induced her former husband to adopt her children, and, on that basis, the court vacated the adopted decree.

HELD: The district court enjoys wide discretion in deciding to vacate an order under Iowa R. Civ. P. 252, and we will not reverse the trial court's decision on this question unless an abuse of discretion has been shown. We are more reluctant to find an abuse of discretion where the judgment has been vacated than when relief has been denied.

Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996)

Standard of Review - Witness Credibility

Standard of Review - Award of Special Damages

Landowners in close proximity to a commercial hog confinement facility brought a nuisance suit against the owners of the facility. The district court concluded that the facility was a temporary nuisance and awarded the landowners $45,000 in damages for their pain and suffering. The facility owners appealed, and the landowners cross-appealed.

HELD: In a case tried in equity, the Supreme Court is especially deferential to the district court's assessment of witness credibility.

HELD: If there is any reasonable basis in the record to support an award of special damages in a nuisance case, the Supreme Court will not disturb it.

Paul v. Luigi's, Inc., 557 N.W.2d 895 (Iowa 1997)

Standard of Review - Substantiality of Evidence

A police officer who was injured when he fell into an uncovered window well behind a restaurant brought a premises liability action against the restaurant, and the district court entered judgment in favor of the officer. Defendant appealed, claiming that the district court erred in concluding that it had abandoned the comparative fault defense.

HELD: When reviewing evidence for its substantiality, the appellate court views it in light most favorable to upholding district court's judgment.

HELD: The finding that any negligence on the part of the police officer was not the cause of his injuries was supported by substantial evidence, thus precluding review of whether the trial court had improperly determined that the restaurant had abandoned its comparative fault defense in the officer's action against the restaurant.

A

Harris v. Olson, 558 N.W.2d 408 (Iowa 1997)

Standard of Review - Trial Court's Refusal to Enter Judgment Pursuant to Terms of Confession of Judgment

Plaintiff sued Defendant for damages sustained in an automobile collision, and five days before trial Defendant mailed Plaintiff a confession of judgment. Plaintiff did not respond, the case proceeded to trial, and the jury returned a verdict for Plaintiff in an amount less than the offer to confess. Plaintiff then moved for an entry of judgment pursuant to the confession, but the district court rejected the request as untimely. Plaintiff appealed.

HELD: The Supreme Court's review of the trial court's refusal to enter judgment pursuant to the terms of the confession of judgment is for errors at law. Affirmed.

Glenn v. Carlstrom, 556 N.W.2d 800 (Iowa 1996)

Standard of Review -- Trial Management Orders

A patient sued her neurosurgeon and the hospital were an operation on her tethered spinal cord was performed for medical malpractice, and the jury returned a defense verdict. On appeal, the patient contends, among other things, that a trial management order entered by the district court improperly encroached on her ability to present expert medical evidence.

HELD: Discretionary rulings of the trial court are presumptively correct and will be disturbed on appeal only upon clear showing of abuse of discretion. In light of the considerable discretion the trial court has in directing the course of the trial, when reviewing the trial court's case management order, the appellate court must consider the circumstances under which the challenged order was entered.

Magers-Fionof v. State, 555 N.W.2d 672 (Iowa 1996)

Standard of Review - Statutory Interpretation

Standard of Review - Motion to Dismiss

Preservation of Error

Upon learning that the Iowa Department of Natural Resources had been harvesting trees in several Iowa state parks, Plaintiffs commenced a class-action suit under Iowa Code ch. 669 (Tort Claims Act) and Iowa Code § 658.4 (treble damages for injures to trees) seeking money damages to compensate them for their personal loss of the use and enjoyment of the logged trees. The State moved to dismiss, claiming that they had no statutory private cause of action against the state for injury to trees grown in state parks. The district court sustained the motion to dismiss, and Plaintiffs appealed, claiming the court read too narrowly the purpose of the statute, and that their cause of action is supported by the public trust doctrine.

HELD: When reviewing a claim that the court read a statute too narrowly, the court reviews for errors at law.

HELD: When reviewing an order sustaining a motion to dismiss, the appellate court views the allegations of the petition in the light most favorable to the plaintiffs, resolving doubts in the plaintiffs' favor, and upholding the ruling only if the plaintiffs are unable to sustain their cause of action under any state of facts provable under the petition.

HELD: Because Plaintiffs sought no expansion of the trial court's ruling, which did not address the issue of whether their claim for damages would be supported by the public trust doctrine, the issue was not preserved for appeal.

Interest of T.V., 563 N.W.2d 612 (Iowa 1997).

Transcript Unavailable

T.V. was adjudicated a delinquent child after the juvenile court found he committed assault with intent to commit sexual abuse. After T.V. appealed, a new attorney was appointed to represent him. In his attempt to obtain the transcript, the attorney determined the audio tapes that recorded the adjudicatory hearing were partially inaudible, and portions of the alleged victim's testimony were not recorded at all. T.V. claims that, even though we directed him to settle the content of the record by allowing the procedures in Iowa Rule of Appellate Procedure 10(c) (statement of the evidence or proceedings when no report was made or when the transcript is unavailable), he was unable to do so. He also claims we should dismiss the case or remand it for a new trial because the lack of an adequate transcript denies him the right to a meaningful appeal.

HELD: We conclude T.V. attempted, but was unable, to prepare a Rule 10(c) statement of the evidence or proceedings. Because the appellate attorney did not represent T.V. at the adjudicatory hearing, he had no independent knowledge of the proceedings. Furthermore, T.V.'s trial attorney filed an affidavit stating he did not have sufficient independent recollection of the proceedings to prepare a credible statement of the evidence. Under these circumstances, we do not believe T.V. should be penalized for not preparing the statement. In addition, we conclude the unavailability of a complete transcript in this case entitles T.V. to a new hearing. We reverse and remand for new adjudicatory and dispositional hearings.

A

CIVIL PROCEDURE

Harris v. Olson, 558 N.W.2d 408 (Iowa 1997)

Additional Time After Service by Mail

Plaintiff Harris sued Olson for damages sustained in an automobile collision. Five days before trial Olson mailed Harris a confession of judgment in the amount of $12,600. Harris did not respond. The jury entered a verdict for Harris in the amount of $4,600. Harris moved for entry of judgment pursuant to Olson's previously delivered confession of judgment. The district court rejected Harris' tender as untimely. Harris appealed.

HELD: Iowa R. Civ. P. 83(b), which provides three additional days for a party to act when service of notice or other paper was by mail, has no application to Iowa Code ch. 677 (Offer to Confess Judgment).

Norgard v. Iowa Department of Transportation, 555 N.W.2d 226 (Iowa 1996)

Additional Time After Service By Mail

The county compensation commission made an appraisement of damages awarding Plaintiffs $2,800 for their condemned property, and, on that same day, the commission mailed Plaintiff's a "Notice of Appraisement of Damages and Time for Appeal." This notice failed to indicate either the date of mailing or the date of the appraisement. Thirty-one days later the county sheriff's office received Plaintiffs' notice of appeal, and three days after that the sheriff served the attorney general's office with the notice of appeal. The Iowa Department of Transportation filed a motion to dismiss on limitations grounds because the statutory appeal period of 30 days had expired. The court dismissed the matter, and Plaintiffs appealed.

HELD: Iowa R. Civ. P. 83(b), permitting an additional three days to respond to notice by mail, did not extend the statutory 30-day period for the landowners' appeal of the compensation commission's award for condemned property. Furthermore, Rule 83(b) applied only to measure the time for deadlines established by the Rules of Civil Procedure, and not to situations where the time in which a particular action had to be taken was fixed by statute. We affirm the dismissal.

Kerndt v. Rolling Hills National Bank, 558 N.W.2d 410 (Iowa 1997)

Adequacy of Damage Award

A former bank president sued the bank for defamation and breach of contract following his termination. The jury returned a verdict in favor of the president on the breach of contract claim, and for the bank on the defamation claim. The bank appealed and the president cross-appealed contending, among other things, that the jury's damage award of $14,000 was inadequate.

HELD: Under Iowa R. Civ. P. 244(d), an inadequate award of damages merits a new trial as much as an excessive one. Whether damages awarded are inadequate in a particular case depends on the facts of the case. If uncontroverted facts show that the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate, and the district court's refusal to grant either additur or new trial is abuse if discretion. The damage award here was inadequate, as the amount of the verdict bore no reasonable relationship to the loss suffered. Reversed and remanded.

Baysden v. Hitchcock, 553 N.W.2d 901 (Iowa App. 1996).

Application for Leave to Amend Pleadings

A prospective buyer of a brokerage business sued the prospective seller after the business was sold to another buyer. Plaintiff claimed a number of theories for recovery, but the case was tried solely on the basis of breach of contract. Plaintiff had sought to amend his petition to add a claim for aiding and abetting the other buyer in tortuously interfering with an existing contract and prospective business relations, but the trial court denied the motion.

HELD: Under Iowa R. Civ. P. 88, leave to amend is to be freely given when justice so requires. The trial court has considerable discretion in granting or denying a motion for leave to amend; the appellate court will only reverse when a clear abuse of discretion is shown. In the present case, however, Plaintiff cannot distinguish the amendment from his prior tortious interference claim which was directed out on summary judgment, so the requested amendment was properly denied.

Glenn v. Carlstrom, 556 N.W.2d 800 (Iowa 1996)

Discovery - Independent Expert Inspection of Records

Application for Leave to Amend Pleadings

Plaintiff underwent surgery in December of 1990 to correct a tethered spinal cord at Iowa Methodist Medical Center. Dr. Carlstrom provided Plaintiff's postoperative care, and Dr. Boarini, among other doctors, provided such care for several days during Dr. Carlstrom's absence. Following an unsuccessful recovery, Plaintiff brought a malpractice action against the defendants based on alleged acts or omissions in her care. The district court directed a verdict in favor of Dr. Boarini, and the jury found in favor of the other two defendants. On appeal Plaintiff alleged, among other things, that the trial court erred in: (1) refusing to allow independent expert inspection of medical records; and (2) denying Plaintiff's application to amend her petition.

HELD: Plaintiff's motion for order requiring defendants to turn over originals of medical records for independent evaluation by plaintiff's expert document examiner was properly denied, despite allegations of spoliation, because such request should have been made soon after records custodian's deposition was taken rather than a few days before trial. The trial court properly determined plaintiff's counsel was allowed the opportunity to

inspect the original documents and that, at worst, there had been a lapse in record keeping and not intentional destruction or falsification of records.

HELD: An order by the trial court establishing a deadline for filing applications to amend pleadings does not carry any assurance that all applications made prior to the deadline will be granted; it is possible for such to be denied as untimely based on the extent to which the proposed new pleadings would alter the course of litigation.

HELD: A motion to amend pleadings should not be granted in close proximity to trial if it will substantially alter issues to be tried.

HELD: Plaintiffs amendment, filed the day before the pre-trial scheduling order closed pleadings, sought to add various new claims to her medical malpractice action, including punitive damages, breach of warranty, abandonment, medical battery, malicious and willful battery, intentional infliction of emotional distress, breach of fiduciary duty, and tortious interference with medical treatment. The proposed amendment would have changed the issues to be tried and completely altered the course of trial preparation by reopening the entire discovery process. It was properly denied.

Aquadrill v. ECCS, 558 N.W.2d 391 (Iowa 1997)

Discovery Sanctions

Aquadrill, Inc., an Iowa corporation, brought suit against an out-of-state corporation, ECCS, and two of its officers for breach of contract and negligent and fraudulent misrepresentation arising out of failure to pay for services performed in Iowa. The district court entered default judgment against the defendants after they failed to comply with an order compelling discovery. One of the officers appealed, contending, among other things, that a default judgment was too harsh a sanction.

HELD: The default judgment against the corporate officer was an appropriate sanction under Iowa R. Civ. P. 134 for failure to comply with the discovery order against the corporation and officer where the officer's failure to turn over any information in response to the court's order could be deemed willful.

Wagner v. Miller, 555 N.W.2d 246 (Iowa App. 1996)

Discovery Sanctions

Two investors brought this action against a securities brokerage firm to recover damages for losses they allegedly sustained, alleging negligence and breach of fiduciary duty. After fifteen months of attempting to get the investors to provide adequate responses to interrogatories, the brokerage firm filed a motion for sanctions. The district court found that the investors had committed multiple discovery abuses, and that their inadequate response to interrogatories was a delay tactic. The court determined because such conduct was willful, dismissal was the only appropriate sanction. The investors appealed.

HELD: Discovery sanction of dismissal is a drastic measure that should not be ordered absent willfulness, fault, or bad faith. However, clients are responsible for the actions of their attorneys, and in appropriate circumstances an attorney's action or inaction may serve as a basis for dismissal of a client's case.

HELD: The failure of a party to fully comply with multiple orders by the district court can provide a basis for using dismissal as a discovery sanction. Here, dismissal was an appropriate sanction for Plaintiffs' willful failure to comply with the discovery requests.

Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996).

Discovery - Statutory Privilege

In a medical malpractice action, plaintiff learned that one of the defendant's experts had conducted three reviews of the defendant hospital's anesthesia department. Plaintiff thereafter subpoenaed all documents related to peer reviews. The district court, however, determined that the documents were privileged and nondiscoverable and plaintiff appealed.

HELD: The district court did not abuse its discretion in disallowing discovery of the documents related to the peer review. Even though Iowa R. Civ. P. 125 allows for broad discovery of the facts known, mental impressions, and opinions held by an expert to be called as a witness at trial, Iowa R. Civ. P. 122(a) limits the scope of discovery to any matter, not privileged, which is relevant to the subject matter involved in the pending action. Iowa Code § 147.135 provides a broad statutory privilege for the writings and other records generated by a peer review committee, and Rule 122(a) requires this statutory privilege to be honored.

Sergeant Bluff-Luton School Dist. v. City of Sioux City, 562 N.W.2d 154 (Iowa 1997).

Injunction

The school district brought an equitable action against the city, seeking a permanent injunction to restrain the city from amending its urban renewal plan under Iowa Code chapter 403 to include a recently annexed high income residential area as part of an economic development area. The amendment occurred after proper notice had been given and a hearing had been held pursuant to Iowa Code § 403.5(3) (urban renewal plans). The district court applied the balancing of the equities test contemplated in *Lakota Consolidated Independent School v. Buffalo Center/Rake Community Schools*, 334 N.W.2d 704, 709 (Iowa 1983), and denied the injunction. The Supreme Court affirmed on other grounds.

HELD: The city's act challenged here was clearly a judicial one subject to a certiorari action under Iowa R. of Civ. P. 306 because a city exercising a government function is tribunal within the meaning of Rule 306.

HELD: Because an action for an injunction will not lie where the petitioner has an adequate remedy at law, and the school district clearly had a legal remedy – certiorari –

available, its proceeding for an injunction was correctly dismissed. The district court need not have reached the balancing test.

In Interest of A.G., 558 N.W.2d 400 (Iowa 1997).

Intervention

Grandmother moved to intervene in a child in need of assistance proceeding. The district court denied the motion and the grandmother appealed.

HELD: Although Iowa R. Civ. P. 75 affords interested parties the opportunity to intervene, the trial court possesses a certain amount of discretion to deny intervention in appropriate cases. This discretion is not the ability to deny intervention when the prerequisites regarding intervention have been met; rather, this discretion is to be exercised on the question of whether the intervenor is interested in litigation as required by the rule. One is "interested" for purposes of intervention if one has a legal right that the proceeding will directly affect, or if one has a legal liability which will be directly enlarged or diminished by a judgment or decree in a pending action. An interest which is indirect, remote, or conjectural is insufficient to support intervention. A statutory right will support intervention, provided that right will be directly affected by the subject litigation.

HELD: The grandmother had a right to intervene in the CINA proceeding involving the grandchild as the grandparents has a statutory right to be considered for custody in the dispositional phase of the CINA proceeding.

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

Judgment Notwithstanding the Verdict

New Trial

Plaintiff, a former employee who was injured on the job, brought a slander action against his employer and the employer's nurse for statements made by the nurse to an examining physician implying that the former employee was faking his injury. The jury returned a verdict for the former employee, award $4,000 in actual damages and $15 million in punitive damages. Defendants filed a motion for judgment notwithstanding the verdict (JNOV), and an alternative motion for a new trial. The trial court ordered a remittitur of the amount of punitive damages over $100,000 and a new trial conditioned upon the remittitur conditions. Plaintiff rejected the remittitur, and the trial court ordered a new trial. Plaintiff appealed, claiming the trial court abused its discretion in ordering a new trial, and Defendant cross-appealed.

HELD: A motion for JNOV should be denied if there is substantial evidence in the record to support each element of Plaintiff's claims. Substantial evidence exists if a reasonable mind would find the evidence presented adequate to reach the same findings. When considering a JNOV, the district court must view the evidence in a light most

favorable to the nonmoving party. Here, there was sufficient evidence in the record to support all elements of Plaintiffs claims.

HELD: A trial court has the inherent power to grant a new trial where the verdict fails to administer substantial justice, and the court is not limited to the grounds for granting a new trial specified in Iowa R. Civ. P. 244 (new trial). However, the court's discretion in ruling on a motion for a new trial is not unlimited, and it can be exercised only for sound judicial reasons. For a trial court to grant a new trial in the interest of justice, it must have some support in the record for doing so. Further, courts have no right to set aside a verdict through mere caprice or whim, or to reweigh the evidence, or to sit in judgment on the credibility of witnesses. Here, the punitive damage award of $15 million was excessive, but the record supports an award of $2 million. If Plaintiff rejects this remittitur, then Defendants' motion for a new trial will be granted.

Doerring v. Kramer, 556 N.W.2d 816 (Iowa App. 1996)

Notice Pleading

Application for Leave to Amend Pleadings

Plaintiff, a motorist involved in an automobile accident, brought an action against the estate of the other driver involved who was killed in the accident. The Defendant estate filed a combined answer, an affirmative defense, and a counterclaim. The estate claimed in the affirmative defense that Plaintiff was negligent, but failed to affirmatively allege negligence in the counterclaim. Plaintiff filed a motion to dismiss the counterclaim for failure to state a claim. The court granted the motion and denied Defendant's motion to amend, finding that the amendment was barred by the statute of limitations. Defendant appealed, alleging it was error to dismiss the counterclaim and to deny her motion to amend.

HELD: Iowa R. Civ. P. 69(a)--notice pleading--requires only a short and plain statement of the claim and does not require a pleading of the facts. Thus, the allegations in the combined answer, affirmative defense, and counterclaim were sufficient to give notice of the claims made and to state a claim. Even though the estate had failed to allege negligence in its counterclaim, the issue of negligence was clearly raised through the affirmative defense. The Rule 104(b) dismissal was error.

HELD: The trial court's denial of Defendant's application for leave to amend the counterclaim was abuse of discretion; the proposed amendment did not substantially change the issues but only clarified issues already raised. Thus, under Iowa R. Civ. P. 88, the application should have been granted.

American Family Mut. Ins. Co. v. Allied Mut. Ins. Co., 562 N.W.2d 159 (Iowa 1997)

Notice Pleading

Two insurance companies, American Family and Allied, were potentially responsible for the coverage of injuries sustained by an automobile passenger who suffered a gunshot

A

wound during a hunting outing when a gun accidentally discharged while being placed in the trunk of an automobile. After both companies pointed to the other as responsible, American Family assumed the defense and settled the claims, including $5,000 medical pay benefits to Allied. American Family then brought a declaratory judgment action to recoup against Allied. Both parties moved for summary judgment and the district court granted Allied's motion. The court relied on two alternative grounds in its ruling: (1) American Family had not sought contribution in its declaratory judgment petition, having only pled indemnity; and (2) issue preclusion. American Family appealed, the Court of Appeals affirmed, and the Supreme Court granted further review.

HELD: American Family's petition was easily sufficient under Iowa Rule of Civil Procedure 69 (notice pleading rule) to raise the demand for contribution, and it was inappropriate to enter summary judgment based on insufficient pleading.

Alvarez v. Meadow Lane Mall Limited Partnership, 560 N.W.2d 588 (Iowa 1997)

Service of Notice

Motion to Dismiss

A pedestrian injured in a slip and fall in a retail parking lot sued the property owner, but did not arrange for service of original notice as required by Iowa R. Civ. P. 49(b). Plaintiff's attorney asserted a claims representative of the property owner's insurer indicated it would accept service on the owner's behalf, but the claims representative testified otherwise. When this attorney had his license suspended, Plaintiff retained new counsel. Plaintiff then amended the petition by adding three additional property owners as defendants. It appears the new defendants were properly served with original notice Next, Defendants filed a motion to dismiss. The trial court sustained the motion for all defendants, finding the long delay in serve was presumptive abusive to the initial defendant and the amendment adding the new defendants as parties did not relate back to the original petition for limitations purposes. Plaintiff appealed.

HELD: The Iowa Rules of Civil Procedure require dismissal of an action if there is an abusive delay in completing service. In such instances, a court must first determine if the delay was presumptively abusive. If the delay was presumptively abusive the court must then determine if the plaintiff has carried the burden of proving the delay was justified. If it was not justified, the case must be dismissed. Even if the delay was not presumptively abusive, an intentional delay can still require dismissal. Here, the delay of 159 days in serving the defendant after the plaintiff had filed the petition was presumptively abusive, and Plaintiff has failed to show the delay was justified. Dismissal affirmed.

Griffith v. Moss, 554 N.W.2d 571 (Iowa App. 1996)

Work-Product Privilege

The focal issue in this appeal where both parties sought recovery following automobile accident is whether Plaintiff should have a new trial because the district court denied his motion to compel Defendant to provide a copy of a statement she gave to her liability

insurance carrier in the month following the accident. The trial court denied the motion on the basis that the plaintiff's expert did not recall what she had said in her transcribed statement. The jury found Plaintiff 82% at fault and Defendant 18% at fault, and Plaintiff appealed.

HELD: According to Iowa R. Civ. P. 122, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of a civil action, and such rule must be applied liberally. Since the statement, in this case, was made for an automobile insurer's investigation, however, it falls within the work product privilege of Rule 122(c) and the defendant had the burden to show he had a substantial need for the material in preparation for his case and he was unable, without hardship, to obtain the materials by other means. Plaintiff did not meet that burden here because he had an opportunity to obtain Defendant's version of the facts by deposition, so we affirm.

COURTS

Aspelmeier, Fisch, Power v. Allied Group, 556 N.W.2d 805 (Iowa 1996)

Actions at Law or Equity

Allied intervened in tort action brought by its insured, Little, to protect its subrogation interest. Little recovered judgment for $586,684, and Allied was subrogated to $37,851 of the total recovery. Attorneys for Little brought a separate action against Allied for recovery of a pro rata share of their attorney's fees. The district court determined that Allied was bound tc contribute $10,339 toward attorney's fees. Allied appealed, alleging, among other things, that it was entitled to a jury trial.

HELD: The matter was properly tried as an action in equity because it related to a foreclosure of a lien against a res.

In Re Conservatorship of Leonard, 563 N.W.2d 193 (Iowa 1997).

Jurisdiction of Appellate Courts

A son filed a petition for an involuntary conservatorship of his father and the district court entered an order granting the request. The father appealed on several grounds, and also requested an order declaring payment of various fees paid to persons for services rendered to the conservatorship and requiring a refund of fees paid.

HELD: The Supreme Court does not have original jurisdiction over the proposed ward's request that individuals receiving fees from the conservator, who was improperly appointed, refund those sums; only the district court had jurisdiction over such a request.

Ray v. Paul, 563 N.W.2d 635 (Iowa App. 1997)

Juror Misconduct

Judge's Remarks During Voir Dire

Plaintiff's three year old son was injured in an accident when he was struck by a truck. A physician treated the child's broken leg by placing him in a body cast. When the cast was subsequently removed, a number of skin alterations were discovered that necessitated additional treatment. Plaintiff then brought this malpractice action against the physician. During jury selection, two jurors indicated that the Defendant's professional status would make it difficult for them to decide the case impartially. The first juror was excused without comment. When the second juror expressed this concern, the court asked him if his concerns were sincere or whether he was simply seeking to avoid service. Although the second juror was excused, he was instructed to remain in the court room so the court could speak with him following completion of jury selection. After the case was submitted to the jury, the court received a note from the jury foreman indicating that

one of the jurors expressed an opinion concerning the Defendant's professional reputation and also told other jurors that the juror's son had been successfully treated by the Defendant. The court denied the Plaintiff's motion for a mistrial and, following consultation with counsel, excused the juror. The jury was then instructed to disregard his remarks and rely on the evidence presented at trial. A verdict was returned in favor of the physician. On appeal, Plaintiff contends, among other things that the judge's remarks to the second excused juror discouraged the remaining panel members from expressing their true sentiments regarding jury service in the medical malpractice case.

HELD: We find nothing harsh, demeaning, or oppressive about the judge's remarks to the second excused juror. In the absence of other objective evidence suggesting the jury panel was influenced as Plaintiff claims, we will not presume the judge's conduct was prejudicial.

HELD: We are unable to say that there is a reasonable probability the juror's remarks concerning the Defendant's professional reputation influenced the verdict. Thus, we find no error in the district court's refusal to grant a new trial based on the alleged juror misconduct.

Bride v. Heckard & Sons, 556 N.W.2d 449 (Iowa 1996).

Judges – Duty to Disclose Possible Conflict

In this negligence action arising from an injury at a construction site, Plaintiff claims the trial judge violated Canon 3(D)(1) of the Code of Judicial Conduct in failing to disclose his prior representation by a member of defense counsel's law firm. This representation, which Plaintiff did not discover until the trial was completed, occurred less than two years before trial. Plaintiff claims he would have requested a recusal based on "conflict of interest and ethical considerations if this fact had been timely disclosed.

HELD: The trial judge erred by failing to disclose to the parties a representation by defense counsel's law firm approximately two years prior to the trial in question. Although the judge was not required to recuse himself, he was required to disclose the possible conflict of interest to the parties so that the parties would have opportunity to request a recusal.

Matter of Integrated Resources Life Insurance Co., 562 N.W.2d 179 (Iowa 1997).

Proposed Orders

Two insurance companies in receivership, Integrated Resources Life Insurance Co. and Fidelity Bankers Life Insurance Co., dispute the impact of an assumption agreement executed between Integrated and its delegee, North American Reassurance. The district court's opinion adopted verbatim the proposed findings of fact and conclusions of law submitted by Integrated's counsel.

A

HELD: The practice of adopting verbatim one party's proposed findings of fact and conclusion of law is viewed with disfavor because it obscures the independent and disinterested insight of the trial judge whose decision is on review.

EVIDENCE

Smith v. Air Feeds, Inc., 556 N.W.2d 160 (Iowa App. 1996)

Admissibility of Evidence - Strict Liability Claim

Plaintiff's hand was severed while operating a press at work. He brought a products liability action, and the jury found the manufacturer to be 10% at fault. On appeal, Plaintiff contends the court erred in allowing certain evidence pertaining to remedial efforts the manufacturer took after the accident.

HELD: While the principle is well established that proof of a defendant's post-accident repair or improvement is ordinarily not admissible in negligence actions, evidence of subsequent measures is not excluded when offered in connection with a claim based on strict liability. Here, the manufacturer was arguing that a co-worker was grossly negligent by not installing guards that were later added, and the evidence of the guards was also relevant to the manufacturer's contention that installation of such guards was feasible. The evidence was properly received.

Ray v. Paul, 563 N.W.2d 635 (Iowa App. 1997)

Collateral Source Rule

Plaintiff's three year old son was injured in a pedestrian-vehicle and treated by Defendant-physician accident. Plaintiff recovered $75,000 from her uninsured motorist insurance policy, and then initiated an action against the Defendant for medical malpractice. Prior to trial, Plaintiff filed a motion in limine seeking exclusion of any evidence or reference to her settlement with her auto insurer. The court denied the Plaintiff's motion, terms of the settlement were admitted at trial, and the jury returned a verdict in favor of Defendant. Plaintiff appeals contending, among other things, that evidence of the settlement agreement was inadmissible and it was error for the court to conclude otherwise.

HELD: Iowa law allows a recovery by an injured party in an action against the treating physician for malpractice even though the patient has settled his claim against the original tort-feasor. The trier of fact must decide whether the injured party intended to release the physician at the time of settlement, and whether the earlier settlement, in fact, compensated the injured Plaintiff for the malpractice which accompanied the treatment of the original injury. This rule is a limited exception to the general rule imposing liability for all damages flowing from an injury, including medical malpractice. In this case, the district court expressly acknowledged that the purpose for admitting the settlement evidence was to allow the jury to resolve this issue. The collateral source rule is therefore not implicated because the purpose of admitting the evidence of the Plaintiff's settlement and release was for a reason other than that prohibited by the rule.

C.S.I. Chemical Sales, Inc. v. Mapco Gas Products, Inc., 557 N.W.2d 528 (Iowa App. 1996)

A

Expert Witnesses

C.S.I., a liquid fertilizer manufacturer, sued Mapco for negligent inspection and repair of its furnace following a fire which destroyed C.S.I's plant. The district court found for C.S.I., and Mapco appealed, challenging the admission of testimony as to the replacement cost of the plant offered by experts who testified as to facts and opinions of non-testifying experts in support of their opinion.

HELD: Under Iowa R. Evid. 703, experts can give opinions based on facts and data not admissible in evidence when such information is reasonably relied on by experts in a particular field in forming opinions, and the rule permits an expert in one field to base an opinion in part on information and opinions of other experts in other fields. An expert witness cannot be an expert in all fields, and it is reasonable to expect that experts will rely on opinions and information from experts in other fields as background material for arriving at an opinion.

HELD: Hearsay evidence is not automatically permitted at trial simply because an expert is testifying, and to be admissible, underlying hearsay must be fact or data reasonably relied on by experts in the field in reaching their conclusion. Once the foundational requirement is met, evidence is only admitted to explain the basis for the expert opinion and is not admitted for its truth.

HELD: Rule 703 allowing the expert to give an opinion based on facts and data not admissible in evidence does not empower an expert witness to testify that other experts support his opinion; such information may not be used to corroborate the testifying expert's opinion.

HELD: In this case, in establishing the value of the fertilizer plant that was destroyed by fire, the underlying information presented by bids of nontestifying subcontractors and suppliers was both properly used to explain the expert's opinion and improperly used to corroborate it, where the expert testified that he not only used bids and estimates to formulate his opinion but also believed those bids and estimates were fair and reasonable. Permitting the expert to testify about those bids was not abuse of discretion, however, where the opponent did not object to the failure to establish a foundation, where the testimony indicated that the expert used the bids primarily as a basis for his opinion, and where the opponent was not prejudiced as the supplier testified and was cross-examined as to the most critical component, so that the expert's testimony was mainly cumulative.

Mensink v. American Grain, 564 N.W.2d 376 (Iowa 1997).

Expert Witnesses

Jay Mensink had just delivered a truckload of corn to the Defendants' grain elevator when lightening struck the elevator and caused a grain dust explosion. Mensink sustained serious injuries. He and his wife filed this lawsuit against the Defendants, alleging several theories of recovery. At trial, Mensink's case rested to a large extent on the testimony of Dr. Leonard Bernstein, who testified that installation of a

lightening protection system would have reduced the chance of a lightening strike. Bernstein is a retired professor of electrical and computer engineering at the University of Wisconsin who presently works as a consulting engineer on safety issues, including lightening damage protection. The Defendants attacked his credentials, however, largely because of his lack of specific experience in grain elevator cases. The trial court allowed Bernstein to testify and Bernstein explained he considers several risk factors in his work, including: (1) the type of structure; (2) the type of construction; (3) the topography of the surrounding area in relation to the structure; (4) the occupancy and contents of the structure; and (5) the lightening frequency of the area. Bernstein also testified, over the Defendants objection, that the building was not reasonably safe without lightening protection on it and that the explosion would not have occurred if there had been a properly installed lightening protection system. The jury returned a verdict for Plaintiffs. On appeal, the Defendants claim, among other things, that it was error to submit Plaintiffs' failure to provide fire protection theory because (1) it rested on the testimony of a purported expert who was not competent to give an opinion; (2) the expert should have been rejected under the Daubert standard; and (3) the expert witness was improperly allowed to express an opinion on an ultimate fact.

HELD: The trial court was well within its discretion in finding Plaintiffs expert witness to be qualified to testify.

HELD: The risk factors considered by Bernstein are those that an average layperson would understand, and the factors do not involve a highly complex matter of scientific evidence. The Daubert analysis was not intended to apply to a cause such as this one, and it would only complicate the court's decision regarding reliability. We conclude, that irrespective of Daubert, the witness sufficiently established the reliability of this evidence and that it would likely assist the trier of fact in determining the facts and issue. Thus, it is admissible under Iowa Rule Evid. 702.

HELD: Bernstein testified, based on the risk assessment discussed above, that the building in question was at a "severe risk," but he did not testify as to the jury's ultimate decision – whether the Defendants were negligent. The jury was free to disregard this testimony, and the Defendants were free to attack it on cross examination or through rebuttal evidence of their own. We find Defendants' argument that this constituted an improper opinion on an ultimate fact without merit.

Williams v. Hedican, 561 N.W.2d 817 (Iowa 1997).

Expert Witnesses

Melissa and Adam Williams brought this medical malpractice action against Dr. Robert E. Hedican and OB-GYN Specialists, P.C. Plaintiffs allege Defendants negligently failed to treat Melissa with an antibody for chicken pox while she was pregnant and as a result, her child was born blind in one eye. In a pretrial ruling, the district court excluded expert testimony on causation from the plaintiffs' medical expert because it concluded the

testimony lacked a sufficient foundation under the test suggested in *Daubert v. Merrell Dowe Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

HELD: In *Daubert*, the court established a two part analysis for judges to employ when passing on the question of admissibility of evidence under Fed. R. Evid. 702 (which is identical to Iowa R. Evid. 702). First, the court must determine whether the proffered expert testimony is reliable. Second, the court must ensure the proposed expert's testimony is relevant to the matter at hand. The court provided a nonexclusive checklist to help trial courts decide whether the underlying reasoning and methodology are both scientifically valid and applicable to the issues in the case; namely, whether the theory or technique (1) can be (and has been) tested, (2) has been subject to peer review and publication, (3) is generally accepted within the relevant scientific community, and (4) has a known or potential rate of error.

HELD: We do not decide whether a *Daubert* analysis is appropriate under these facts because Plaintiff made no such objection.

HELD: Under *Daubert*, any inquiry into the admissibility of expert testimony is flexible and the inquiry focuses solely on the principles and methodology underlining the testimony, and not on the conclusions they generate.

HELD: When applying the *Daubert* test, the fact that a theory or technique has not been widely peer reviewed – meaning subject to the scrutiny of the scientific community – does not necessarily brand the theory or technique as scientifically invalid. Some well grounded but innovative theories may be too particular, too new, or of too limited interest to be published. Publication is but one element of peer review.

HELD: Statistical proof need not be shown before a medical expert can testify on causation. The fact that a certain study has no statistically proven information effects the weight of the expert's opinion, not the opinions admissibility.

HELD: When applying the *Daubert* standard for determining the admissibility of expert testimony, a reliability assessment does not require, but does allow, the explicit identification of the relevant scientific community and an expressed determination of the particular degree of acceptance within that scientific community.

HELD: When assessing the possibility for unfair prejudice in the admission of a certain piece of evidence, the test for scientific evidence is more linked to the complexity of the evidence and the unwillingness or inability of the expert to explain it, rather than to the type of injuries involved.

HELD: Because rule allowing courts to balance probative value of evidence against its unfair prejudicial effect allowed the trier of fact to exclude relevant evidence, court should apply the rule sparingly.

HELD: The proffered expert testimony here was admissible under *Daubert* and its probative value outweighed its prejudicial impact under Iowa R. Evid. 403.

A

Matter of Estate of Kelly, 558 N.W.2d 719 (Iowa App. 1996)

Expert Witnesses - Inadmissible Hearsay as Basis for Opinion

Depositions - Preservation of Evidentiary Objections

A medical center, as the residuary beneficiary of a farm under decedent's prior will, objected to the probate of decedent's more recent will based on lack of testamentary capacity and undue influence. The district court ruled in favor of the medical center. The will proponent appealed, asserting, among other things, that the trial court committed prejudicial error by admitting into evidence attorney memorandums of prospective witness interviews referenced (but never offered into evidence) in a videotaped medical expert deposition presented at trial because it was hearsay. The medical center countered that the will proponent waived his objection to the memorandums by failing to object to them at the deposition.

HELD: Iowa R. Evid. 703 permits hearsay evidence to be admitted, not as substantial evidence, but to explain the basis of an expert's opinion. The rule does not, however, permit hearsay to be admitted without first satisfying the foundational requirement that it be the type of information reasonably relied upon by experts in the field in reaching their conclusions. In the instant case, the medical expert identified only two exhibits as those containing information upon which he relied in rendering an opinion, nothing in the record indicated that the memorandums were included within those two exhibits, and no foundational evidence was offered concerning the memoranda exhibits. Thus, the memorandums were admitted at trial without the required foundation.

HELD: Iowa R. Civ. P. 158 requires an objection be made during a deposition to inadmissible evidence if the grounds for excluding the evidence could have been cured at the deposition. The memorandums constituted inadmissible hearsay, but this ground for objection could have been cured by establishing the proper foundation. The will proponent did not waive objection, however, as he had no reason to object to the memorandums because they were never offered into evidence.

HELD: The will proponent deserves a new trial based on the prejudice from the inadmissible evidence.

State v. Kone, 557 N.W.2d 97 (Iowa App. 1996)

Hearsay Exceptions - Residual Exception

Defendant was convicted of second-degree murder. He appealed, challenging the admission of his then-girlfriend now wife's testimony at trial, as well her tape-recorded statement made to police on the night of the murder. The Court of Appeals remanded for the limited purpose of making more specific findings of how her statement meets the requirements of the residual exception to the hearsay rule, retaining jurisdiction to resolve the issue.

A

HELD: Where a party seeks the admission of hearsay under the residual exception to the hearsay rule, Iowa R. Evid. 803(24), the district court is to make specific findings on record regarding the requisite elements. Failure to satisfy one requirement of the residual exception precludes admission of the evidence. The trial court's statement that the witness' previously tape-recorded statement met all the requirements for admission under the residual exception to the hearsay rule did not sufficiently set forth with specificity the court's rationale for admission of the statement; admission of evidence under the residual exception requires a more detailed weighing and balancing of each element.

Anderson v. Miller, 559 N.W.2d 29 (Iowa 1997)

Inferences and Presumptions

Jacobsen and Miller were involved in a one vehicle accident. Both men were intoxicated. Jacobsen died, and his estate sued Miller, as the principal user and alleged driver, and Miller's father, as the owner of the vehicle. The defendants filed a motion for summary judgment on the basis that the estate failed to generate an issue of fact to support the claim that Miller was the driver. The district court entered summary judgment for the defendants and the court of appeals affirmed. On further review, the estate contended , among other things, that circumstantial evidence along with an inference that the principal user of a vehicle was the driver was sufficient to raise a fact issue as to whether Miller was driving.

HELD: An inference or rebuttable presumption exists that an owner (or principle driver) who was present in a vehicle at the time of an accident was the driver of the vehicle at the time of the accident. Evidence sufficient to destroy the inference must be objective, not evidence that is likely to be motivated by the interest of the witness. Here, Miller was not an objective witness and there existed circumstantial evidence that Jacobsen did not like to drive. Thus, the estate raised a genuine issue of material fact and it was error to grant summary judgment on this issue.

Craig Foster Ford v. Iowa Department of Transportation, 562 N.W.2d 618 (Iowa 1997)

Inferences and Presumptions

After an automobile manufacturer obtained approval from the Department of Transportation to terminate the manufacturer's franchise agreement with a dealership, pursuant to Iowa Code chapter 322A (motor vehicle franchise law), the dealership sought judicial review. Although the dealership's sales exceeded by almost ten fold, the estimates projected in the franchise agreement, the owner admitted he submitted falsified sales date information to the manufacturer in order to claim dealer and customer cash incentives. When asked whether he forged endorsements on rebate checks, the owner claimed a fifth amendment privilege not to answer.

HELD: While it would be unconstitutional in a criminal trial for a court to instruct a jury that adverse inferences could be drawn from the defendant's silence, a trial court may infer in a civil case, from the party's refusal to answer based on a claim of privilege against self-incrimination, that the answer would be adverse to that party.

A

Lamb v. Newton-Livingston, Inc., 551 N.W.2d 333 (Iowa App. 1996)

Opinion Testimony

Plaintiff, the daughter of a nursing home resident who committed suicide, brought an action against the nursing home for wrongful death, intentional infliction of emotional distress, and loss of consortium. The jury awarded Plaintiff damages for loss of consortium, the district court ordered remittitur, and both parties appealed. Plaintiff contends the trial judge abused his discretion in sustaining objections to testimony regarding the emotional impact of her mother's suicide on her, the extent of her loss of her mother's love and affection, and an employee's attitude of the impact of her mother's suicide on her. Defendants contend the trial court erred in not excluding evidence of mental damage to plaintiff after her mother's death.

HELD: Iowa has a liberal rule on the admission of opinion evidence and generally the admission of such evidence rests in the trial court's discretion. Based on the record in this case, the trial court did not abuse its discretion.

State v. Howell, 557 N.W.2d 908 (Iowa App. 1996)

Prior Bad Acts

Unfairly Prejudicial Evidence

Defendant who was charged with third-degree sexual abuse filed motion in limine to exclude the testimony of the victim of a prior sexual assault by Defendant. The motion was denied and Defendant was convicted. He appealed alleging that the trial court abused its discretion in admitting evidence of prior bad acts.

HELD: To admit evidence of prior bad acts under Iowa R. Evid. 404(b), the evidence must be relevant and there must be clear proof that the individual against whom the evidence is offered committed the prior acts. Prior bad acts evidence with a different victim is properly admitted where the evidence tends to demonstrate the sexual pattern engaged in by the defendant. Thus, the witness's testimony that the defendant had sexually assaulted her in the past was relevant in the prosecution for sexual abuse in light of the factual similarities between the prior assault and the present case.

HELD: Iowa R. Evid. 403 does not provide protection against all evidence that is prejudicial or detrimental to one's case; it only provides protection against evidence that is unfairly prejudicial. In determining whether the probative value of evidence of prior bad acts is outweighed by the danger of unfair prejudice, the court considers: actual need for evidence in view of the issues and other available evidence, the strength of evidence showing that prior bad acts were committed by the accused, the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and the degree to which the jury will probably be roused by the evidence improperly. In the present case, the probative value of the witness's testimony that the defendant had sexually assaulted her under similar circumstances outweighed the danger of unfair prejudice.

A

Baysden v. Hitchcock, 553 N.W.2d 901 (Iowa App. 1996)

Similar Acts

Plaintiff, a prospective buyer of a brokerage business, sued the prospective seller after the business was sold to another buyer. The jury returned a verdict in favor of Plaintiff, but the trial court entered a judgment notwithstanding the verdict for Defendant. One issue raised in Plaintiff's appeal contends the testimony of another prospective purchaser concerning his failed negotiations to purchase a portion of Defendant's business was admissible as evidence of similar acts under Iowa Rule of Evidence 404(b).

HELD: Evidentiary rulings under Rule 404(b) are committed to the sound discretion of the trial court. Unlike Plaintiff, the other prospective purchaser had not reached a binding agreement with Defendant. They were merely in negotiation over possible terms when Defendant indicated he was no longer interested and subsequently sold a portion of the business to someone else. The trial court did not abuse its discretion in excluding the other purchaser's testimony because the other purchaser's negotiations with Defendant were not "similar acts" as that term is defined in Iowa Rule of Evidence 404(b).

Tucker v. Caterpillar, Inc., 564 N.W.2d 410 (Iowa 1997).

Subsequent Remedial Measures

This dispute arises from an accident involving a Caterpillar 416 backhoe loader (CAT 416). The CAT 416 in question was manufactured by Defendant Caterpillar, Inc. and sold to a construction company, C. E. Contracting, in June 1986. In November 1986, in response to customer complaints, Caterpillar developed a warning decal that specifically instructed operators to engage the transmission neutral lock (TNL) during backhoe operation. It did not, however, send copies of the decal to C. E. Contracting or other owners of previously-sold machines. In addition, Caterpillar revised its instruction manual in 1990 to advise operators to engage the TNL during backhoe operation to prevent undesired movement. On September 4, 1990, Plaintiff, an employee of C. E. Contracting, was severely injured when the CAT 416 ran over him following unexpected movement during backhoe operation. Plaintiff filed a products liability action against Caterpillar claiming both strict liability and negligent failure to warn. Caterpillar filed a pretrial motion in limine seeking to exclude exhibits containing the warning decal, the 1990 manual, and other material because such materials were subsequent remedial measures under Iowa R. Evid. 407 and prejudicial under Iowa R. Evid. 403. The trial court sustained Caterpillar's motion and later rejected Plaintiff's offers of proof with regard to exhibits. The jury returned a verdict for Caterpillar. On appeal, Tucker contends, among other things, that the trial court erred in its evidentiary rulings because (1) measures taken by the manufacture of a product after the sale of the product but before the accident leading to the suit are not subsequent remedial measures; (2) even if they do constitute subsequent remedial measures, such measures are admissible for a purpose other than to prove negligent

or culpable conduct; and (3) the decal in the 1990 manual was not inadmissible under Rule 403.

HELD: The language of Rule 407 leads to the conclusion that the term "event" refers to the accident or time of injury to the Plaintiff. Thus, measures taken after a product is manufactured but before an accident occurs from that product are not remedial measures under the rule. Caterpillars argument to the contrary that the event triggering the protection of the rule was the receipt of complaints which lead to the warning decal and updated manual is rejected.

HELD: Although the evidence was improperly excluded, reversal is warranted under Iowa R. Evid. 103(a) only if Plaintiff has shown that exclusion of the evidence concerning the warning decal in the 1990 manual affected his substantial rights. Because there was substantial other evidence from which the jury in the nine-day trial could have concluded that Caterpillar was negligent in connection with Plaintiff's allegation of Caterpillar's continuing duty to warn of dangers associated with the operation of the machine, we conclude the exclusion did not affect Plaintiff's substantial rights as contemplated by Rule 103(a). Thus, no error warranting reversal of the case appears.

Glenn v. Carlstrom, 556 N.W.2d 800 (Iowa 1996)

Standard of Care - Hospital Accreditation Standards

In this medical malpractice action that resulted in a jury verdict for Defendants-physicians, Plaintiff contends the district court erred by failing to admit the standards of the Joint Commission on the Accreditation of Hospitals concerning informed consent as evidence of the proper standard of care.

HELD: Hospital accreditation standards are not necessarily evidence of the legal standard of care in medical malpractice cases. In order to be admissible as some evidence of the standard of care, these accreditation standards must be authenticated and made relevant to the issue by appropriate expert testimony. We find that the record made in the present case did not satisfy this requirement, and the evidence was properly excluded.

Davis v. Roberts, 563 N.W.2d 16 (Iowa App. 1997).

Statute of Frauds

Hearsay Exceptions – Statements Against Interest

Hearsay Exceptions – State of Mind

Under terms of Cleo Davis' Will, Richard Davis and Marion Roberts each inherited a one-half interest in a certain piece of residential real estate as tenants in common. Due to an error by the estate's executors, however, the change of title certificate identified Marion and Richard as joint tenants with rights of survivorship. Marion took possession of the property. Although she paid no rent to Richard, she paid all

A

other expenses incidental to ownership. Marion lived in the house until she died. Following Marion's death, Richard sold the house to the local school district. Upon examination of the abstract, the school district's attorney discovered the defect in title, and refused to accept title to the property without a deed from Marion or her survivors in interest. As a result, Terry Roberts and Dave Roberts, Marion's children, were required to probate Marion's Will. Under the terms of the Will, an undivided one-half interest in the subject property passed to Terry and David. Although Richard, Terry, and David all agreed on the terms of the sale to the school district, Richard disputed their entitlement to the sale proceeds. Richard filed a declaratory judgment action to resolve the dispute.

At trial, Richard testified that prior to Marion's occupancy of the home, they agreed Marion could live in the house rent free if she paid the expenses incidental to ownership and occupancy. He also testified it was Marion's express wish that the survivor between the two of them become the sole owner of the property. Richard offered a letter from Marion to Mary Jo Davis, Richard's daughter, indicating her approval of this arrangement as evidence of her intention to create a joint tenancy with right of survivorship. In her letter, Marion stated:

> I think we could arrange it so that he (Marion's lawyer) would make it possible that the survivor's half of the property would revert to them as sole owners. I don't think either of my kids want the property so that would be fine with me.

Terry and David contended the statute of frauds renders any evidence of an oral agreement incompetent and that Marion's letter to Mary Jo is inadmissible hearsay evidence. The district court, setting in equity, received the evidence but noted the Defendants' standing objections.

HELD: The district court properly withheld ruling on the evidentiary objections to facilitate our *de novo* review of the entire record in the case.

HELD: Iowa Statute of Frauds, Iowa Code § 622.32(3) (statute of frauds) provides that no evidence of a contract to convey an interest of land is competent unless a written memorandum signed by the party to be charged or a recognized exception to the statute applies. One such exception states proof of an oral contract is permitted if some or all of the "purchase money" or other consideration has been paid. Proof of the acts, conduct, or circumstances constituting consideration for the claimed oral contract must be clear, satisfactory, and convincing. Here, we are unable to find Richard's waiver of Marion's rent exclusively and unequivocally referred to a contract to create survivorship rights. Richard testified he withdrew his initial request for rent to accommodate Marion's distressed financial circumstances. His forbearance could also be viewed as a fair exchange of Marion's obligation to pay incidental expenses. Accordingly, Richard cannot prove this exception to the statute of frauds.

HELD: Another exception to the statute of frauds provides parol evidence is admissible to prove an oral agreement where it is established by oral evidence from

an adverse party. Here, Terry and David acknowledged Marion's and Richard's intentions to create mutual survivorship rights. They also testified they assumed, based on conversations with Marion, that these arrangements were completed before Marion died. Although this testimony does not necessarily constitute an explicit admission of the contract, it does provide substantial evidence from which it can be found the alleged contract was formed and thus removes the matter from the statute of frauds defense.

HELD: Marion's statements to Richard and others concerning their agreement are admissible as an exception to the hearsay rule because statements made an unavailable declarant against the declarant's proprietary interest are admissible and this general exception includes statements by a property owner in disparagement of title. Iowa R. Evid. 804(b)(3).

HELD: Our reading of the letter does not support its admission under the same hearsay exception as Marion's oral statements. The subject portion of the letter, if it is hearsay, is, however, admissible as a statement of Marion's state of mind or intent to create survivorship rights [under Iowa R. Evid. 803(3)].

In Re Marriage of Driscoll, 563 N.W.2d 640 (Iowa App. 1997).

Valuation of Personal Property

In a dissolution proceeding the court adopted the wife's valuations of the parties home and vehicles as listed on her financial affidavit. The wife testified to the value of $21,125 for a Ford Explorer and $16,150 for a Mercury Cougar, relying on valuations obtained from Dupaco and Anderson-Weber. The husband contests the trial court's valuations of the vehicles.

HELD: An owner may qualify as competent to testify as to the value of personal property. The court's valuations were within the permissible range of evidence and we will not disturb then on appeal.

A

INSURANCE

Thompson v. United States Fidelity Guaranty Company, 559 N.W.2d 288 (Iowa 1997)

Bad Faith - First Party

Plaintiff suffered injuries in a work-related accident when he fell two stories from the roof of a building and landed on a cement floor. He initially received worker's compensation benefits, but the insurer, USF&G, later terminated them on the grounds the individual was intoxicated at the time of the incident and the intoxication was a substantial factor in causing his fall. Plaintiff appealed to the industrial commissioner, and the commissioner overruled the intoxication defense and ordered USF&G to reinstate benefits. USF&G did not challenge the order. Plaintiff then sued USF&G for alleged bad faith in terminating his benefits. The district court directed a verdict for USF&G on the basis that Plaintiff's claim was fairly debatable, and Plaintiff appealed.

HELD: In first party bad faith claims the plaintiff must show (1) the absence of a reasonable basis for denying the claim; and (2) that the defendant knew or had reason to know that his denial was without reasonable basis. Whether evidence is sufficient to generate a jury question is an issue of law for the court. Applying these principles in bad faith cases, a court should direct a verdict for the defendant only when, viewing the record in the light most favorable to the claimant, there is no substantial evidence to support the elements for the claim. Here, Plaintiff's claim was fairly debatable as a matter of law based on the intoxication defense, so a directed verdict was proper.

Grinnell Mutual Reinsurance Company v. Recker, 561 N.W.2d 63 (Iowa 1997).

Consent to Settlement Clause - UIM Policy

An underinsured motorist (UIM) insurer sought a declaratory judgment that its insured's settlement of his claim against the tortfeasors and their liability insurer one day after the statute of limitations had run and without the UIM insurers' consent barred UIM coverage because (1) it violated the policy's "consent-to-settlement" clause and (2) it prejudiced the insurer's subrogation rights in violation of the policy. The insured counterclaimed, seeking damages on the theories of breach of contract and bad faith. The district court ruled the insured was not entitled to UIM coverage, and the insured appealed.

HELD: The purpose of underinsured motorist coverage is to provide protection from loss caused by tortfeasors who are not financially responsible. An insured is not entitled, however, to any duplication of benefits under the tortfeasor's liability insurance and insured's own UIM insurance.

HELD: Consent-to-settlement clauses are valid and enforceable. If the UIM insurer proves that a breach of the consent-to-settlement clause prejudices the insurer's right to subrogation against the insurer, the covered person loses UIM coverage. The insured must prove, however, that absent the breach it could have collected from the tortfeasor.

HELD: When an injured party settles with a tortfeasor's liability carrier, that party is assumed—for UIM coverage purposes--to have received the policy limits of the tortfeasor's liability policy. Thus, under UIM coverage, the injured party may only recover the difference between the liability policy limit and the damages suffered, subject to the UIM policy limits.

HELD: Once an insured receives an offer to the policy limits from a tortfeasor motorist's liability insurer, the insured has a duty under a consent-to-settlement clause in a UIM policy to notify the UIM insurer of the proposed settlement and receive written consent to the settlement.

HELD: When a tortfeasor makes a settlement offer to an insured, the insured's UIM insurer can protect its contingent subrogation rights by tendering an amount equal to the settlement offer and substituting its payment for that of the offer.

HELD: Applying these principles to the present case, we think by filing suit against the tortfeasor within the allowed time period, the insured tolled the statute of limitations both as to his own claim and as to his UIM insurer's contingent subrogation claim. However, we find that by settling with the tortfeasor after that limitations period had expired and by failing to give his UIM insurer notice, the insured precluded his UIM insurer from exercising its subrogation rights. Moreover, the evidence suggests the tortfeasor had sufficient nonexempt assets to pay for damages in excess of policy limits. Thus, the insured's breach of the consent-to-settlement clause prejudiced his UIM insurer, precluding coverage.

HELD: In response to the insured's counterclaims, the UIM insurer's contingent subrogation right accrued on the date of the insured's accident, and this right was protected by the consent-to-settlement clause. Thus, subrogation rights existed when the limitations period expired. Although the UIM insurer mistakenly relied on an invalid policy provision requiring exhaustion of the tortfeasor's liability before paying UIM benefits, such reliance did not constitute an absolute refusal to pay and thus a waiver.

HELD: The insured's breach of the consent settlement clause in the UIM policy and the resulting prejudice to the insurer's subrogation rights provided a reasonable basis for the insurer to deny the insured's UIM claim and to bring declaratory judgment action for a judicial ruling upholding the denial. No bad faith can be shown.

Cedar Rapids v. Insurance Co. of North America, 562 N.W.2d 156 (Iowa 1997).

Coverage – Additional Insured

Reasonable Expectations

The City of Cedar Rapids and a hotel owner were parties to an agreement concerning the hotel's lease of air space over a city-owned arena. The contract contained an indemnity agreement and required the hotel to maintain public liability insurance with respect to improvements located on or over the city's arena and to name the city as an additional insured. The city and the hotel also agreed to a lease by the hotel of a ballroom adjacent

A

to the hotel on property owned by the city. This agreement required the hotel to include the ballroom within its public liability insurance policy. A dispute arose after the city successfully defended a tort claim brought by a guest at a private party held in the ballroom pursuant to arrangements made with the hotel. The guest was seriously injured in an accident that occurred in the city-owned skywalk system providing access to the ballroom. The city brought a declaratory judgment action contending that, as an additional insured under the hotel's liability insurance policy on ballroom operations, it is entitled to be indemnified under the hotel's public liability insurance policy for the costs of its defense. The district court determined that the liability coverage afforded to the city did not extend to an occurrence that took place on the city-owned skywalk system not leased by the hotel and not described in the declarations of the hotel's policy. The City appealed.

HELD: Because the declaration section of the policy specifically provides that it pertains to "premises owned by, rented to, or controlled by the named insured," and does not describe the city-owned skywalk system, we are unable to conclude that the occurrence giving rise to the injured claimant's legal action against the city was within the coverage afforded to an additional insured.

HELD: If, as the city contends, the hotel failed to procure for the city the full extent of liability coverage that was required under the agreement, the city must look to the hotel for recourse and not the insurance company.

HELD: The doctrine of reasonable expectations concerns the expectations of an insured who contracts directly with the insurer and does not extend to an additional insured whose expectations arise from private agreements made with the named insured.

American Family Mut. Ins. Co. v. Allied Mut. Ins. Co., 562 N.W.2d 159 (Iowa 1997).

Coverage

Two insurance companies, American Family and Allied, were potentially responsible for coverage for injuries sustained by an automobile passenger who suffered a gunshot wound during a hunting outing when a gun accidentally discharged while being placed in the trunk of an automobile. The automobile was owned by the tortfeasor's father and insured by the father with Allied. The policy describes an "insured" as "[a]ny person using, including loading and unloading, 'your covered auto.' This provision . . . does not apply to any person other than: . . . a lessee or borrower or any of their employees, while moving property to or from an 'covered auto.'" The tort-feasor's mother's American Family homeowner's policy provides personal liability coverage for "damages for which any insured is legally liable because of bodily insurance or property damage caused by an occurrence covered by this policy." The tort-feasor is an insured under the policy definition because he resides in his mother's household and she is the named insured. In addition, the accident giving rise to the lawsuit qualified as an occurrence under the policy. The American Family excludes coverage for personal liability, however, if the occurrence arose at of the "loading and unloading" of "any type of motor vehicle." After both companies pointed to the other as responsible, American Family assumed the defense, settled the claims, and then brought a declaratory judgment action to recoup

against Allied. Both parties moved for summary judgment and the district court granted Allied's motion. The Court of Appeals affirmed, and the Supreme Court granted further review.

HELD: Under the facts of the case, the tort-feasor qualifies as a "borrower" under the Allied policy because at the time of the accident he was using the automobile with his father's permission and was moving property (a shotgun) to or from a "covered auto" as required by the policy. Thus, coverage exists under the Allied policy.

HELD: Construing the American Family automobile exclusion clause narrowly, as the rules of construction require, the exclusion clause does not apply because the vehicle-related negligence by the tort-feasor cannot be said to be the sole proximate cause of the victim's injuries, as evidenced by several nonvehicle-related allegations of negligence contained in the victim's petition. Thus, coverage also exists under the American Family policy.

Matter of Integrated Resources Life Insurance Co., 562 N.W.2d 179 (Iowa 1997).

Coverage

Integrated Resources Life Insurance Co. (Integrated) entered into several reinsurance treaties with Fidelity Bankers Life Insurance Co. (Fidelity). Subsequently, National American Reassurance (NAR) became Integrated's delegate, assuming Integrated's interests and obligations on these treaties. NAR notified Fidelity's director of reinsurance and instructed that all reinsurance transactions under the Integrated treaties would henceforth be between NAR and Fidelity. Fidelity thereafter submitted premium payments and claim documentation to NAR. It appears undisputed that although Fidelity viewed the acquisition with favor, it never countersigned the assumption agreement even though requested to do so by Integrated and NAR. Meanwhile, Fidelity sold a block of its life insurance business to Protective Life Insurance Co. (PLIC). As a condition of the sale, PLIC required a third-party "stop loss" guarantor for mortality risks on the policies purchased. An agreement was reached where by NAR agreed to indemnify PLIC on excess mortality provided that Fidelity indemnify NAR. Thus, the assumption and indemnification agreements placed NAR simultaneously in the role of debtor and creditor to Fidelity.

A dispute eventually arose between the three companies. When policyholder claims arose under Fidelity's treaties with Integrated, Fidelity first looked to NAR for payment. NAR declined to pay, claiming a setoff for payments owed by Fidelity under the PLIC treaty. Meanwhile, Fidelity went into receivership and Integrated went into liquidation. Fidelity then looked to Integrated for payment and filed a proof of claim pursuant to Iowa Code chapter 507C. The liquidator denied Fidelity's claim, Fidelity objected in writing, and the liquidator applied to the district court for hearing. Fidelity argued Integrated remained obligated for reinsurance losses unpaid by NAR because no agent of Fidelity ever signed the assumption agreement. Integrated countered with two defenses: (1) NAR assumed the Integrated treaties with Fidelity's knowledge, and Fidelity's subsequent payments of premiums to NAR released Integrated from any obligation under the treaties;

A

and (2) Fidelity's outstanding obligation to NAR on the PLIC transaction offset any sums it could claim under the Integrated treaties.

HELD: Under Virginia law, which applies to the guarantor agreement, lack of mutuality between the treaties bars setoff of the respective debts owed.

HELD: A party asserting novation must establish by clear and satisfactory evidence: (1) a previous valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old contract; and (4) validity of the new contract. Here, Integrated failed to meet its burden under elements (2) and (3). The mere fact that a new contract obligates a third-party to assume the financial obligation of the debtor will not alone support a presumption that the creditor accept the new debtor and releases the old one. The fact that Fidelity did not counter sign the assumption agreement between Integrated and NAR furnishes persuasive proof of Fidelity's intent to preserve its contractual ties to Integrated. We reverse and remand for entry of judgment on Fidelity's claim.

Simpson v. U.S. Fidelity & Guar. Co., 562 N.W.2d 627 (Iowa 1997).

Coverage

Cooperation Requirement

A Des Moines Waterworks employee, Sidney Simpson, was severely injured when, after parking his employer's pick up truck, he was struck by a passing vehicle. Simpson received worker's compensation benefits. Des Moines Waterworks had acquired both worker's compensation and commercial automobile insurance from United States Fidelity & Guaranty Company (USF&G). The commercial automobile policy provided coverage to persons occupying a covered auto, and defined "occupying" as "in, upon, getting in, on, out or off." Simpson filed a personal injury lawsuit against the tort-feasor, and USF&G filed a notice of worker's compensation with lien. Two months later, the tort-feasor filed a confession of judgment and Simpson accepted. The confession and acceptance, however, were made without notice to or consent of USF&G. The tort-feasor subsequently filed for bankruptcy, and Simpson filed a petition for declaratory judgment against USF&G seeking uninsured motorist coverage. USF&G denied coverage existed and countered Simpson should also be denied recovery because he failed to comply with all of the conditions precedent to bringing suit, namely, failure to cooperate with and provide notice of the settlement. Both parties moved for summary judgment, and the district court entered judgment in favor of USF&G.

HELD: When the policy definition of the term "occupying" does not impose a mandatory requirement of physical contact, most jurisdictions recognize that there is a zone or area around the insured's vehicle in which protection is afforded. Here, it is clear that Simpson was in close proximity (between 5 to 20 feet) to the truck when he was injured, and he was clearly engaged in an activity related to the use of the specialized truck (a toolbox on wheels). The vehicle was not merely a means of transporting persons, but was designed and equipped to aid with water valve inspection, clean up, and repair. Thus, Simpson was an insured of USF&G at the time he was struck by the uninsured motorist.

HELD: Whenever policy provisions are conditions precedent to coverage under an insurance contract, an insured must show substantial compliance with such conditions. If substantial compliance cannot be shown, the insured must prove that (1) the failure to comply was excused, (2) the requirements of the condition were waived, or (3) the failure to comply was not prejudicial to the insurer. If an insured fails to prove substantial compliance, excuse, or waiver, prejudice to the insurer is presumed. Here, Simpson failed to meet his burden of showing substantial compliance with the policy's cooperation provision because USF&G was not a party in the lawsuit against the uninsured motorist, it did not participate in the litigation, and it did not receive notice of the offer to confess judgment or its acceptance until after they were filed in district court.

HELD: Simpson contends his failure to include USF&G in settlement discussions should be excused because his attorney was unaware that USF&G had an uninsured motorist policy that would cover him, but we reject this contention because Simpson failed to exercise due diligence in determining the existence of coverage.

HELD: Despite Simpson's contention to the contrary, there is no evidence in the record that USF&G waived the cooperation provision or any other policy provision.

HELD: Without Simpson's cooperation, USF&G was not able to participate in settlement discussions, and under the circumstances, Simpson failed to show lack of prejudice as a matter of law.

Tropf v. American Family Mutual Insurance, 558 N.W.2d 158 (Iowa 1997)

Coverage

Definition of "Occupying"

Plaintiff, a driver who was injured after a two-car accident when he exited his insured vehicle and then had to lunge out of the way of another vehicle which had slid toward the accident scene, brought this suit against his automobile insurer seeking medical payments coverage. Under the policy, coverage applied only to an "insured", which was defined in part to include any person "occupying" the insured vehicle. "Occupying" was defined as being "in, on, getting into or out of, and in physical contact with." The District Court entered judgment for the insurer, and the Court of Appeals reversed. The Supreme Court granted further review.

HELD: Where the parties offer no extrinsic evidence as to the meaning of policy language, interpretation of the insurance policy is a question of law for the court. Thus, the phrase "in physical contact with" as used in the definition of "occupying" in the automobile policy's medical payments coverage, was to be given its plain and ordinary meaning: claimant has to be in actual physical contact with the insured vehicle when the injury occurred in order to be insured under the policy. Coverage does not exist here.

Regent Insurance Co. v. Estes Co., 564 N.W.2d 846 (Iowa 1997).

A

Extent of Coverage

Estes Company (Estes), a general contractor, subcontracted with Crawford Heating (Crawford) for work on a housing project. Pursuant to the subcontract provisions, Crawford obtained an insurance policy from Regent Insurance Company (Regent) naming Estes as an additional insured. The pertinent provision read as follows: "WHO IS AN INSURED . . . is amended to include as an insured the person or organization shown in the schedule, but only with respect to liability arising out of 'your work' before that insured . . . ." The subcontract itself also contained an indemnification clause providing:

> [T]he Subcontractor shall indemnify and hold harmless . . . Contractor . . . from and against claims, damages, losses, and expense including but not limited to attorneys' fees, arising out of or resulting from performance of the work . . . but only to the extent caused in whole or in part by negligent acts or omissions of the subcontractor, anyone directly or indirectly employed by them or anyone [for] whose acts they may be liable . . . .

A Crawford employee, Robert Martin, sustained serious injuries on the job when tresses installed by the general contractor, Estes, collapsed. In a subsequent action against Estes Martin, recovered a large award. Regent brought a declaratory judgment action contending its insurance policy did not cover Estes' liability for Martin's claims. The district court granted Regent's motion for summary judgment. On Estes' appeal, the court of appeals affirmed the district court's analysis of liability under the indemnification clause but remanded the case for further consideration of other questions raised on the motion. The Supreme Court granted Regent further review.

HELD: Crawford's obligation to indemnify Estes from certain liabilities under the terms of the subcontract is an entirely different issue from Regent's obligation to Estes as an additional insured under Crawford's policy. Estes was added as an additional insured only with respect to liability arising out of Crawford's work for Estes. Under the facts of the case, Martin's right of recovery against Estes was in no way attributable to the work performed or to be performed by Crawford under its contract with Estes. Thus, Estes is afforded no protection under the Regent policy for the claims against it by Martin. If the extent of the coverage provided Estes under the Regent policy is less than that to which it was entitled under its subcontract with Crawford, it must look to Crawford for recourse, and not the insurance company.

Lumbermens Mutual Casualty Co. v. State Department of Revenue, 564 N.W.2d 431 (Iowa 1997).

Fidelity Insurance Coverage

A

FACTS: From 1989 to 1992, a Revenue Department employee embezzled $692,458.00. She was aided in the scheme by her husband and two neighbors. The Department carried coverage for loss due to public employee dishonesty under a fidelity bond with Lumbermens Mutual Casualty Co. (Lumbermens), and Lumbermens paid the Department $592,468.00 - the amount of the theft less a $100,000.00 deductible. The Department quickly shifted gears from crime victim to tax collector and, because embezzled funds are treated as income tax purposes, it issued expedited estimated "jeopardy assessments" to the embezzlers pursuant to its taxing authority. The state was only able to recover a portion of the assessments, and never recovered any of the restitution ordered in the embezzler's criminal sentences. Nothing remained for Lumbermens to attach, so it brought this declaratory judgment action to establish its right to reimbursement from taxes collected on the stolen funds. The district court reasoned the insurer's subrogation rights under the party's contract extended only to insured risks, not tax assessments. Lumbermens' appeals seeking reversal on three alternative grounds: (1) the court erroneously rejected its claim to an equitable lien; (2) its liability under the fidelity bond should be computed by subtracting the recovery money from the amount embezzled to arrive at the "direct loss"; and (3) the Department's collection efforts breached the insurance contract.

HELD: The fundamental flaw in Lumbermens' equitable lien theory is its failure to distinguish between the Department's dual role as the employer that suffered the embezzlement and the body charged with collecting income taxes on the embezzled money. Lumbermens furnished coverage for the embezzlement loss, not the tax law. The party's contract limits Lumbermens to reimbursement for "any loss [the Department] sustained and for which [Lumbermens] paid or settled." Because neither loss sustained by the Department has been fully compensated, there is no unjust enrichment.

HELD: Lumbermens theorizes that its liability for the loss sustained by the Department should be reduced by sums recovered on the embezzlers' tax debts. Here, the Department has received only partial payment on the delinquent tax debts, and no restitution on the direct loss. Lumbermens' liability on the covered direct loss, therefore, cannot be reduced by amounts collected on the noncovered tax debt.

HELD: Regarding Lumbermens' breach of contract argument, it misperceives its rights under the policy as well as the Department's statutory obligations. Under the subrogation clause, Lumbermens has the right to seek recovery, not a right to recover. By statute, the Department has the duty to pursue tax debtors with vigor. Lumbermens remains free to seek civil judgment against the embezzlers, or to pursue it subrogation rights in the event restitution or recovery is made on the direct loss, but it enjoys no enhancement of its subrogation rights merely by virtue of its insured's taxing power.

Allied Mutual Ins. Co. v. Costello, 557 N.W.2d 284 (Iowa 1996)

Interpretation - Exclusions

An employer's liability insurer brought this declaratory judgment action to determine whether the policy's intentional act exclusion barred coverage for the insured's assault of an employee. The policy contained an exclusion for "bodily injury intentionally caused or aggravated by you [the insured]." The trial court found the insured did not intend to cause the injury, and thus the exclusion did not apply. The insurer appealed.

HELD: Certain well-settled principles control the interpretation of insurance policies. If an insurance policy is ambiguous, the court adopts the interpretation that is most favorable to the insured. It is the duty of the insurer to define any limitations or exclusionary clauses in clear and explicit terms. The burden of establishing an exclusion rests upon the insurer.

HELD: With regard to an intentional-act exclusion, the intent to cause injury may be either actual or inferred from the insured's conduct. Here, the insured's angry mental state did not deprive him of the ability to intend the assault against his employee. The insured was not mentally ill and although assault was irrational, it could still be intentional. Thus, the intentional act exclusion applied.

Schneider Leasing, Inc. v. U.S. Aviation Underwriters, Inc., 555 N.W.2d 838 (Iowa 1996)

Interpretation - Extrinsic Evidence

The owner of an airplane brought suit against its insurer to recover under the physical damage coverage of its insurance policy after the airplane was destroyed in a crash. The insurance company moved for summary judgment, contending that the loss was not covered because the plane was being operated by a pilot who lacked the qualifications required by the policy as a condition of coverage for rental and charter uses. The district court denied the motion, ruling Iowa Code § 515.101 (invalidating stipulations) applied, and the Supreme Court granted the insurer's interlocutory appeal.

HELD: Extrinsic evidence on the commercial aviation industry's specialized vocabulary for rental and charter uses was admissible in interpreting airplane lessor's physical damage insurance stating pilot requirements for rental and charter uses.

HELD: Iowa Code §515.101 was inapplicable to Plaintiff's physical damage insurance coverage, as the limitation relied on by the insurer did not void any existing coverage, but rather, it simply placed the particular loss outside the coverage afforded from the inception of the contract.

HELD: The status of the pilot as using the plane for "rental use" and not "charter use" and the fact that he failed to meet four of the seven required criteria for rental uses precluded physical damage coverage under the policy as written, but a genuine issue of material fact exists concerning Plaintiff's claims of waiver and estoppel as to Defendant's policy defense.

Dilly v. Grinnell Select Insurance Co., 563 N.W.2d 197 (Iowa App. 1997).

A

Not Owned But Insured Clause

Jason Dilly was a resident of his parents household. He owned an automobile, but he did not carry insurance on the vehicle. His parents had an automobile insurance policy with Grinnell Select Insurance Company (Grinnell) for two vehicles owned by them. Jason was injured in an accident after he allowed a friend to drive. He received a payment from the driver's automobile insurance carrier, but his damages exceeded the driver's policy limits. As Jason was considered an "insured person" under the definition found in the underinsurance motorist section of the Grinnell policy, he filed a claim for underinsured motorist benefits. Grinnell denied coverage by relying upon a provision which stated the term "underinsured motor vehicle" does not include any vehicle owned by or furnished or available for the regular use of you or a relative." Jason filed suit, and Grinnell moved for summary judgment. Grinnell contends the language of the policy constitutes an "owned but not insured" clause which has been held valid under Iowa law in the underinsured motorist context. *See* Jones v. American Star Insurance Co., 501 N.W.2d 536 (Iowa 1993). Jason asserts the language must be considered a "not owned but insured" clause which has been held as void as against public policy in the underinsured motorist context. *See* Veach v. Farmers Insurance Co., 460 N.W.2d 845 (Iowa 1990) (holding a "not owned but insured" clause invalid due to the inequitable result that occurred when the Plaintiff purchased $25,000 of underinsured motorist coverage and yet would have lost $50,000 of uninsured coverage provided to him as an insured under his mother's policy).

HELD: Although the "not owned but insured" exclusion is related to the "owned but not insured" exclusion, they are different in their operation and the same public policy concerns are not applicable. The subject clause in the Grinnell policy has been described as the "owned but not insured" type. Thus, we find the public policy concerns raised by the "not owned but insured" provision in Veach are not present in this case, and we affirm the decision of the district court granting summary judgment to Grinnell.

Grinnell Mut. v. State Farm Mut., 558 N.W.2d 176 (Iowa 1997)

Omnibus Clause

Contrary to his parents' instructions, Brian authorized his girlfriend Molly to drive his truck. Without Brian's knowledge, however, Molly let her friend Brenda drive the truck instead. A single-vehicle accident resulted, injuring Molly, the passenger. Brenda was uninsured. Brian's parents had an insurance policy with uninsured motorist coverage, which provided that the vehicle had to be used within the scope of the owners' consent. Molly's parents had a policy with an omnibus uninsured motorist clause as well, which excluded from coverage any person using a vehicle without having sufficient reason to believe that the use was with permission. Molly's parents' insurer filed a declaratory judgment action against the owners' insurer seeking a ruling that the passenger was covered, if at all, under the owners' policy and not under its own policy. The district court established that there was coverage under the passenger's parents' policy, but not under the owners' policy. The passenger's parents' insurer appealed.

A

HELD: The "omnibus clause" of an automobile liability insurance policy extends the policy's coverage to any person using or responsible for the use of the insured vehicle, provided the use is with permission of the named insured. Here, the passenger was not insured under the omnibus uninsured motorist clause in her boyfriend's parents' automobile insurance policy because she was not using the truck within the scope of the consent of the boyfriend's parents, but she was insured under her parents' automobile insurance policy, because she had implied consent from her boyfriend to allow her friend to drive the truck.

Clock v. Larson, 564 N.W.2d 436 (Iowa 1997).

Settlement and Release

FACTS: Betty Naber was rendered a paraplegic in an accident that occurred on property she was renting from Merlin Clock. Clock had $100,000 of liability insurance coverage with IMT Insurance Company (IMT), which had been procured by Clock's insurance agent, L.L. Larson and his agency. Clock alleges he requested Larson to obtain a $1,000,000 umbrella liability policy with IMT but no such policy had been procured. Naber brought a tort and contract action against Clock seeking damages for the injuries she suffered in the accident, and IMT provided Clock with a defense. Clock subsequently filed the present declaratory judgment action against Larson, his agency, and IMT, alleging breach of contract and negligence for failure to procure the umbrella liability policy. Clock and Naber, thereafter, reached a settlement agreement by which Naber agreed to accept $110,000 from Clock (the $100,000 policy limits plus $10,000 paid personally by Clock) in exchange for releasing her tort claim against Clock. As part of the agreement, Clock assigned his interest in his declaratory judgment to Naber, and Naber agreed to dismiss her tort suit against Clock with prejudice. Naber then filed an Application to Adjudicate law points to determine whether the declaratory judgment action could still be maintained. The trial court held, among other things, that the settlement agreement fixed the maximum amount that Naber, as Clock's assignee, could recover in the present action at $10,000. The Supreme Court granted Clock's application for interlocutory appeal and also granted the Defendant's application to bring an interlocutory cross-appeal.

HELD: This case differs from Red Giant Oil Co. v. Lowlor, 528 N.W.2d 524 (Iowa 1995), a case in which we determined the settlement of a tort claim was not dispositive of the insured's suit against the insurer for failure to provide adequate coverage because (1) IMT did not refuse to defend Clock in Naber's tort suit, and (2) the settlement provided Clock with far more than a covenant not to execute (i.e., unlike Red Giant, here there is a full and complete release of all claims of liability against Clock other than the $10,000).

Six v. American Family Mut. Ins. Co., 558 N.W.2d 205 (Iowa 1997)

Stipulated Settlements

A

Plaintiff, an accident victim, brought this declaratory judgment action against the tort-feasor's insurer to establish the insurer was liable, to the extent of its policy limits, to satisfy a stipulated judgment in favor of the victim and against the tort-feasor. The jury returned a special verdict in favor of the insurer, finding that the amount of stipulated judgment was not reasonable. The district court entered final judgment in favor of the insurer, denied Plaintiff's motions for a new trial, judgment notwithstanding the verdict, declaratory relief, and a determination of a reasonable settlement amount as untimely. Plaintiff appealed, seeking a determination that the purported entry of a final judgment by the district court was premature because there were issues yet to be resolved.

HELD: The insurer's liability was not extinguished when the jury found the stipulated settlement, made by the insured tort-feasor and accident victim after the insurer refused to defend, was reasonable and prudent. If coverage exists, an insurer that declined to defend a claim is liable to hold its insured harmless for that portion of the stipulated judgment that represents a reasonable and prudent settlement.

Aspelmeier, Fisch, Power v. Allied Group, 556 N.W.2d 805 (Iowa 1996)

Subrogation

Allied intervened in tort action brought by its insured, Little, to protect its subrogation interest. Little recovered judgment for $586,684, and Allied was subrogated to $37,851 of the total recovery. Attorneys for Little brought a separate action against Allied for recovery of a pro rata share of their attorney's fees. The district court determined that Allied was bound to contribute $10,339 toward attorney's fees. Allied appealed, alleging that the attorneys were not entitled to one-third of the amount recovered by Allied, and that Allied was entitled to a jury trial.

HELD: Although a partial subrogee may intervene in the case pursuant to Iowa R. Civ. P. 75, the partial subrogee's interest is such that it has no right to obtain a judgment in its own name.

HELD: Allied's participation as subrogee in the insured's tort action, which included two strikes in jury selection, questioning prospective jurors concerning views on insurance, an introductory statement to the jury, participation in stipulations concerning medical bills and property damage, and submission of proposed instructions and interrogatories, exceeded its rights as intervenor seeking to protect its right to subrogation.

HELD: The insured's attorneys were entitled to one-third of automobile insurer's recovery in subrogation, despite efforts of insurer's attorneys in aiding insured in litigation; the automobile insurer's only proper role in the litigation was to protect its right to reimbursement from any tort recovery.

Tedrow v. Standard Life Insurance Co., 558 N.W.2d 198 (Iowa 1997)

Suicide Exclusion

A

Michael Tedrow attempted to commit suicide by running his pickup truck in his enclosed garage. However, he apparently had a change of heart and was found dead by carbon monoxide poisoning in his house near the front door, not in the garage. His death was ruled a suicide. His wife sought benefits under his life insurance policy. The insurer denied the claim based on the suicide exclusion clause in the policy. The district court concluded that the exclusion prevented her from recovering under the policy as a matter of law. She appealed, arguing that his subsequent move to escape the fumes renders his ultimate death accidental.

HELD: The presumption against suicide operates as a presumption in favor of the theory of accident. The presumption against suicide is a strong one, based in the love of life and the instinct of self-preservation, the fact that self-destruction is contrary to the general conduct of mankind, and that suicide by a rational person is an act of moral turpitude. Nevertheless, the fact that the insured had a change of heart about trying to commit suicide and attempted to escape the carbon monoxide fumes did not render his death accidental because his voluntary acts set in motion the circumstance likely to result in death. Thus, the suicide exclusion in his life insurance policy precluded his widow from collecting full benefits.

A

JUDGMENT

Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

Claim Preclusion

Plaintiff coal mining company brought an action against the county in which it was located after the county passed a zoning ordinance prohibiting the use of strip-mining property for landfills. The case proceeded all the way to the Iowa Supreme Court, where the claim was dismissed because it was not ripe for adjudication. Plaintiff brought the present action after the county passed a new but almost identical zoning ordinance. The district court awarded damages to Plaintiff on its takings claim and claim of tortious interference with a prospective contractual relationship. The county appealed. One of its issues on appeal was whether Plaintiff's failure to raise claims of tortious interference and nonconforming use in the first action constitutes a bar in the present action via res judicata in the sense of claim preclusion.

HELD: Claim preclusion barred neither Plaintiff's tortious interference nor nonconforming use claims because the demand for recovery, the rights alleged to be infringed, and the applicable principles of law are distinct from the claims in the first action that the zoning ordinance was illegally enacted and resulted in an unconstitutional taking.

Dubuque Policemen's Protective Association v. City of Dubuque, 553 N.W.2d 603 (Iowa 1996).

Declaratory Judgments

A police officer and his association brought a declaratory judgment action against the City of Dubuque claiming the officer should have been allowed sick leave under Iowa Code § 411.6(5) (accidental disability benefit) for absences when he undertook – and recovered from – a cardiovascular stress test and an angioplasty. The district court held, in pertinent part, that the officer was entitled to restoration of sick leave for a portion of his absences, but it declined to order the City to restore the sick leave because such rights are determined under the parties collective bargaining agreement, not § 411.6(5), and this agreement was not made a part of the action. The officer appealed and the City cross-appealed.

HELD: A declaratory judgment is an action in which a court declares the rights, duties, status, or other legal relationships of the parties. Declaratory judgments are res judicata and binding on the parties. The distinctive characteristic of a declaratory judgment is that the declaration stands by itself and requires no executory process.

HELD: The rules of procedure which apply in ordinary actions also apply in declaratory judgments.

A

HELD: The effect of the collective bargaining agreement on the parties' rights under § 411.6(5) was a material and probative issue to the controversy and thus, under the notice pleading rule, the officer was entitled to a decision on how the statute affected his rights under the statute.

Grains of Iowa L.C. v. The Iowa Department of Agriculture and Land Stewardship, 562 N.W.2d 411 (Iowa App. 1997).

Declaratory Judgments

A grain dealer brought a declaratory judgment action asking the court to construe and confirm the legal standards governing the inspection of certain records by the Department of Agriculture and Land Stewardship. The district court dismissed the Petition on the grounds of lack of subject matter jurisdiction, and the grain dealer appealed.

HELD: We agree with the district court that any suggestion in the declaratory judgment action, either directly or by inference, that requests a ruling as to the applicability of Iowa Code § 203.9 (Inspection of Premises, Books and Records of Grain Dealers) to certain records maintained grain purchasers, is grounds for dismissal of the action. This is so because the department is an agency of the State of Iowa under Iowa Code § 17A.2(1) (Definition of Agency), and generally agency action is reviewed under the Iowa Administrative Procedures Act.

HELD: Declaratory judgments deal with present rights and each petition must be examined to determine whether present legal rights are at issue between the parties. The question of the applicability of the statute governing inspection of a grain dealer's records was not justiciable or fully ripened, as it sought to determine abstract questions not resting on existing or determinable facts or rights.

Six v. American Family Mut. Ins. Co., 558 N.W.2d 205 (Iowa 1997)

Declaratory Judgments

Plaintiff, an accident victim, brought this declaratory judgment action against the tort-feasor's insurer to establish the insurer was liable, to the extent of its policy limits, to satisfy a stipulated judgment in favor of the victim and against the tort-feasor. Factual issues were submitted to the jury, and the jury returned a special verdict in favor of the insurer finding that the amount of stipulated judgment was not reasonable. The district court entered final judgment in favor of the insurer, and denied Plaintiff's motions for a new trial, judgment notwithstanding the verdict, declaratory relief, and a determination of a reasonable settlement amount as untimely. Plaintiff appealed, seeking a determination that the purported entry of a final judgment by the district court was premature because there were issues yet to be resolved.

HELD: Purported entry of final judgment by the district court following a special verdict of the jury finding that Plaintiff's parents were not residents of his

household for purposes of the insurance policy was premature, since the jury's verdict concerned only one aspect of the insurance coverage question and the case was not submitted to the jury on the basis that its response to the special verdict question automatically determined the issue of coverage. Under Iowa R. Civ. P. 205, therefore, the district court was obliged to determine the remaining matters necessary to enter the declaratory judgment that had been requested.

HELD: The accident victim's acquiescence in the tort-feasor's insurer's objection to having the jury determine the amount of a reasonable and prudent settlement, in the event that the jury found the stipulated judgment between the insured and the accident victim to be unreasonable, was only a waiver of the accident victim's right to have the jury decide that issue in the suit against the insurer. Thus, under Iowa R. Civ. P. 205, the matter was left for subsequent determination by the court and was not a basis for denial of the request to adjudicate the issue.

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

Inconsistent Verdicts

Plaintiff, a former employee who was injured on the job, brought a slander action against his employer and the employer's nurse for statements made by the nurse to an examining physician implying that the former employee was faking his injury. The jury returned a verdict for the former employee, awarding $4,000 in actual damages and $15 million in punitive damages. Defendants filed a motion for judgment notwithstanding the verdict, and an alternative motion for a new trial. The court ordered a new trial. Both parties appealed, and on cross-appeal Defendants argued, among other things, that the punitive damage award was fatally ambiguous and thus void because the jury did not identify against whom the punitive damages were awarded.

HELD: A jury's verdict is to be liberally construed to give effect to the jury's intention and to harmonize the verdicts if possible. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. In the present matter, a reading of the instruction as a whole indicates the employer was to be held solely liable for the punitive damage award based on the conduct of the nurse/employee.

American Family Mut. Ins. Co. v. Allied Mut. Ins. Co., 562 N.W.2d 159 (Iowa 1997).

Issue Preclusion

Estoppel by Acquiescence

Two insurance companies, American Family and Allied, were potentially responsible for the coverage for injuries sustained by an automobile passenger who suffered a gunshot wound during a hunting outing when a gun accidentally discharged while being placed in the trunk of an automobile. After both companies

A

pointed to the other as responsible, American Family assumed the defense and settled the claims, including $5,000 medical pay benefits to Allied. American Family then brought a declaratory judgment action to recoup against Allied. Both parties moved for summary judgment and the district court granted Allied's motion. The court relied on alternative grounds in its ruling, including issue preclusion. The Court of Appeals affirmed, and the Supreme Court granted further review.

HELD: "Issue preclusion," or "collateral estoppel" applies if four requirements are met: (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) the issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment. Before applying these four requirements, however, a status test must ordinarily be met: "the parties in both actions must be the same," or "there must be privity between the party against whom issue preclusion is invoked and the party against whom the issue was decided in the first litigation." Although American Family satisfies the status test because Allied is using issue preclusion defensively, Allied fails to establish that the insurance coverage issue was raised and litigated in the prior action because Allied asserted only an unspecified subrogation right to the $5,000 medical payment and the issue of whether the tortfeasor was or was not insured by Allied was not litigated.

HELD: Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waiver or abandon the right. The doctrine serves the same purpose as issue preclusion, but proceeds on the equitable basis of waiver or latches. Here, American Family has in no way neglected its right to seek indemnity or contribution against Allied for such a time as would imply an intention to waive the right.

Braunger v. Karrer, 563 N.W.2d 1 (1997).

Issue Preclusion

A husband and wife purchased a home as joint tenants. Due to financial problems, the husband ultimately filed for chapter 7 bankruptcy protection. At the hearing, a business associate objected to the discharge of a $30,000 debt the husband owed him. The bankruptcy court ruled the debt could not be discharged because of the husband's fraud. The business associate filed the judgment, but the bankruptcy court ruled the lien did not attach to the husband's home because the husband had claimed a homestead exemption. The IRS subsequently filed a tax lien against the husband for $65,000. The husband and wife eventually sold the home and received a net return of approximately $106,000. The couple paid the IRS $53,000 in partial satisfaction of the tax lien leaving them with $53,000 of the house sale proceeds. Before the couple closed the sale, the business associate garnished $30,000 of those proceeds in the hands of the buyers to be applied in satisfaction of his judgment. After garnishment, the wife filed a claim for ownership of the remaining sale proceeds, claiming the proceeds were exempt. The husband also filed a notice of exemption, claiming he and his wife had executed an offer to buy a replacement

home with the proceeds. Following hearing, the district court ruled that $11,500 of the business associates $30,000 judgment represented proceeds from the homestead portion of the entire property sold and was therefore exempt, but the remaining $19,500 was not exempt because it was attributable to the nonexempt portion of the residential property. An appeal followed that presented this issue: Whether proceeds from the sale of a homestead are entirely exempt notwithstanding a limitation under Iowa Code § 561.2 (one-half acre limitation on homestead exemption for land within a city plat) that would make only a portion of the proceeds exempt.

HELD: Because the husband claimed all the property exempt as a homestead when he filed his chapter 7 bankruptcy and the business associate failed to object within the prescribed period, the bankruptcy court ruled that the business associate could not contest the validity of the claimed exemption and could not subject the homestead to his judgment lien. This ruling is binding on the business associate and any subsequent proceeding through the principles of issue preclusion incorporated in the doctrine of res judicata. Thus, at the time of the garnishment the sale proceeds were exempt from execution. We remand for an order releasing the garnishment and direct the clerk to return the funds to the couple.

Brown v. Kassouf, 558 N.W.2d 161 (Iowa 1997)

Issue Preclusion

A driver and passenger who were injured in an automobile accident brought an action against the alleged tort-feasor and the driver's underinsured motorist coverage (UIM) carrier. The claims against the UIM insurer were subsequently severed. The passenger settled with the tort-feasor prior to trial, and the jury returned a verdict in favor the tort-feasor. The UIM insurer then filed an application for adjudication of law points seeking a determination that the doctrine of issue preclusion prevent both the driver and the passenger from relitigating the issue of fault in their action against the insurer for UIM benefits. The district court ruled that both the parties were bound by the jury's verdict. Thus, the driver's insurance carrier avoided any obligation to pay underinsured motorist benefits to the plaintiffs. The passenger--the settling plaintiff--appealed.

HELD: Neither mutuality of parties nor privity is necessary where issue preclusion is applied defensively if the party against whom issue preclusion is invoked was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution. Here, the passenger and the driver shared an interest in proving as much fault as they could against the tort-feasor in order to have an underinsured motorist claim, the passenger had been a party to the suit until she settled shortly before trial, and the passenger and driver both shared the same attorney. Thus, issue preclusion applied.

A

Powell v. Grewing, 562 N.W.2d 761 (Iowa 1997).

Judgment Liens

Plaintiff Shirley Powell was once married to Don Carmichael. When they divorced, Shirley quit claimed her interest in Don's property in exchange for a $20,000 judgment payable by Don. Don never satisfied the judgment, and he conveyed his interest in the property to Defendant Lois Grewing, who later became his wife. Following Don's death, Shirley commenced proceedings under Iowa Code chapter 626 (execution) to enforce her judgment by way of execution sale of the property then occupied by Lois. Shirley tendered the only bid at the sheriff's sale. After a year passed without redemption by Lois or any other creditor, Shirley acquired title by sheriff's deed and brought this forcible entry and detainer action. Lois resisted eviction arguing the sheriff's deed was void and unenforceable because there was no action and decree vesting her of title pursuant to Iowa Code §§ 626.88 (real estate of deceased judgment debtor) or 630.16 (equitable proceedings against judgment debtor's debtors).

HELD: Section 626.88 has no application to this case because Lois acquired her interest by quit claim deed rather than devise. Because Lois made no redemption, the interest obtained by Shirley as grantee of the sheriff's deed is superior to Lois', entitling Shirley to possession of the premises.

HELD: Section 630.16 only furnishes means auxiliary to execution by which a creditor may uncover property which the debtor still holds and interest. Because Don, now deceased, retained no interest in the property subject to discovery by way of a creditor's bill, the statute has no application to the case.

Estate of Vazquez v. Hepner, 564 N.W.2d 426 (Iowa 1997).

Res Judicata

Decedent died as a result of injuries sustained in a fire in the duplex where he was living. The cause of the fire was faulty wiring located in a ceiling space between the first and second floors. Decedent's estate filed a wrongful death petition against the landlords, alleging common law negligence and a violation of the implied warranty of habitability. By agreement, the court entered judgment for the landlords on the estate's common law negligence claims, and the estate was permitted to amend the petition to include claims based on both the implied warranty of habitability and negligent breach of duties imposed by statute and ordinance. The case was then submitted to the court on stipulated facts, and judgment was entered for the landlords. The estate appealed, and the landlords cross appealed alleging that all of the estates claims in the amended petition must be dismissed because of the doctrine of res judicata.

HELD: The judgment entered on the negligence claims does not affect, on grounds of res judicata, the estate's claim involving implied warranty of habitability because

negligence and implied warranty of habitability are two different causes of action with distinct elements.

Putensen v. Hawkeye Bank of Clay County, 564 N.W.2d 404 (Iowa 1997).

Summary Judgment

A conservator of a mental patient brought this action for damages allegedly caused by the bank in foreclosing on the patient's home. The bank was granted summary judgment.

HELD: Summary judgment is appropriate under Iowa R. Civ. P. 237 only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

HELD: In reviewing a summary judgment, we consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. No fact question exists if the only dispute concerns the legal consequences flowing from disputed facts.

Thompson City of Des Moines, 564 N.W.2d 839 (Iowa 1997)

Summary Judgment

FACTS: Jerry Thompson, the former City of Des Moines Employment Relations Director, brought this action for breach of contract based on the City's employee handbook and a manual for supervisory and professional employees (SPM manual), tortious interference with contractual relationship, conspiracy, and violation of due process against the City after he lost his job when the City reorganized its management structure in 1993. The district court granted the City's motion for summary judgment on all issues except for one, and the jury returned a verdict for the City. On appeal, Thompson argues, among other things, that because the case was factually intensive, it cannot properly be resolved by summary judgment.

HELD: It is true that summary judgment is properly granted under Iowa R. Civ. P. 237(c) only when the moving party demonstrates (1) the absence of any genuine issue of material fact, and (2) entitlement to judgment as a matter of law. Fact issues are material, however, only when the dispute over them might affect the outcome of the suit. If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper.

In Re Adoption of B. J. H., 564 N.W.2d 387 (Iowa 1997).

Vacated Judgments

In this case, the district court found a woman had fraudulently induced her former husband to adopt her children, and, on that basis, the court vacated the adopted decree.

A

HELD: A district court enjoys wide discretion under Iowa R. Civ. P. 252 in deciding to vacate an order on the ground of fraud practiced in obtaining the order.

HELD: Rule 252(b) permits the court to vacate a judgment if fraud was practiced in obtaining it. There are two types of fraud: extrinsic and intrinsic. Extrinsic fraud is some act or conduct of the prevailing party which has prevented a fair submission of the controversy, and it includes lulling a party into a false sense of security or preventing the party from making a defense. In contrast, intrinsic fraud inheres and the judgment itself and it includes, for example, false testimony and fraudulent exhibits. The evidence supports the trial court's finding of extrinsic fraud in the present matter.

A

JURISDICTION

Cole v. Staff Temps, 554 N.W.2d 699 (Iowa 1996)

Concurrent Jurisdiction - The Americans with Disabilities Act

Plaintiff sued her employer under the Americans with Disabilities Act (ADA), claiming she was unlawfully discriminated against in her employment because of a disability.

HELD: Iowa's state courts may properly hear matters under the ADA. There is nothing in the text of the ADA affirmatively divesting state courts of jurisdiction over actions brought under it, nor is there any reason to suppose that Iowa state courts do not have concurrent jurisdiction with federal courts to construe the ADA.

Aquadrill v. ECCS, 558 N.W.2d 391 (Iowa 1997)

Personal Jurisdiction of Court

Fiduciary Shield Doctrine

Aquadrill, Inc., an Iowa corporation, brought suit against an out-of-state corporation, ECCS, and two of its officers for breach of contract and negligent and fraudulent misrepresentation arising out of failure to pay for services performed in Iowa. The district court entered default judgment against the defendants after they failed to comply with an order compelling discovery. One of the officers appealed, contending, among other things, that Iowa did not have personal jurisdiction over him.

HELD: A two-step analysis is applied to determine whether the district court appropriately exercised personal jurisdiction: (1) whether a statute or rule authorizes exercise of jurisdiction, and (2) whether the exercise of jurisdiction would offend due process principles in the United States Constitution. Under Iowa R. Civ. P. 56.2 and the minimum contacts analysis, exercising personal jurisdiction over a nonresident corporate officer, based on assurances that he would pay the bill if his corporation did not, did not offend due process. The officer's contacts with Iowa regarding the contract were made in person, on the telephone and by mail, and the contacts had a close nexus with the causes of action.

HELD: According to the fiduciary shield doctrine, a nonresident corporate agent is not individually subject to the forum state's in personam jurisdiction if that individual's only contact with the state is by virtue of his acts as a fiduciary of the corporation. Here, the doctrine did not deprive the Iowa court of personal jurisdiction over the non-resident corporate officer where there was a claim that the corporation was mere a shell or insolvent and there was evidence that the corporate officer did not act "only" for the benefit of the corporation in promising to pay the corporate debt.

A

Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

Subject Matter Jurisdiction

Plaintiff coal mining company brought an action against the county in which it was located after the county passed a zoning ordinance prohibiting the use of strip-mining property for landfills. The district court awarded damages to the mining company on its takings claim and claim of tortious interference with a prospective contractual relationship. The county appealed. One of its issues on appeal was that the mining company had no capacity to sue because its landfill lease had expired prior to the county's enactment of the ordinance, thus depriving the district court of subject matter jurisdiction.

HELD: The county's argument confuses three concepts: subject matter jurisdiction, capacity to sue, and cause of action. "Subject matter jurisdiction" refers to the authority of the court to hear and determine cases of a general class to which the proceeding in question belongs, not merely the particular case before the court. "Capacity to sue" relates to a party's personal or official right to litigate the issues presented by the pleadings. "Cause of action" has been defined as a legal right in the plaintiff, a corresponding duty on the part of the defendant, and an attendant breach of that duty with resultant harm to the plaintiff. Here, the district court had the authority to hear the type of cases to which this proceeding belongs, and even if Plaintiff were in violation of its lease (the record indicated it was not), the county would have no standing to challenge noncompliance. Therefore, the court's exercise of jurisdiction was proper.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Hughes, 557 N.W.2d 890 (Iowa 1996)

Subject Matter Jurisdiction

This disciplinary action was brought after an attorney, Hughes, advised his client to ignore a trial judge's order to client undergo a substance abuse evaluation. Hughes sincerely believed that the court lacked authority to enter such an order and, thus, the order was void.

HELD: "Subject matter jurisdiction" is the authority of the court to hear and determine cases of a general class to which the proceedings in question belong. When a court acts without legal authority to do so, it lacks jurisdiction of subject matter. Any orders entered by a court lacking subject matter jurisdiction are void. While one cannot be punished for violation of a void order, violation of orders merely alleged to be erroneous may be punished as contempt.

HELD: Disobedience of a court order is not an appropriate step to test the validity of the court's ruling. Rather, an aggrieved party should appeal and/or motion for a stay. Thus, Hughes' conduct violated the Code of Professional Responsibility DR 7-106(A), warranting a public reprimand.

A

LIMITATIONS OF ACTIONS

General Car & Truck v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996)

Doctrine of In Pari Delicto

Plaintiff sought the assistance of Defendant law firm in applying for and renewing the registration of its service mark. The registration was later canceled due to misrepresentations made in supporting affidavits signed Plaintiff's officers. Plaintiff then brought this legal malpractice action to recover consequential damages, claiming he untrue statements made in the affidavits were done at the direction of Defendant. The district court granted Defendant's motion for summary judgment on the alternative grounds that Plaintiff's action was barred by the statute of limitations, and that Plaintiff's misrepresentations invoked the doctrine of in pari delicto, thereby barring recovery.

HELD: The purpose of the in pari delicto doctrine is to deter future misconduct by denying relief to one whose losses were substantially caused by his own fraud or illegal conduct.

HELD: For the purposes of determining whether the doctrine of in pari delicto barred the legal malpractice claim, issue preclusion barred the registrant from relitigating whether it engaged in fraud to register and renew registration for its service mark because the elements of fraud in the procurement or renewal of a federal trademark were identical to the elements of fraud necessary to invoke the in pari delicto doctrine. Thus, summary judgment was appropriate because Plaintiff's claim was barred.

Soutter v. Interstate Power Co., 563 N.W.2d 609 (Iowa 1997).

Failure of Action

On September 19, 1992, Timothy Soutter received serious injuries when a grain auger came into contact with a high voltage power line owned by the Defendant, Interstate Power Company. On October 20, 1993, the Soutters brought suit in federal court against Interstate Power seeking damages stemming from the accident. In alleging the federal court had diversity jurisdiction over the matter, the Soutters asserted they were residents of Wisconsin and that Interstate Power was incorporated in Iowa and had its principal place of business here. Pretrial discovery revealed, however, that the Soutters had moved from Wisconsin to Iowa prior to filing the federal suit. Thus, the federal suit was dismissed for lack of diversity jurisdiction based upon the Soutters' Iowa residency. Within six months the Soutters brought this action in Iowa district court, pursuing the same claim for damages. The district court granted Interstate Power's motion for summary judgment because Iowa Code § 614.10, which would have permitted the Iowa action to be a continuation of the first action for statute of limitations purposes, did not apply because the federal action failed due to negligent prosecution.

A

HELD: A Plaintiff must establish four prerequisites for claiming relief under § 614.10: (1) the failure of a former action not caused by the Plaintiffs' negligence; (2) the commencement of a new action brought within six months thereafter; (3) the parties must be the same; and (4) the cause of action must be the same. In this case, the parties dispute only whether the first requirement has been met – whether it is shown that the failure of the federal court action was not based on the Soutters' negligence. We think the Soutters have failed to prove their burden of pleading and proving their freedom from negligence in the prosecution of the first action because they cannot show they were reasonably unaware of the diversity problem. Thus, bringing and pressing the federal suit in face of the facts that would deprive the federal court of diversity jurisdiction denies the Soutters the relief accorded by Iowa Code § 614.10.

Tallman v. W.R. Grace & Co.-Conn., 558 N.W.2d 208 (Iowa 1997)

Improvements to Real Estate

The executor of a deceased electrician brought an asbestos exposure action against the manufacturers of asbestos products. Decedent came in contact with the asbestos products in 1968 and 1969. The district court granted summary judgment in favor of one of the manufacturers but denied it against the other manufacturers. Plaintiff appealed, contending the Iowa Code § 614.1(11) 15-year statute of repose does not apply because the asbestos is not an improvement, and also arguing that the statute does not apply to manufacturers. The other manufacturers cross-appealed.

HELD: Regarding Plaintiff's appeal, based on the plain wording of the statute, the statute of repose does apply to manufacturers. In addition, the products became "improvements" subject to the 15-year statute of repose upon their attachment. The evidence was undisputed that the subject manufacturer's product had become attached at the time of Plaintiff's exposure; thus, the 15-year statute of repose applied to bar Plaintiff's claim against this manufacturer.

HELD: Regarding the remaining manufacturers' appeal, a genuine issue of material fact existed regarding whether the electrician's exposure occurred before or after the asbestos products were attached to the house precluded summary judgment in favor of the remaining manufacturers.

Buttz v. Owens-Corning Fiberglas Corp., 557 N.W.2d 90 (Iowa 1996)
Lowe v. Owens-Corning Fiberglas Corp., 557 N.W.2d 90 (Iowa 1996)

Improvements to Real Property

In 1993 the Plaintiffs, construction workers who retired in 1978 and later developed asbestos-related diseases, brought this consolidated products liability action against the defendants--manufacturers of asbestos-containing products. The Defendants filed a motion for summary judgment claiming the suits were barred by Iowa Code §614.1(11) which provided that "an action arising out of the unsafe or defective condition of *an improvement to real property* ... founded on ... injury to the person

or wrongful death, shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death" (italics added). The district court denied the motion, and the Supreme Court granted the Defendants' application for interlocutory appeal.

HELD: Plaintiffs' actions were not governed by the statute of repose governing actions involving improvements to real property. Regardless of the eventual intent to attach the products to real property, the products were not so attached at the time of the workers' exposure.

Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

Limitations Period for Tortious Interference Claim

Plaintiff coal mining company brought an action against the county in which it was located after the county passed a county-wide zoning ordinance which affected the coal mining company. The district court awarded damages to the mining company on its takings claim and claim of tortious interference with a prospective contractual relationship. The county appealed. One of its claims on appeal was that the tortious interference claim was time-barred by statute of limitations.

HELD: Because Plaintiff's claim is truly a tortious interference claim, the applicable period of limitations under Iowa Code § 614.1(4) is five years. Plaintiffs claim was therefore filed in a timely manner.

Estate of Beck v. Engine, 557 N.W.2d 270 (Iowa 1996)

Notice of Probate Proceedings

A petition to set aside probate of a will was dismissed as untimely by the district court. The decedent's heir-at-law appealed, alleging that due process required the giving of a mailed notice of admission of will to probate.

HELD: Due process required that a mailed notice of probate be given to the heir-at-law who was known by the executor of the estate. Thus, summary judgment which had been sustained based on the court's belief that Plaintiff's petition was time barred under Iowa Code §§ 633.304 and 633.309 must be reversed.

Matter of Estate of Renwanz, 561 N.W.2d 43 (Iowa 1997).

Notice of Probate Proceedings

Decedent's estate was open for probate on December 27, 1993. The second notice to creditors was published on January 6, 1994. On February 17, 1994, Plaintiff brought a civil action against the estate for personal injuries resulting from tort committed by decedent. Plaintiff ultimately filed a voluntary dismissal of her case without prejudice after receiving discovery sanctions. In October 1995, Plaintiff

filed a claim in probate against the estate. The district granted the executor's motion for summary judgment, holding the February 1994 action waived any further obligation of the executor under Iowa Code § 633.410 regarding notice, and thus the October 1995 action was untimely. Plaintiff appealed.

HELD: In construing Iowa Code § 633.410, the court applies the principle of statutory construction that courts do not favor statutes of limitation. When two interpretations of a statute of limitation are possible, the preferred interpretation is the one that allows the litigant seeking relief to have a longer period to file.

HELD: Strict compliance with the clear wording of § 633.410 is required, and the failure to serve mailed notice to Plaintiff resulted in a failure to commence the limitations period under § 633.410 that would otherwise have barred her claim against the estate.

Alvarez v. Meadow Lane Mall Limited Partnership, 560 N.W.2d 588 (Iowa 1997)

Relation Back of Amendments to Pleadings

A pedestrian injured in a slip and fall in a retail parking lot sued the property owner, but did not arrange for service of original notice as required by Iowa R. Civ. P. 49(b). Plaintiff's attorney asserted a claims representative of the property owner's insurer indicated the insurer would accept service on the owner's behalf, but the claims representative testified otherwise. When this attorney had his license suspended, Plaintiff retained new counsel. Plaintiff then amended her Petition by adding three additional property owners as defendants. It appears the new defendants were properly served with original notice. Defendants subsequently filed a motion to dismiss. The trial court sustained the motion for all defendants, finding the long delay in serve was presumptive abusive to the initial defendant and the amendment adding the new defendants as parties did not relate back to the original petition for limitations purposes. Plaintiff appealed.

HELD: Plaintiff's amendment did not "relate back" because Plaintiff failed to meet her burden under Iowa R. Civ. P. 89 to show that the added parties received notice of the initiation of the action within the two year limitations period. Notice of intent to bring a suit is in no way tantamount to notice of its filing, and notice to an insurer is not notice to an insured.

Doerring v. Kramer, 556 N.W.2d 816 (Iowa App. 1996)

Relation Back of Amendments to Pleadings

Plaintiff, a motorist involved in an automobile accident, brought an action against the estate of the other driver involved who was killed in the accident. The Defendant estate filed a combined answer, an affirmative defense, and a counterclaim. The estate claimed in its affirmative defense that Plaintiff was negligent, but failed to affirmatively allege negligence in the counterclaim. Plaintiff filed a motion to dismiss the counterclaim for failure to state a claim. The court

granted the motion and denied Defendant's motion to amend, finding that the amendment was barred by the statute of limitations. Defendant appealed, alleging it was error to dismiss the counterclaim and to deny her motion to amend.

HELD: Trial court's denial of Defendant's application for leave to amend its counterclaim was an abuse of discretion. The proposed amendment did not substantially change the issues, but only clarified issues already raised that the estate was alleging negligence; as such, the proposed amendment related back to the date of the filing of the original counterclaim for statute of limitations purposes pursuant to Iowa R. Civ. P. 89.

Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996)

Time of Accrual of a Cause of Action

Plaintiffs, landowners in close proximity to a commercial hog confinement facility, brought a nuisance suit against the defendants--owners of the facility. The district court concluded that the facility was a temporary nuisance and awarded the landowners $45,000 in damages for their pain and suffering. Defendants appealed, and Plaintiffs cross-appealed. Defendants contend that as their property was designated an agricultural area on October 8, 1991, Iowa Code § 352.11(1) (nuisance restriction) prohibits any award for damages for nuisance actions after the property becomes included in an agricultural area.

HELD: Causes of actions accrue when the wrongful act produces loss or damage to the claimant. Thus, as the nuisance created by the operation caused the plaintiffs damage long before the land was approved as an agricultural area, and because the nuisance is a permanent one, the damages were complete at the time the nuisance arose.

A

Herrington v. Toshiba Machine Co., Ltd., 562 N.W.2d 190 (Iowa 1997).

Tolling

Two days before the two-year statute of limitations was to expire in a products liability case filed in federal court, the plaintiff, pursuant to Iowa Code § 613.18(3) certified the fact that he was unable to identify who manufactured the product that caused his injury. The federal district court certified a question inquiring whether (1) § 613.18(3) provides a new two-year statute of limitations to begin when the defendant-manufacturer is identified, or (2) the original two year statute of limitations is merely suspended pending identification.

HELD: We conclude that the tolling under Iowa Code § 613.18(3) means that the time between the filing of the certification under the statute and the identification of the manufacturer is to be deducted from the total elapsed time in computing the date of expiration of the two year statute of limitations under § 614.1(2) (injuries to person). The identification of the manufacturer does not commence a new period of limitations.

A

TRIAL

Thompson City of Des Moines, 564 N.W.2d 839 (Iowa 1997)

Discretion in Evidentiary Rulings

Jury Instructions

FACTS: Jerry Thompson, the former City of Des Moines Employment Relations Director, brought this action for breach of contract, tortious interference with contractual relationship, conspiracy, and violation of due process against the City after he lost his job when the City reorganized its management structure in 1993. The district court granted the City's summary judgment motion on all issues except for Plaintiff's "bumping rights" upon lay off theory, which was submitted to the jury. Under this theory, Thompson contends the City breached his contractual right to "bump" into another position at the same salary level as his previous position. In support of his claim, Thompson tendered into evidence fifteen Personal Action Forms (PAFs) purporting to show the City's pattern of transferring employees to different jobs while retaining the same rate of pay and benefits. The court permitted introduction of four PAFs showing "salary freezes" for City employees transferred to positions with lower pay grades, but excluding the remaining records because they were cumulative in nature. The court did permit, however, Thompson's counsel to ask a witness to examine the remaining eleven PAFs and describe what they showed. The jury returned a verdict for the defense. On appeal, Thompson seeks a new trial based on alleged errors in the exclusion of the documentary evidence and with respect to the jury instruction.

HELD: The district court did not abuse its discretion in refusing to admit all forms purporting to show the City's "bumping" policies because the tendered PAF evidence was arguably cumulative, and substantial documentation was allowed to show the City's transfer policies. Furthermore, Thompson was granted, and utilized, the opportunity to have his witness testify to the significance of the excluded documents.

HELD: We do not believe the trial court erred by refusing Thompson's request to instruct the jury on whether the employee handbook was still in effect or was rescinded by the subsequently issued SPM Manual. Litigants are entitled to have their legal theories submitted if those theories are supported by the pleadings and substantial evidence in the record. A court's instructions must convey the applicable law in such a way that the jury as a clear understanding of the issues it must decide. The trial court, however, must refuse to instruct on an issue having no substantial evidential support or which rests on mere speculation. The record in the present matter contains no evidence on the essential elements of recision underlying Thompson's requested instruction; therefore, the court properly refused the proposed instruction.

Hagen v. DeNooy, 563 N.W.2d 4 (Iowa App. 1997).

A

Inconsistent Verdicts

Jury Misconduct

A motorist who collided on a gravel road with an oncoming farm tractor and cultivator brought a negligence action against the tractor's operator and owner. At trial the evidence indicated a portion of the tractor or cultivator was on the wrong side of the road, and the motorist approached the tractor at a disputed speed between 25 and 65 m.p.h. The motorist apparently applied her brakes and left skidmarks on the road before colliding with the tractor and cultivator. The jury returned a verdict finding the Defendants at fault, but also finding that the Defendants' fault was not a proximate cause of Plaintiff's damages. The Plaintiff filed a motion for a new trial alleging: (1) the verdict was inconsistent; and (2) juror misconduct tainted the outcome of the trial because juror affidavits indicated that during a weekend break two of the witnesses conducted their own braking tests and determined the Plaintiff must have been going over 25 m.p.h.. The district court granted a new trial on the ground the jury's determination that the Defendants were at fault but their fault was not a proximate cause of Plaintiff's damages was inconsistent, and the Defendants appealed.

HELD: A jury's verdicts are to be liberally construed to give effect to the intention the jury and to harmonize the verdicts if it is possible to do so. Here, the verdicts were not inconsistent because the jury could have reasonably concluded that the Defendants' fault was not a substantial factor in producing damage to the Plaintiff and the damage Plaintiff suffered would have been incurred even though the Defendants were negligent.

HELD: To impeach a verdict on the basis of juror misconduct, three conditions must be met: (1) evidence from the jurors must consist only of a objective facts concerning what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to and with reasonable probably did influence the verdict. Although the jurors acted improperly in conducting independent experiments, the Plaintiff was not thereby prejudiced because the jury could have reasonably concluded the Plaintiff was traveling at an excessive speed from the evidence admitted at trial.

Bride v. Heckart, 556 N.W.2d 449 (Iowa 1996)
Union Mutual Insurance Co. v. Heckart, 556 N.W.2d 449 (Iowa 1996)

Jury Instructions

An employee of a general contractor who was injured at a worksite while assisting a subcontractor in excavation work brought a negligence suit against the subcontractor. At defendants request, the trial court instructed the jury on the borrowed servant doctrine. After the jury found plaintiff was a borrowed employee of the subcontractor at the time of the accident, precluding recovery, the court entered a judgment for the defendants. On appeal, the employee argues, among

other things, that the district court erred in instructing the jury on the borrowed servant doctrine.

HELD: Under Iowa R. Civ. P. 196, the trial court is required to instruct the jury as to the law applicable to all material issues in the case; however, the instructions should not marshal the evidence or give undue prominence to any particular aspect of the case.

HELD: Requested instructions that are not related to the factual issues to be decided by the jury should not be submitted even though they may set out a correct statement of the law, and submission of instructions upon issues that have no support in the evidence is error.

HELD: In weighing the sufficiency of evidence to support a jury instruction, the Iowa Supreme Court gives the instruction the most favorable construction it will bear in favor of the party seeking submission. Here, the evidence did not support submission of instructions on the borrowed servant doctrine, thus warranting reversal.

Smith v. Air Feeds, Inc., 556 N.W.2d 160 (Iowa App. 1996)

Jury Instructions

Plaintiff's hand was severed while operating a press at work. He subsequently brought a products liability action against the press manufacturer, the press designer, and a co-employee. Plaintiff settled with the co-worker and dismissed the designer. The case proceeded to trial, and the jury found the manufacturer to be 10% at fault. Plaintiff appealed, contending, among other things, that the court erred in submitting the certain jury instructions and failing to submit others.

HELD: Requested jury instructions are required to be given when they properly state the law and apply to the facts in the case.

HELD: "Substantial evidence" must be presented at trial to support the submission of a proposed jury instruction; evidence is substantial when reasonable minds would accept it as adequate to reach the conclusion.

HELD: A trial court does not err in refusing to submit a party's proposed instruction when its concepts are embodied in other instructions submitted to the jury.

Wright v. Midwest Old Settlers and Threshers Association, 556 N.W.2d 808 (Iowa 1996)

Jury Instructions - Common Carrier

Plaintiff was injured at a public threshing event while stepping down from a passenger train which drove patrons around the fenced in grounds of the event. She

filed suit against the association and train operator, maintaining that the train was a common carrier and that the association should be held to a higher degree of care. The district court declined to submit an instruction to the jury on the liability of a common carrier. The jury returned a verdict in favor of the defendants, and Plaintiff appealed.

HELD: The train operated by the association was not a common carrier, and thus the district court was correct in refusing to instruct the jury on the higher decree of care of a common carrier.

Six v. American Family Mut. Ins. Co., 558 N.W.2d 205 (Iowa 1997)

Jury Instructions - Preservation of Error

Plaintiff, an accident victim, brought this declaratory judgment action against the tort-feasor's insurer to establish the insurer was liable, to the extent of its policy limits, to satisfy a stipulated judgment in favor of the victim and against the tort-feasor. Factual issues were submitted to the jury, and the jury returned a special verdict in favor of the insurer finding that the amount of stipulated judgment was not reasonable. The district court entered final judgment in favor of the insurer, and denied Plaintiff's motions for a new trial, judgment notwithstanding the verdict, declaratory relief, and a determination of a reasonable settlement amount as untimely. Plaintiff appealed, seeking a determination that the purported entry of a final judgment by the district court was premature because there were issues yet to be resolved.

HELD: An erroneous statement in the jury instructions, not objected to by Plaintiff at trial, that the accident victim could not recover against the tort-feasor's automobile insurer if the damages stipulated in the settlement between the victim and the insured were not reasonable and prudent did not prevent Plaintiff's challenge in this appeal. While such language might have made a general verdict final and binding on this issue, it was mere surplusage with respect to the jury's special verdict.

Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418 (Iowa 1996)

Motion for Directed Verdict

Plaintiff coal mining company brought an action against the county in which it was located after the county passed a county-wide zoning ordinance which affected the coal mining company. The district court awarded damaged to the mining company on its takings claim and claim of tortious interference with a prospective contractual relationship. The county appealed. One of its arguments on appeal was that the district court should have sustained the county's motion for directed verdict.

HELD: In an action tried to the court without a jury, Defendant should have designated its motion as a motion to dismiss, rather that as a motion for a directed verdict. The misnomer is not material, however, as the motions are equivalent.

When reviewing the trial court's ruling on a motion for directed verdict, the appellate court reviews the evidence in the same light as the district court to determine whether or not a jury question was generated. The district court properly overruled the motion for directed verdict as the evidence was sufficient to generate a jury question.

In Re Marriage of Kunkel, 555 N.W.2d 250 (Iowa App. 1996)

Pretrial Orders

In this dissolution proceeding, the husband appealed the custodial provisions of the dissolution decree which awarded physical custody of their son to his wife based solely upon the fact that she has been the primary care giver of the child since his birth. The mother cross-appealed, claiming that the district court should have considered her home study report. The court excluded the report because it was not submitted as required by a pretrial order.

HELD: Iowa R. Civ. P. 138, which authorizes the entry of appropriate pretrial orders governing the course of trial, provides the court with the inherent authority to enforce such orders with appropriate sanctions. Thus, it was within the trial court's discretion to exclude the custody evaluation because it was not timely submitted pursuant to a pretrial order.

Glenn v. Carlstrom, 556 N.W.2d 800 (Iowa 1996)

Trial Management Orders

A patient sued her neurosurgeon and the hospital were an operation on her tethered spinal cord was performed for medical malpractice, and the jury returned a defense verdict. On appeal, the patient contends, among other things, that a trial management order entered by the district court improperly encroached on her ability to present expert medical evidence.

HELD: Trial court has considerable discretion in directing the course of trial.

HELD: An amended trial management order entered following repeated delays by Plaintiff, requiring Plaintiff to call her first expert witness at 9 a.m. the following Monday and her second expert no later than 1:30 that day did not unduly restrict her ability to effectively present her medical evidence to the jury.

A

WORKERS' COMPENSATION

Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

Alternate Medical Care

Reynolds suffered a work-related knee injury in 1993 while employed by Pirelli-Armstrong Tire Co. (Pirelli). Reynold's medical care was eventually assumed by Dr. Kirkland in May 1994. In May 1995, Reynolds' knee symptoms had not improved and Dr. Kirkland stated that he did not feel there was anything further to be done. Dr. Kirkland also stated Reynolds was free to get a second opinion. Reynolds then consulted with Dr. Riggins who recommended diagnostic arthroscopy. Although Reynolds had previously declined surgery offered by a prior doctor (Dr. Breedlove), Reynolds requested that Pirelli approve this surgical procedure which was to be done by Dr. Kimelman. Pirelli refused, and Reynolds filed an application for alternate medical care pursuant to Iowa Code § 85.27. The deputy industrial commissioner authorized the alternate medical care on the grounds that Dr. Kirkland's offer of no further care was tantamount to refusing to treat the injury. The deputy industrial commissioner also stated that an alternative basis for granting alternate medical care was Dr. Kirkland's de facto referral of Reynolds to another doctor by stating that Reynolds was free to get a second opinion. The deputy's decision was upheld on judicial review by the district court and Pirelli appealed.

HELD: Affirmed. The supreme court held that substantial evidence supported the deputy's decision that Dr. Kirkland's care was not reasonably suited to treating Reynolds' knee complaints. Consequently, the supreme court held that when employer-authorized medical care has not been effective and such care is "inferior or less extensive" than other available care requested by the employee, it is reasonable for the industrial commissioner to order alternate medical care requested by the employee. The supreme court specifically declined to address the second basis of the deputy's decision which asserted that Dr. Kirkland had essentially referred Reynolds to another doctor for treatment.

Bridgestone/Firestone v. Accordino, 561 N.W.2d 60 (Iowa 1997).

Appellate Procedure – "Short Form" Appeal Decisions

Appellate Procedure – Scope of Supreme Court Review

Accordino brought a workers' compensation claim for benefits related to a bilateral carpal tunnel condition. Following a hearing, a deputy industrial commissioner entered a ruling holding that Accordino's injury was compensable and also determining the amount of benefits to which she was entitled. Bridgestone appealed to the industrial commissioner and Accordino cross-appealed. The industrial commissioner entered a "short form" decision affirming the deputy's decision: the decision was essentially one-paragraph stating that the industrial commissioner had reviewed the evidence and concurred in the deputy's prior findings of fact and conclusions of law. Bridgestone sought judicial review by the district court and Accordino cross-appealed. The district

court, acting sua sponte, held that the industrial commissioner's short form appeal decision did not meet the requirements of Iowa Code § 17A.16(1), which requires detailed factual and legal findings and conclusions in any agency decision. Consequently, the district court remanded the matter to the industrial commissioner for a detailed decision. The district court overruled a joint motion for reconsideration by the parties pursuant to Iowa Rule of Civil Procedure 179(b), and the parties again appealed and cross-appealed to the supreme court.

HELD: Reversed and remanded. The supreme court held that the industrial commissioner was not required to write a detailed opinion in cases where the deputy's arbitration decision was already sufficiently detailed to meet the requirements of Iowa Code § 17A.16(1). However, as the district court had not entered any decision on the merits of the appeal, the supreme court held it did not have jurisdiction to consider the merits of the case in the present appeal, despite the obvious judicial economy of doing so. Consequently, the case was remanded to the district for entry of an appropriate decision on the merits.

Thompson v. United States Fidelity & Guar. Co., 559 N.W.2d 288 (Iowa 1997).

Bad Faith – Standard for Summary Judgment

While working for McKiness General Contractors in October 1991, Thompson fell two stories from the roof of a building onto cement resulting in severe injuries. McKinness' workers' compensation carrier, United States Fidelity & Guaranty Co. (USF&G), initially provided workers' compensation benefits, but later terminated those benefits on the ground that Thompson was intoxicated at the time of the incident and that the intoxication was a substantial factor in causing his fall. This denial was based on post-injury lab tests which indicated cocaine and other drug use. Thompson himself admitted to using cocaine approximately 25 hours before his accident. The deputy industrial commissioner ruled that USF&G had not proven their defense and awarded benefits to Thompson. Thompson subsequently sued USF&G for bad faith in district court. The district court directed a verdict for USF&G on the basis that the claim was fairly debatable. Thompson appealed to the Iowa Supreme Court.

HELD: Affirmed. The Iowa Supreme Court began its analysis by reviewing the circumstances in which summary judgment or a directed verdict is appropriate in a bad faith case. The court noted that judgment as a matter of law may be appropriate in cases where there is no substantial evidence to support the elements of the claim (i.e., that the insurer lacked reasonable basis for denial and that it knew or should have known it lacked such a basis). In the present case, the court held that, although USF&G did not prove that Thompson was intoxicated at the time of the accident, the evidence available to USF&G, including the drug test results and Thompson's admission of cocaine use 25 hours prior to the accident, was sufficient to provide a fairly debatable issue as to a potential intoxication defense as a matter of law.

Baird v. Ottumwa Community Sch. Dist., 551 N.W.2d 874 (Iowa 1996).

Claim Preclusion – Sexual Harassment

A

Baird filed a petition for workers' compensation benefits asserting an emotional or psychological injury as a result of alleged abusive treatment by supervisors during her employment with the Ottumwa Community School District (the "school"). Baird also brought a simultaneous civil rights claim against the school alleging sexually motivated harassment and retaliation. The school subsequently entered into a settlement with Baird of her civil rights claim, denying the allegations made by Baird but agreeing to pay Baird $35,000 and to take several additional actions. The civil rights settlement agreement stated that it did not include any recovery for any claims for medical care or other relief available under the Iowa Workers' Compensation Laws and also stated that Baird retained "all rights to proceed under the Iowa Workers' Compensation Act." Subsequent to the civil rights settlement, the school filed a motion for summary judgment before the industrial commissioner asserting that Baird's pursuit of civil rights remedies precluded her claim under Iowa's workers' compensation laws for any injury which may have resulted from the same conduct by the employer. Relying upon *Ottumwa Housing Authority v. State Farm Fire & Casualty Co.*, 495 N.W.2d 723 (Iowa 1993), the industrial commissioner granted summary judgment in favor of the school and was affirmed upon judicial review by the district court. Baird appealed to the supreme court.

HELD: Reversed and remanded. The supreme court held that summary judgment was inappropriate as genuine issues of material fact existed with respect to the nature of the acts forming the basis of Baird's civil rights claim and her workers' compensation claim. The court noted that not all circumstances which may give rise to a compensable mental injury for workers' compensation purposes would rise to the level of a civil rights sexual harassment claim. Further, the record did not reflect whether Baird's workers' compensation claim was based upon the same circumstances as her civil rights claim. Consequently, summary judgment was inappropriate.

Decatur County v. Public Employment Relations Bd., 564 N.W.2d 394 (Iowa 1997).

Collective Bargaining Agreements – Negotiations Regarding Statutory Workers' Compensation Benefits

Prior to the expiration of a collective bargaining agreement between Decatur County and a union representing a group of the county's employees, the county board of supervisors passed a resolution which limited the accrual of sick leave, vacation days, and holiday pay while an employee was receiving workers' compensation benefits. During the next period of collective bargaining negotiations, the union proposed changes to the provisions. The county refused to bargain on the subject, claiming among other reasons that the union's proposal violated Iowa Code § 85.2 (the section provides that, when a county is an employer, the provisions of the workers' compensation law are "exclusive, compulsory, and obligatory upon both employer and employee."). The public employment relations board (PERB) determined that the subject of workers' compensation benefits was a legal subject of mandatory collective bargaining. PERB's decision was upheld on judicial review by the district court, and the county appealed to the supreme court.

HELD: Affirmed. The supreme court first determined that matters of holiday pay, sick leave, and vacation pay are clearly subjects of mandatory bargaining under Iowa Code § 20.9. The court further determined that the county's contrary prior resolution on the subject did not make the subject an "illegal" topic of bargaining; the county's right of "home rule" could not conflict with a legislative determination of mandatory subjects of collective bargaining. Finally, the court held that the parties could negotiate methods of supplementing or augmenting the statutory workers' benefits without violating Iowa Code § 85.2.

Conklin v. MacMillan Oil Co., 557 N.W.2d 102 (Iowa Ct. App. 1996).

Death Benefits – Common Law Marriage

Charlene Johnson and Donald Conklin were married in 1974 and had three children during their marriage. They were divorced in 1985. In 1987, Conklin and Johnson began to live in a common household and indicated on occasion that they were husband and wife, although they never remarried in a legal ceremony. At various times, Johnson and Conklin would indicate in documents that they were single or divorced, and at other times would indicate that they were married. Conklin was killed while in the course of his employment with MacMillan Oil Company. Johnson sought spousal death benefits from MacMillan. Although a deputy industrial commissioner entered an arbitration decision finding Johnson and Conklin to be common law married, the industrial commissioner reversed that decision on the basis that Johnson had not proven all of the elements of a common law marriage. The industrial commissioner's decision was upheld by the district court upon judicial review, and Johnson appealed.

HELD: Affirmed. Contrary to Johnson's assertion, there is no presumption of common law marriage. Rather, the burden of proof is on the party asserting the existence of a common law marriage, and any claim of common law marriage is regarded with suspicion and is closely scrutinized. Although Johnson did prove continuous cohabitation, she did not demonstrate any open declaration to the public by both parties as to their status as husband and wife. Further, the industrial commissioner's determination that Johnson did not intend to be common law married was supported by substantial weight in the record. Consequently, Johnson was not entitled to spousal death benefits.

Bride v. Heckart & Sons, 556 N.W.2d 449 (Iowa 1996).

Employer/Employee Relationship – Borrowed Servant Doctrine

Indemnity and Subrogation – Intervention by Workers' Compensation Insurance Carrier in Third Party Action

Bride was employed by Winger Contracting Company (Winger) as a plumber. In 1989, Winger was hired by a general contractor to relocate a storm sewer system and water main on a job site. Winger contracted with Heckart & Sons to provide a backhoe and operator for excavation work on the project. The backhoe operator was expected to assist Winger employees in lowering pipes into trenches. Gary Heckart, an employee and president of Heckart & Sons, was using the backhoe to position a pipe when a block of

wood snapped and struck Bride. Bride's leg was eventually amputated. Bride received workers' compensation benefits through Winger's insurance carrier, Union Mutual Insurance Company (Union Mutual). Bride also filed a negligence action against Gary Heckart and Heckart & Sons. Union Mutual filed a notice of lien and a petition for intervention which were resisted by Bride. The district court held that the lien had not been timely filed but did allow the petition for intervention.

Gary Heckart and Heckart & Sons asserted that Gary was a borrowed servant of Winger at the time of the injury and consequently Gary and Bride were co-employees of Winger. Under this theory, defendants argued that Iowa Code § 85.20(2) required proof of gross negligence for Gary to be liable for Bride's damages and for Heckart & Sons to be vicariously liable for Gary's actions. The jury returned a special verdict finding Gary Heckart was a borrowed employee of Winger. Bride appealed to the supreme court.

HELD: Reversed and remanded. The supreme court held that there was insufficient evidence to submit the issue of whether Gary Heckart was a borrowed servant to the jury. The court reviewed the evidence and the legal standard for the borrowed servant doctrine and determined that Gary Heckart was at all times under the direction and control of Heckart & Sons and was never subject to direction or control by Winger. At most, Gary Heckart was cooperating in connecting pipes pursuant to industry practice.

HELD: The supreme court also determined that, although Union Mutual was entitled to intervene in the action, Union Mutual's participation at trial was to be severely limited. The court emphasized that primary control and direction of the litigation always remains with the injured party. The supreme court also reaffirmed prior case law holding that evidence of payment of workers' compensation benefits is inadmissible so long as the indemnification requirements of § 85.22 are satisfied.

Horsman v. Wahl, 551 N.W.2d 619 (Iowa 1996) (per curiam).

Exclusive Remedy Provision – Sole Proprietors

Horsman lost her right index finger while working at a grocery store owned and operated by Wahl. Wahl, as the store's sole proprietor, had elected to be covered for workers' compensation pursuant to Iowa Code §85.1A. Horsman filed a petition in district court against Wahl claiming her injury was caused by Wahl's gross negligence. Wahl moved to dismiss the petition on the grounds that, as Horsman's employer, any claim by Horsman was barred by the exclusive remedy provision of Iowa Code § 85.20(1). Horsman argued that Wahl's election to be covered for workers' compensation under Iowa Code § 85.1A made Wahl a co-employee who could be held liable for gross negligence pursuant to Iowa Code § 85.20(2). The district court held that Wahl's election to be covered as a sole proprietor did not alter his status as an employer under Iowa Code § 85.20. Consequently, the district court dismissed Horsman's petition for lack of subject matter jurisdiction. Horsman appealed to the supreme court.

HELD: Affirmed. The supreme court held that the plain language of § 85.1A was limited to the issue of whether a sole proprietor is covered by the workers' compensation laws. Consequently, election by a sole proprietor to be covered pursuant to § 85.1A does

not alter the exclusive remedy provision available to that employer pursuant to Iowa Code § 85.20.

Smith v. CRST Int'l, Inc., 553 N.W.2d 890 (Iowa 1996).

Exclusive Remedy Provision – Liability of Third Party Vehicle Owner for Negligence of Co-Employee Driver

Smith and Symmonds were truck drivers employed by Lincoln Sales and Services, Inc. (Lincoln), a company that leases its employee drivers to interstate motor carriers. In 1990, Smith and Symmonds were employed to drive a tractor trailer owned by Rapid Leasing, Inc. (Rapid), an equipment leasing company, which had been leased to CRST, Inc. (CRST), an interstate motor carrier. CRST and Lincoln are wholly owned subsidiaries of CRST International, Inc. (International), a holding company; Rapid is a wholly owned subsidiary of Lincoln. During the course of their employment, a motor vehicle accident occurred in Utah while Symmonds was driving the truck. Smith brought a claim for workers' compensation benefits against CRST and Lincoln. Following a hearing, the industrial commissioner concluded Smith was an employee of both CRST and Lincoln and that his injuries had arisen out of and in the course of his employment. The industrial commissioner's award of workers' compensation benefits was not at issue in this appeal.

Smith also filed suit in district court against International, CRST, Rapid, and Lincoln alleging negligence on the part of his co-employee, Symmonds, and asserting that Symmonds alleged fault should be imputed to each of the defendants under Iowa Code § 321.493 and the doctrine of respondent superior. Defendants filed a joint motion for summary judgment asserting that Lincoln and CRST were statutorily immune from tort liability under Iowa Code § 85.20 as they were Smith's employers; Rapid, CRST and Lincoln participated in a common enterprise which extends CRST's and Lincoln's immunity to Rapid; and finally, that no claim for liability could exist against International as International was a holding company not actively engaged in any business other than as an ownership entity. Additionally, Defendants contended that, as no gross negligence had been alleged on the part of Symmonds, Symmonds was immune from liability pursuant to Iowa Code § 85.20. Consequently, Defendants argued that, as Symmonds was immune, that immunity extended to his employers. The district court rejected Rapid's common enterprise claim, holding that Rapid did not exert control over his daily activities. However, the district court granted summary judgment in favor of each defendant on the ground that, as Symmonds was immune from liability, no liability could be imputed to any of his employers. Smith appealed to the supreme court, but on appeal disputed only the district court's grant of summary judgment to Rapid.

HELD: Affirmed in part, reversed in part, and remanded. Relying on a similar recent decision, *Estate of Dean v. Air Exec, Inc.*, 534 N.W.2d 103 (Iowa 1995), the supreme court determined that Symmonds' co-employee immunity from liability did not create similar immunity from liability in a third party owner of a vehicle when that owner was not also the employer of the driver. The court stated that Rapid's liability for Smith's injuries results from Symmonds' alleged negligence, rather than Symmonds' liability for his negligence. Consequently, Rapid could still be held liable for Symmonds' negligence

even though Symmonds was immune from liability for his negligence under Iowa Code § 85.20. The supreme court also noted that it would be inappropriate to extend the exclusive remedy provisions of Iowa Code § 85.20 to the benefit of third parties not included in the language of that statute. The supreme court reversed the grant of summary judgment in favor of Rapid and remanded the case for further proceedings. However, the supreme court did uphold the grant of summary judgment in favor of the remaining defendants on the ground that Smith's failure to argue those issues on appeal constituted a waiver of those issues.

Veasley v. CRST Int'l, Inc., 553 N.W.2d 896 (Iowa 1996).

Exclusive Remedy Provision – Liability of Third Party Vehicle Owner for Negligence of Co-Employee Driver

Employer-Employee Relationship – Joint Venture by Multiple Potential Employers

Veasley and Powlistha were truck drivers hired by Lincoln Sales and Service, Inc. (Lincoln), to drive a truck owned by Rapid Leasing (Rapid), and leased to CRST, Inc. (CRST), an interstate motor carrier. Powlistha was driving the truck in Arizona when a motor vehicle accident occurred. Veasley brought suit in district court against Rapid, Lincoln, CRST, and a holding company, CRST International (International). The defendants filed motions for summary judgment on several grounds, including an argument that Powlistha's alleged negligence could not be imputed to Rapid, the owner of the truck, as Powlistha was immune as a co-employee for negligent actions pursuant to Iowa Code § 85.20. Rapid also argued that it was immune from liability pursuant to Iowa Code § 85.20 on the theory that Rapid, Lincoln and CRST are so closely affiliated that Rapid must be considered the employer of Veasley. Summary judgment was granted in favor of Rapid, and Veasley appealed to the supreme court.

HELD: Reversed and remanded. Relying on a nearly identical case decided the same date, *Smith v. CRST International, Inc.*, 553 N.W.2d 890 (Iowa 1996) (also summarized in this outline), the supreme court again determined that a co-employee's immunity from liability for negligence under Iowa Code § 85.20 is a personal defense that does not extend to a third party owner of a vehicle involved in an accident. The court further determined that Rapid was not Veasley's employer, and consequently, Iowa Code § 85.20 provided no direct immunity to Rapid. Although a prior industrial commissioner decision held that Lincoln was CRST's agent for hiring employees and consequently both entities were employers for purposes of workers' compensation laws, in the present case, Rapid established neither that Lincoln was a hiring agent for Rapid nor that Rapid possessed any right to control Veasley's activities. The supreme court also rejected Rapid's claim that the various corporate entities involved in the claim were engaged in a joint venture such that each and every one of them could be regarded as Veasley's employer for purposes of workers' compensation law. The supreme court noted that the various corporations had been arranged specifically to compartmentalize different parts of the joint venture. The supreme court determined it would be unjust to allow Rapid to disregard the corporate forms it had arranged in order to provide an advantage in litigation. The supreme court also ruled against Rapid on two additional issues regarding whether Iowa Code § 321.493, which imposes liability on a truck owner for negligent

acts of his driver, could be applied to an accident occurring in Arizona, and also on the issue of whether a 1995 amendment to § 321.493, which narrowed the scope of that section in cases involving leased vehicles, could be applied retroactively.

Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa Ct. App. 1996).

Expert Testimony

Sanchez sustained a slip and fall injury in January 1991 while working for Blue Bird Midwest (Blue Bird). Sanchez eventually sought medical treatment for a lower back strain and received workers' compensation benefits while he was off work for approximately two weeks. He was released to full duty work on January 28, 1991. Sanchez had not missed any work due to back pain nor had he sought any medical treatment for his back until after he was laid off in August 1991. Sanchez subsequently began work for a different employer and again began to experience and treat for back pain. His treating physician, Dr. Hart, noted in his medical records that Sanchez's back pain was work related. However, Dr. Hart's medical records indicated Sanchez had not had previous treatment for back pain, which was untrue. Dr. Hart was also unaware of the physical nature of Sanchez's work with his subsequent employer. Finally, Sanchez's credibility was questionable as he had previously had a doctor falsify a report so that he could be excused from work and had later misled a second doctor by passing the false report off as accurate. Although a deputy industrial commissioner awarded Sanchez workers' compensation benefits, the industrial commissioner reversed on appeal finding that Sanchez had not established a causal connection between his injury and his subsequent back complaints through sufficient reliable medical evidence. The district court affirmed this decision on judicial review and Sanchez brought the current appeal.

HELD: The weight to be given an expert opinion is for the industrial commissioner to decide in its role as fact finder. The industrial commissioner may reject uncontroverted expert opinion testimony when that opinion was not fully informed.

In Re Estate of Sylvester, 559 N.W.2d 285 (Iowa 1997).

Indemnity and Subrogation – Approval of Third Party Settlement

Indemnity and Subrogation – Loss of Consortium Claims

Sylvester and Lauer were both killed in a motor vehicle collision. At the time of the collision, Sylvester was in the course of his employment. Lauer's estate sued Sylvester's estate for wrongful death, Sylvester's wife and son sued Lauer for loss of consortium, and the employer's workers' compensation carrier, Cincinnati Insurance Company (Cincinnati) brought suit against Lauer for wrongful death on behalf of Sylvester in its role as subrogee. The parties agreed to a global settlement in which Sylvester's insurer paid Lauer $800,000 for wrongful death while Lauer's insurance carrier paid $35,000 on the consortium claim. Cincinnati filed a resistance to distribution of the $35,000 claiming that a portion of the $35,000 should be allocated to its wrongful death claim and further objecting that the settlement required approval by the industrial commissioner pursuant to

A

Iowa Code § 85.22(3). The district court entered an order approving the settlement and Cincinnati appealed to the Iowa Supreme Court.

HELD: Affirmed. The supreme court first determined that the district court had jurisdiction to approve the settlement rather than the industrial commissioner. Under the facts of this particular case, the supreme court determined that there was no basis for believing that any recovery could be made on Sylvester's estate's wrongful death claim. Consequently, unless the settlement proceeds can be otherwise subjected to Cincinnati's indemnity claims, there is no reason to submit the issue to the industrial commissioner. However, the supreme court continued its analysis by noting that loss of consortium claims are separate property rights belonging to each spouse. By contrast, an insurance carrier's right of indemnity under §85.22(1) is against the worker's recovery. Consequently, Cincinnati had no indemnity interest in the loss of consortium portion of the settlement.

Toomey v. Surgical Services, P.C., 558 N.W.2d 166 (Iowa 1997).

Indemnity and Subrogation – Medical Malpractice Claims

Toomey sustained work-related bilateral hernias. Surgery was performed by Dr. Llewellyn which resulted in serious medical complications. Toomey brought a medical malpractice action in district court against Surgical Services, P.C. and Dr. Llewellyn. United Fire and Casualty Co., the workers' compensation insurance carrier, had provided in excess of $155,000 in benefits. Pursuant to Iowa Code § 85.22, United Fire filed a notice of lien in the medical malpractice action, seeking to recover past and future workers' compensation benefits. All of the other parties to the district court action filed motions for summary judgment arguing that Iowa Code § 147.136 precluded imposition of a workers' compensation lien because that code section prohibits recovery by a medical malpractice plaintiff for any economic losses that have been replaced by insurance or other sources. The district court determined that § 147.136 precluded any § 85.22(1) workers' compensation lien in a medical malpractice action and granted summary judgment on the issue. United Fire appealed.

HELD: Affirmed. The supreme court analyzed the competing code sections and determined that § 147.136 acted as a special exception to the general lien permitted by § 85.22. Essentially, the court determined that allowing a § 85.22 workers' compensation lien to attach would be an unjust double reduction of an injured employee's recovery insofar as the injured employee, who cannot recover damages for medical expenses and lost wages, would have to reimburse the workers' compensation insurance carrier out of a recovery for other damages, such as pain and suffering.

Firstar Bank of Burlington v. Hawkeye Paving Corp., 558 N.W.2d 423 (Iowa 1997).

Indemnity and Subrogation – Notice of Lien

Daniel Borrego, Jr. was killed in the course of his employment with Hawkeye Paving Corp. Hawkeye's workers' compensation insurer was Fireman's Fund Insurance Company (Fireman's Fund). Borrego's estate and his surviving child, Sylvia, brought

A

suit in district court against the driver of the car that killed Borrego. The estate's attorney notified Fireman's Fund by letter of the lawsuit but did not serve an original notice as required by Iowa Code § 85.22. The estate's attorney also assured Fireman's Fund that any settlement proceeds would be used to offset any obligation by Fireman's Fund to provide survivor's benefits to Sylvia. The lawsuit was eventually settled for $100,000 and a release was signed by Fireman's Fund indicating that the settlement offset any future obligation to provide survivor's benefits. However, two additional children then asserted claims for survivor's benefits. These children brought a claim for workers' compensation survivor's benefits against Hawkeye and Fireman's Fund (as well as a malpractice against Hutchison). The industrial commissioner awarded survivor's benefits but declined to settle any indemnity issue on the grounds the commissioner was without jurisdiction. The children then brought suit in district court to obtain judgment for the workers' compensation award. Fireman's Fund filed a request for declaratory judgment asserting their entitlement to a lien or credit for the third party recovery. The children argued that Fireman's fund did not have a lien as it did not file a notice of lien in the third party action. The district court ruled that Fireman's Fund had a valid lien on the third party recovery and further had a right to be indemnified from the settlement proceeds. The children appealed to the supreme court.

HELD: Affirmed. The supreme court determined that, as the estate's attorney never served a copy of the original notice on Fireman's Fund or Hawkeye, the requirements of § 85.22 had not been met. Consequently, Fireman's Fund had a valid lien on the third party recovery. The supreme court specifically determined that actual notice of the third party action was insufficient to meet the requirements of § 85.22.

A

Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996).

In the Course of Employment – Going and Coming Rule

In the Course of Employment – Special Errand Exception

In the Course of Employment – Deviation Exception

Medical Expenses – Modifications to Home and Van

Medical Expenses – Home Nursing Services

Industrial Disability – Accommodation by Employer

Ciha was employed by Quaker Oats as a maintenance supervisor. Although Ciha's duties did not normally include weekend work, he was occasionally assigned to on-call weekend supervisory duty. During one such weekend in 1991, Ciha was contacted by the Quaker Oats plant because several cooling fans were malfunctioning. Ciha drove his motorcycle to the plant on a direct route in order to remedy the problem. On his way home, Ciha took a different, less direct route that took approximately 5-7 minutes longer than his usual route. While returning home, Ciha was involved in a serious motor vehicle accident which rendered him a quadriplegic. Ciha was eventually released to return to work at Quaker Oats in a new position as a materials supervisor. Quaker Oats made several significant accommodations in order to allow Ciha to perform the duties of this new position. Ciha's medical condition also required significant modifications to his home and van. Ciha's wife also underwent special training to perform certain nursing services for her husband. The industrial commissioner held that Ciha's injury had occurred in the course of his employment, and further determined that the home and van modifications constituted compensable appliances under workers' compensation law. The industrial commissioner also determined that Ciha's wife was to be reimbursed for the reasonable value of the nursing services she provided to her husband. Finally, the industrial commissioner determined that Ciha was entitled to an 80% industrial disability award. The industrial commissioner's decision was upheld by the district court upon judicial review. Quaker Oats appealed to the supreme court.

HELD: Affirmed. The supreme court held that Ciha's injury occurred in the course of his employment. Although the going and coming rule generally excludes from workers' compensation coverage those injuries occurring while an employee travels to or from work, the supreme court agreed with the industrial commissioner's finding that Ciha's travel on the date in question fell into the special errand exception to the going and coming rule. In this particular case, Ciha's weekend on-call duty was not a normal part of his job requirements. Rather, Ciha would not have traveled to work on that particular day except to respond to a specific emergency at the plant. The court further agreed with the industrial commissioner that the slightly longer return route selected by Ciha did not constitute a substantial deviation from the most direct route between Ciha's home and the plant. Consequently, Ciha was still considered to be in the course of his employment and his injury was compensable.

HELD: Modifications to Ciha's home and van to accommodate his wheelchair were compensable appliances under Iowa Code § 85.27. The supreme court, relying on Manpower Temporary Services v. Sioson, 529 N.W.2d 259 (Iowa 1995), determined that the industrial commissioner could view the home and van modifications as an extension of Ciha's wheelchair which were specifically made to provide additional function for Ciha.

HELD: Ciha's wife was entitled to reimbursement for the value of skilled nursing services provided to her husband. The supreme court held that reasonable nursing services are medical expenses which may be recovered under Iowa Code § 85.27. Further, Quaker Oats did not present any evidence contesting the reasonableness of the fees sought to be recovered by Ciha's wife. Lacking any contrary evidence, an affidavit and testimony by Ciha's wife regarding the services performed and the value of those services was sufficient evidence to permit an award of nursing service expenses to Ciha's wife.

HELD: The industrial commissioner's award of 80% industrial disability was supported by substantial evidence in the record. Although Quaker Oats contended that its significant accommodations of Ciha's condition mandated a significantly reduced award, the supreme court agreed with the industrial commissioner's finding that Ciha's ability to compete for jobs in the general job market would be severely limited if Ciha should lose his position with Quaker Oats.

Miedema v. The Dial Corp., 551 N.W.2d 309 (Iowa 1996).

In the Course of Employment – Personal Comfort Doctrine

Arising Out of Employment – Causal Connection

Arising Out of Employment – Increased Risk Rule

On August 19, 1991, Miedema, an employee of The Dial Corporation, clocked in for his shift and then went to the rest room to use the toilet. While turning to flush the toilet, Miedema experienced severe lower back pain which required treatment at the emergency room. Miedema missed approximately one month from work before returning to full duty. Miedema subsequently filed a petition before the Industrial Commissioner seeking workers' compensation benefits. The Industrial Commissioner, in an appeal decision, held that although Miedema's back injury had occurred in the course of his employment, it had not arisen out of his employment. The Industrial Commissioner's decision denying Miedema workers' compensation benefits was upheld by the district court upon judicial review. Miedema appealed to the supreme court.

HELD: Affirmed. The supreme court drew a careful distinction between "arising out of" and occurring "in the course of" employment for purposes of establishing a compensable workers' compensation injury. The court agreed that Miedema's injury had clearly arisen in the course of his employment by applying the personal comfort doctrine which allows employees to attend to matters of personal comfort while on duty without being found to have left the course of their employment. However, the court noted merely because an

A

injury occurs in the course of employment does not mean that the injury also arose out of the employment. The supreme court held that Miedema had not proven any causal connection between his employment and his injury. The supreme court specifically held that nothing about the rest room facilities in question placed Miedema at an increased risk of injury. As the court stated, "Any risk of back injury associated with use of Dial's toilet seems to have been singular to Miedema and is not causally connected to the conditions of the rest room facilities."

Waterhouse Water Conditioning, Inc. v. Waterhouse, 561 N.W.2d 55 (Iowa 1997).

In the Course of Employment – Going and Coming Rule

In the Course of Employment – Employer-Provided Conveyance Exception

Creg Waterhouse was president, manager, and a shareholder of Waterhouse Water Conditioning, a family-owned business. Because of the nature of his job, Creg often worked at home. Creg also traveled to and from work in a company-provided van. On September 4, 1991, the van was unavailable as it was being repaired. Creg chose to go to work by bicycle, which he had done on previous occasions. On the way to work, Creg was struck and killed by an automobile. Creg's wife, Kathleen, brought a claim before the industrial commissioner for spousal death benefits. At hearing, the deputy industrial commissioner denied benefits on the basis of the "going and coming rule", which provides that transportation to and from work is not in the course of employment. On appeal, the industrial commissioner reversed the deputy's decision, holding that the accident fell within two exceptions to the going and coming rule: 1) the employer had provided a conveyance for Creg's transportation to work, and 2) Creg's home was a separate work site, so that travel between the two sites was in the course of employment. The industrial commissioner's decision was affirmed on judicial review, and the employer appealed to the supreme court.

HELD: Affirmed. The supreme court held that the employer had provided Creg with a means of transportation to and from work, and consequently assumed the risks inherent in the use of that conveyance. The substitution of a bicycle for the van was not unreasonable as the van was unavailable and Creg had previously used his bicycle to travel to work. The court declined to address whether Creg's home constituted a second work site.

Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450 (Iowa 1996).

Occupational Hearing Loss – Tinnitus

Suspension of Benefits – Refusal of Independent Medical Examination

Ehteshamfar developed tinnitus and hearing loss as a result of his employment with UTA Engineered Systems Division (UTA). These conditions eventually required Ehteshamfar to leave his employment. Ehteshamfar filed a claim for workers' compensation benefits and the deputy industrial commissioner held that his tinnitus condition was compensable as a permanent impairment to the body as a whole rather than as an occupational hearing loss pursuant to Iowa Code chapter 85B or as a scheduled hearing loss pursuant to Iowa Code § 85.34(2)(r). The deputy further found that Ehteshamfar had sustained a 100% loss of earning capacity, although the deputy did suspend those benefits for a period of time because of Ehteshamfar's refusal to undergo an independent medical evaluation as required by Iowa Code § 85.39. On appeal, the industrial commissioner determined that the tinnitus condition was another aspect of hearing loss and consequently was compensable only as an occupational hearing loss pursuant to Iowa Code chapter 85B. Upon judicial review, the district court affirmed the industrial commissioner's decision that the tinnitus condition was an occupational hearing loss and also affirmed the suspension of benefits for refusal of an independent medical examination. Both parties appealed portions of that decision to the supreme court.

HELD: Affirmed in part, reversed in part, and remanded. The supreme court determined that tinnitus does not qualify as an occupational hearing loss because tinnitus is a medical condition in which a person perceives sounds that do not exist rather than being a condition which prevents a person from hearing. Consequently, the supreme court determined that the plain language of Iowa Code Chapter 85B and Iowa Code § 85.34(2)(r) cannot be applied to cases of tinnitus. Rather, Ehteshamfar's tinnitus condition must be compensated as a body as a whole injury under the catch-all permanent disability section, § 85.34(2)(u).

HELD: Refusal of an independent medical examination pursuant to Iowa Code § 85.39 required suspension of benefits where Ehteshamfar's only excuse for refusal was that he was not represented by an attorney at the time the examination was requested.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Penalty Benefits

Meyers injured his left knee while employed by Holiday Express Corp. (Holiday Express). Meyers missed several intermittent periods of time from work as a result of this injury. On several occasions, the workers' compensation insurance carrier delayed commencing benefits to Meyers. Also, some early benefits were paid at an erroneously low weekly compensation rate. After a hearing, the industrial commissioner's decision refused to impose penalty benefits on the grounds that the delays were minimal, even though there had been no showing that the delays were reasonable, were based on probable cause or excuse. Upon judicial review, the district court affirmed the industrial commissioner's decision and Meyers appealed. The Iowa Court of Appeals affirmed in part and remanded additional issues to the industrial commissioner. The supreme court granted further review.

HELD: Affirmed in part, reversed in part, and remanded. Essentially, the supreme court reaffirmed its holding in two recent decisions that penalty benefits are mandatory

A

whenever weekly benefits are delayed without reasonable or probable cause or excuse. The supreme court summarized in detail the various rules which are to be applied in analyzing penalty situations.

NOTE: This case should be read in conjunction with *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254 (Iowa 1996), and *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229 (Iowa 1996), which also address interest and penalty issues.

Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996).

Permanent Disability Benefits – Testimony of Lay Witnesses

Penalty Benefits – Unreasonable Delay in Payment of Weekly Benefits

Interest – Adoption of United States Rule in Workers' Compensation Cases

Christensen was employed by Snap-On Tools Corp. (Snap-On) as a strip tank operator. Christensen sustained an injury to her arm when it was caught between a tank and hoist. Christensen missed some time from work because of this injury, and was subsequently laid off following her return to work, causing her to seek employment with a different manufacturer. Christensen filed a claim for workers' compensation benefits and was awarded a 10% permanent impairment to her right arm, with interest and costs; however, Christensen's claim for penalty benefits was denied. Christensen sought judicial review by the district court which reversed and remanded the case to the industrial commissioner with respect to the impairment rating and penalty benefit issues. Snap-On appealed those issues to the supreme court and Christensen cross appealed on penalty benefit and interest issues.

HELD: Affirmed in part, reversed in part, and remanded. The supreme court determined that the industrial commissioner's decision did not make any specific findings with respect to lay testimony offered by Christensen as to why she felt her impairment exceeded the 10% impairment rating given by the treating physician. The court held that the industrial commissioner is required to consider all evidence of functional impairment and remanded the case for clarification of the prior decision or reassessment of lay testimony as appropriate.

HELD: Unreasonable delay in payment of weekly benefits and unreasonable underpayment of weekly benefits triggered a mandatory imposition of penalty benefits by the industrial commissioner pursuant to Iowa Code § 86.13. The court determined that penalty benefits were mandatory unless the employer provided a reasonable cause or excuse for the delay, either to investigate the claim or in cases where a claimant's entitlement to benefits is "fairly debatable". However, the court noted that use of the bad faith "fairly debatable" standard does not also require the use of the second prong of the bad faith analysis: whether the insurer demonstrated knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. The supreme court noted that § 86.13 focuses on whether timely payment of benefits was made and if not, whether a reasonable excuse for the failure to make timely payment existed. In the present case, Snap-On failed to provide any excuse for delays in paying permanent disability benefits

and also failed to provide any excuse for failure to determine Christensen's proper rate of compensation despite numerous requests by Christensen's attorney over a several month period of time to obtain wage information in order to verify the appropriate rate. However, the supreme court did find a two month delay in payment of permanent disability benefits by Snap-On in order to obtain an independent medical expert report was reasonable.

HELD: When an employer makes a partial payment of past due benefits, the payment is applied first to interest due and the remainder is applied to principal owing (the so-called "United States rule"). Interest continues to accrue on the remaining principal. This rule also presumably applies to payment of weekly benefits at an erroneously low rate.

HELD: For purposes of determining issues related to penalty and interest, payments are considered made when placed in the United States mail addressed to the claimant.

NOTE: This case should be read in conjunction with *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229 (Iowa 1996), and *Meyers v. Holiday Express Corp.*, 557 N.W.2d 502 (Iowa 1996), which also address penalty and interest issues.

Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Permanent Disability – Testimony of Lay Witnesses

Interest – When Benefits are Due

Penalty Benefits – Underpayment of Weekly Benefits

Penalty Benefits – Factors to be Considered

Robbennolt sustained a severe cut to his right third finger while working for Snap-On Tools Corp. (Snap-On) in 1990. Throughout the next two years, Robbennolt underwent several surgical procedures and also missed work during several periods of time. Snap-On initially paid weekly benefits using a rate that did not include Robbennolt's overtime. However, following a year and a half of efforts by Robbennolt's attorney, Snap-On acknowledged in January 1993 that Robbennolt's rate should be approximately $50 per week higher. Snap-On offered no excuse for the miscalculation but did pay the additional compensation owed. Following the hearing, Robbennolt was awarded workers' compensation benefits including permanent disability benefits in the amount of 20% impairment to his hand. This was apparently based on the 20% impairment rating given by Robbennolt's treating physician. The decision also declined to require payment of interest or penalty benefits. The decision was affirmed by the industrial commissioner and later substantially affirmed by the district court upon judicial review. Upon appeal by Robbennolt, the district court's decision was first affirmed by the Iowa Court of Appeals but then transferred to the supreme court for further review.

HELD: Affirmed in part, reversed in part, and remanded. Although the industrial commissioner apparently adopted the treating physician's impairment rating under the A.M.A. Guides, the supreme court held that the industrial commissioner had given

A

adequate consideration to Robbennolt's testimony regarding his additional complaints of fatigue and pain which he felt were not adequately represented in the impairment rating. The supreme court specifically stated that although the industrial commissioner was required to consider all evidence including lay testimony in determining impairment, the industrial commissioner had no affirmative duty to address each and every specific fact in great detail.

HELD: The supreme court determined that Iowa Code § 85.30 provides for an eleven-day grace period following an alleged injury to allow investigation of the injury and determination of the proper weekly compensation rate before the first compensation payment is due. So long as the proper weekly compensation benefit is timely paid at the end of the compensation week, no interest can be imposed. However, interest is required on any amount due and not paid in full at the end of a given compensation week. The court further reaffirmed the use of the so-called "United States rule" in allocating partial payments first to payment of interest and the remainder to payment of unpaid principal. The court also noted that payments are made for purposes of workers' compensation law when a check is either placed in the mail directly to a claimant or when payment is actually delivered to the claimant if some other method of payment is selected. Finally, the court emphasized that payment of interest is mandatory and may not be excused by the industrial commissioner.

HELD: Although Iowa Code § 86.13 provides for penalties in the event of delay in commencing or terminating benefits, the supreme court held that underpayment of benefits without reasonable excuse also triggers automatic imposition of penalty benefits. The court held that "in determining the amount of penalty, the commissioner shall consider such factors as the length of the delay, the number of the delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under § 86.13."

NOTE: This case should be read in conjunction with *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254 (Iowa 1996), and *Meyers v. Holiday Express Corp.*, 557 N.W. 2d 502 (Iowa 1996), which also address interest and penalty issues.

Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595 (Iowa 1997).

Pretrial Procedure – Discovery Deadlines and Admissibility of Evidence

Schoenfeld injured his knee while working at FDL Foods, Inc. Schoenfeld filed a petition with the industrial commissioner seeking medical expenses, healing period benefits and permanent partial disability benefits. By way of a hearing assignment order, the deputy industrial commissioner set a discovery deadline of February 25, 1994. Pursuant to this order, each party was required to serve a list of witnesses and exhibits upon the opposing party prior to the deadline date; additional exhibits were to be admitted only if there was no unfair surprise or prejudice to the other party. The order set the matter for hearing on April 26. Schoenfeld's attorney requested that the treating physician evaluate Schoenfeld on April 14 for purposes of providing a permanent impairment rating. The doctor submitted an evaluation report dated April 19 which was served on defendants on April 20. At hearing, defendants objected to the introduction of

the report claiming the report was untimely served and that the lateness of the report prevented them from deposing the doctor as to his conclusions or the basis for his impairment rating. The deputy industrial commissioner determined that no prejudice had resulted as the report in question had been authored by a treating physician rather than a hired expert, and that defendants had been aware of the doctor's prior notes and records. The deputy subsequently entered a decision awarding Schoenfeld medical expenses, healing period benefits and permanent disability benefits. On appeal to the industrial commissioner, the awards for medical expenses and healing period benefits were affirmed, but the award for permanent disability benefits was reversed on the ground that the impairment rating report should not have been admitted into evidence as it was unfairly prejudicial. The industrial commissioner emphasized that defendants had not been given sufficient time to depose the treating physician. Upon judicial review, the district court and Iowa Court of Appeals affirmed the industrial commissioner's decision. Schoenfeld sought further review by the supreme court.

HELD: Reversed and remanded. Although the supreme court generally gives great deference to the industrial commissioner's imposition of sanctions, the supreme court noted that exclusion of evidence is a severe sanction justified only when prejudice would result. In the present case, the supreme court held that defendants were aware of Schoenfeld's claim for permanent disability benefits and had been provided with all the treating physician's medical records prior to the discovery deadline. The treating physician was also the logical person to evaluate Schoenfeld for a permanent impairment rating. Finally, defendants made no request for a continuance at the time of hearing. Based on all these factors, the supreme court determined that the industrial commissioner should have considered the impairment rating report in arriving at its decision.

Prewitt v. Firestone Tire and Rubber Co., 564 N.W.2d 852 (Iowa Ct. App. 1997).

Scheduled vs. Unscheduled Injury – Shoulder Injury

Prewitt sustained an injury to his right shoulder in 1987 while employed by Firestone Tire and Rubber Co. (Firestone). Prewitt was diagnosed with impingement syndrome, which affects the rotator cuff. Dr. Neff, the treating physician, eventually performed surgery which included removal of a small portion of the interior surface of the achromion, as well as the small joint where the collar bone attaches to the achromion. The surgery was successful and Prewitt regained full range of motion of his shoulder. Dr. Neff opined that Prewitt sustained a 5% impairment to his right upper extremity based on the A.M.A. Guides, but further stated that the impairment did not extend into the body as a whole. The industrial commissioner awarded Prewitt permanent disability benefits based on a 5% impairment to his right arm. Upon judicial review, the decision was affirmed by the district court. Prewitt appealed.

HELD: Reversed and remanded. The Iowa Court of Appeals held that the industrial commissioner's decision was not supported by substantial evidence in the record. The court noted that the use of the phrase "upper extremity" in the A.M.A. Guides is not identical to the use of the word "arm" in Iowa Code §85.34 ("the schedule"). The court stated that, in determining whether an injury is scheduled or unscheduled, the court must look to the site of the impairment rather than the site of the injury. In the present case,

A

although there was no loss of motion in the shoulder joint, Dr. Neff's rating under the A.M.A. Guides was for the performance of the surgery itself. Insofar as surgery was performed on the shoulder joint itself, Iowa case law mandates that the upper extremity impairment rating be converted to a body as a whole rating. The court of appeals remanded the case to the industrial commissioner for determination of Prewitt's industrial disability.

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996).

Self-Insured Employers – Liability for Intentional Torts

Subject Matter Jurisdiction – Intentional Torts

Exclusive Remedy Provision – Intentional Torts

Wilson injured his back while working for IBP, which is self-insured for purposes of workers' compensation. Wilson's medical care was managed by Diane Arndt, a registered nurse employed by IBP. During the course of Wilson's treatment, Arndt falsely informed the treating physician that Wilson was not following the treatment program and physical restrictions imposed by the treating physician. After Wilson settled his underlying workers' compensation claim, he brought suit in district court against Arndt and IBP asserting claims for breach of fiduciary duty and defamation. Following a jury verdict for Wilson, IBP appealed, arguing that Wilson's claim for breach of fiduciary duty fell within the exclusive jurisdiction of the industrial commissioner.

HELD: Affirmed, modified, and remanded. The supreme court held that where no adequate remedies are provided by the Iowa Workers' Compensation Act, the injured worker's claim falls outside of the exclusive remedy provision. The supreme court further determined that the intentional torts alleged by Wilson involved conduct for which there is no adequate remedy under the workers' compensation act, and consequently a separate proceeding in district court could be maintained. The court also noted in passing that IBP's status as a self-insured employer subjected it to the same liability as a workers' compensation insurer.

NOTE: A significant portion of the decision addresses issues unrelated to workers' compensation law. However, this case is essential reading for workers' compensation insurers.

1997 IOWA DEFENSE COUNSEL ANNUAL MEETING & SEMINAR

WEDNESDAY, SEPTEMBER 24

9:00 a.m. Registration

11:00 a.m. Board of Directors Meeting

1:00 p.m. Welcome and Report of Association
IDCA President, Robert Engberg
Aspelmeier, Fisch, Power, Warner & Engberg, P.L.C., Burlington, IA

1:15 - 2:00 p.m. Appellate Update, Part I
Richard Kirschman
Whitfield & Eddy, P.L.C., Des Moines, IA

2:00 - 3:00 p.m. Pretrial Practice, the Judicial Perspective
Honorable Patrick Grady
Judge, 6th Judicial District
Honorable Linda Reade
Judge, 5th Judicial District
Honorable Stephen P. Carroll
Judge, 2nd Judicial District

3:00 - 3:15 p.m. BREAK

3:15 - 4:00 p.m. Maximizing Jury Effectiveness: Innovations & Communications
Honorable Celeste Bremer
United States Magistrate Judge
United States District Court,
Southern District of Iowa

4:00 - 4:30 p.m. Legislative Update
Robert Kreamer
IDCA Legislative Lobbyist
Des Moines, IA

4:30 - 4:45 p.m. DRI - What's New
Robert L. Fanter
President, Defense Research Institute
Whitfield & Eddy, P.L.C., Des Moines, IA

4:45 - 5:15 p.m. Non-Competition Agreements
Mark Zaiger
Shuttleworth & Ingersoll
Cedar Rapids, IA

5:15 - 8:00 p.m. COCKTAILS - Embassy Suites Hotel
(Dinner on your own in Des Moines)

THURSDAY, SEPTEMBER 25

8:30 - 9:00 a.m. Ethical Responsibilities and Legal Malpractice
Mariclare Thinnes Culver
Duncan, Green, Brown, Langeness & Eckley, P.L.C., Des Moines, IA

9:00 - 9:30 a.m. Discovery and Evidentiary Use of Journalistic Evidence
R. Todd Gaffney
Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, IA

9:30 - 10:00 a.m. Protecting Your Client When the Civil Case Has Criminal Ramifications
William B. Serangeli
Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney, Schindler & Scalise, P.C., Des Moines, IA

10:00 - 10:15 a.m. BREAK

10:15 - 11:00 a.m. Workers' Compensation Issues: Penalty, Benefits, Interest and Attorneys Fees
Maureen Tobin
Whitfield & Eddy, P.L.C., Des Moines, IA

11:00 - 11:45 a.m. Defending the Governmental Entity
Eliza J. Ovrum
First Assistant Polk County Attorney,
Civil Bureau, Des Moines, IA

11:45 - 12:30 p.m. Appellate Update, Part II
Webb Wassner
Simmons, Perrine, Albright, & Ellwood
Cedar Rapids, IA

12:30 - 1:00 p.m. Supreme Court Report
Honorable Marsha K. Ternus
Justice, Iowa Supreme Court

1:00 - 2:00 p.m. LUNCH

2:00 - 2:30 p.m. Strategic Use of Summary Judgment Motions
Michael J. Coyle
Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, IA

2:30 - 3:15 p.m. Effective Use of Video Deposition
Guy R. Cook
Grefe & Sidney
Des Moines, IA

3:13 - 3:30 p.m. BREAK

3:30 - 4:00 p.m. Ethical Responsibilities in Dealing With the Uncooperative Client
John D. Stonebraker
McDonald, Stonebraker & Cepican, P.C.
Davenport, IA

4:00 - 4:30 p.m. Protecting Your "Middleman" Client in Product Liability Cases
W. Curtis Hewett
Smith, Peterson Law Firm,
Council Bluffs, IA

4:30 - 5:00 p.m. Election of Officers and Directors and Annual Meeting of IDCA

6:30 - 9:00 p.m. Reception and Banquet
GLEN OAKS COUNTRY CLUB
6:30 - 7:30 Reception 7:30 - Banquet

FRIDAY, SEPTEMBER 26

7:30 - 8:30 a.m. Board of Directors Meeting

8:30 - 9:00 a.m. Workers' Compensation Update
Honorable Iris Post
Iowa Industrial Commissioner

9:00 - 10:00 a.m. The Tripartite Relationship: Update on Ethical Issues
- Insurance Company Perspective
David O. Narigon
Employers Mutual Companies
Des Moines, IA
- Private Defense Counsel Perspective
Mark S. Lagomarcino
Hanson, Bjork & Russell, Des Moines, IA

10:00 - 10:15 a.m. BREAK

10:15 - 11:00 a.m. Emerging Medical Technologies - New Liability Issues
L.W. Rosebrook
Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, IA

11:00 - 11:45 p.m. Recent Issues in Environmental Law
Lawrence P. McLellan
Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

11:45 - 12:30 p.m. LUNCH 12:30 - 1:00 p.m. Federal Court Report
Hon. Ronald E. Longstaff
Judge, United States District Court
Southern District of Iowa

1:00 - 1:30 p.m. Family and Medical Leave Act Issues and Defenses
Patricia J. Martin
Counsel, Maytag Corp., Newton, IA

1:30 - 2:15 p.m. Defending the Age Discrimination Case
Helen C. Adams
Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, IA

2:15 - 3:00 p.m. Appellate Update, Part III
Sean O'Brien
Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA

OFFICERS AND DIRECTORS
1996 - 1997

PRESIDENT

Robert A. Engberg
321 N. 3rd Street.
Burlington, IA 52601

PRESIDENT-ELECT

Jaki K. Samuelson
1300 First Interstate Bank Bldg
Des Moines, IA 50309

SECRETARY

Mark L Tripp
801 Grand Ave , Suite 3700
Des Moines, IA 50309

TREASURER

James A. Pugh
5400 University Ave.
West Des Moines, IA 50266

BOARD OF DIRECTORS
(DATE IS TERM EXPIRATION DATE)

DISTRICT I

Marion L Beatty - 1999
301 W Broadway
Decorah, IA 52101

DISTRICT II

Stephen G. Kersten - 1997
P.O Box 957
Fort Dodge, IA 50501

DISTRICT III

Emmanuel S Bikakis - 1999
Suite 340, Insurance Exchange Bldg
Sioux City, IA 51101

DISTRICT IV

Gregory G Barntsen - 1997
P O Box 249
Council Bluffs, IA 51502

DISTRICT V

Richard G. Santi - 1999
100 Court Ave., Suite 600
Des Moines, IA 50309

DISTRICT VI

Robert D Houghton - 1997
P.O. Box 2107
Cedar Rapids, IA 52406

DISTRICT VII

John D. Stonebraker - 1998
3432 Jersey Ridge Road
Davenport, IA 52809

DISTRICT VIII

Wendy N. Munyon - 1998
P.O. Box 790
Grinnell, IA 50112

AT LARGE

J. Michael Weston - 1999
2720 First Avenue
Cedar Rapids, IA 52406

Michael W. Ellwanger - 1998
Suite 300, Toy National Bank Bldg
Sioux City, IA 51101

Michael W. Thrall - 1997
699 Walnut Street, Suite 1900
Des Moines, IA 50309

David L. Brown - 1999
803 Fleming Bldg
Des Moines, IA 50309

David L. Riley - 1998
327 E 4th Street, Suite 300
Waterloo, IA 50704

PAST PRESIDENTS

* Edward F. Seitzinger 1964 - 1965
* Frank W. Davis 1965 - 1966
Donald J Goode 1966 - 1967
Harry Druker 1967 - 1968
* Phillip H. Cless 1968 - 1969
Phillip J Willson 1969 - 1970
Dudley Weible 1970 - 1971
Kenneth L Keith 1971 - 1972
Robert G. Allbee 1972 - 1973
Craig H. Mosier 1973 - 1974
* Ralph W Gearhart 1974 - 1975
Robert V P Waterman, Sr 1975 - 1976
* Stewart H M Lund 1976 - 1977
* Edward J Kelly 1977 - 1978
Don N. Kersten 1978 - 1979
Marvin F. Heidman 1979 - 1980
Herbert S. Selby 1980 - 1981
L.R. Voigts 1981 - 1982
Alanson K. Elgar 1982 - 1983
* Albert D. Vasey (Honorary) 1983
Harold R. Grigg 1983 - 1984
Raymond R Stefani 1984 - 1985
Claire F Carlson 1985 - 1986
David L Phipps 1986 - 1987
Thomas D. Hanson 1987 - 1988
Patrick M. Roby 1988 - 1989
Craig D. Warner 1989 - 1990
Alan E. Fredregill 1990 - 1991
David L Hammer 1991 - 1992
John B. Grier 1992 - 1993
Richard J Sapp 1993 - 1994
Gregory M Lederer 1994-1995
Charles E Miller 1995-1996

IOWA DEFENSE COUNCIL FOUNDERS AND OFFICERS

* Edward F. Seitzinger
President

* D.J Fairgrave
Vice-President

* Frank W Davis
Secretary

Mike McCrary
Treasurer

William J. Hancock

* Edward J Kelly

Paul D Wilson

ANNUAL MEETING CHAIRPERSONS

General Program - James A. Pugh
Ginger Plummer

Program Chair - Jaki K. Samuelson

* Deceased

1997 ANNUAL MEETING

TABLE OF CONTENTS

B

PRETRIAL PRACTICE
The Judicial Perspective

Honorable Linda R. Reade
Judge, 5th Judicial District
(Pages 1 thru 16)

Honorable Stephen P. Carroll
Judge, 2nd Judicial District
(Pages 17 thru 62)

Honorable Patrick R. Grady
Judge, 6th Judicial District
(Pages 63 thru 73)

B

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

_____, Plaintiff(s), vs _____, Defendant(s)	Case Number _____ ORDER FOR MANDATORY PRETRIAL CONFERENCE

TO PLAINTIFFS, DEFENDANTS, AND THEIR ATTORNEYS

Trial in this matter is set for _____, 199___, at 9:00 a m

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED:

Pursuant to Iowa Rule of Civil Procedure 136 and 137, a mandatory pretrial conference is set in this case for **_____, 1997, from 8:00 to 9:00 a.m. in Courtroom 208** of the Polk County Courthouse, 500 Mulberry, Des Moines, Iowa All pro se litigants and attorneys are required to attend in person If there is more than one attorney for a party, at least one attorney, (who is knowledgeable concerning the case, will participate as trial counsel and is authorized to bind the party to stipulations, agreements, etc), is REQUIRED to attend the conference If counsel or the pro se litigant has a conflict at the time scheduled, call opposing counsel or the pro se litigant and obtain several potential dates all attorneys and pro se parties are available and contact the Court's attendant to reschedule If the case settles before the scheduling conference, pro se plaintiff or plaintiff's counsel is hereby ordered to call the Court directly at (515) 286-3855 and advise that the conference is not needed (A call to Court Administration is not sufficient)

At least ten days in advance of the conference serve the following on opposing counsel or pro se litigants and hand deliver or mail a copy to the undersigned judge:

1 Proposed jury instructions and proposed verdict form

2 Trial Brief

3 Exhibit List and Witness List Each individual exhibit shall be marked for use at trial by number (Plaintiff) and letter (Defendant) and listed by that number or letter on the exhibit list The number or letter shall be the same as will be used at trial Each person who is to be called as a witness shall be identified by name General descriptions of witnesses or exhibits are not acceptable and shall be deemed not to be in compliance with this order

B

4 Any pretrial motions you are urging and a proposed ruling

5 Statement and itemization of damages sought (include amounts that will be sought from the jury.)

At the pretrial conference attorneys and pro se litigants will argue all pending motions including motions in limine, discuss jury instructions, discuss trial procedures and be informed on courtroom decorum to be followed by all attorneys, parties and witnesses

Failure to comply with this order may result in sanctions being imposed pursuant to Iowa Rule of Civil Procedure 136(e), including but not limited to exclusion of evidence, dismissal of the case, default, or an award of attorney's fees.

SO ORDERED this ____ day of _____, 199___

_____
LINDA R. READE, JUDGE
FIFTH JUDICIAL DISTRICT
Polk County Courthouse
500 Mulberry, Room 208
Des Moines, Iowa 50309
(515) 286-3855

If you or your client require the assistance of auxiliary aids or services to participate in court because of a disability, immediately call your ADA Coordinator at (515) 286-3394. (If you or your client are hearing impaired, call Relay Iowa TTY at 1-800-735-2942)

Original filed
Copies to:

B

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

THE STATE OF IOWA, ex rel
THOMAS J MILLER, in his capacity
as ATTORNEY GENERAL
OF THE STATE OF IOWA,
Plaintiff,

v

R J REYNOLDS TOBACCO COMPANY;
RJR NABISCO, INC ; THE AMERICAN
TOBACCO COMPNANY; AMERICAN
BRANDS, INC ; BROWN & WILLIAMSON
TOBACCO CORPORATION; B A T
INDUSTRIES, PLC; BATUS HOLDINGS,
INC ; BRITISH AMERICAN TOBACCO
COMPANY, LTD ; BRITISH-AMERICAN
(HOLDINGS) LTD ; PHILIP MORRIS,
INCORPORATED (PHILIP MORRIS
U S A); PHILIP MORRIS COMPANIES,
INC ; LIGGETT & MYERS, INC ; LIGGETT
GROUP, INC ; THE BROOKE GROUP,
LIMITED; LORILLARD TOBACCO
COMPANY; LORILLARD INCORPORATED;
LOEWS CORPORATION; UNITED STATES
TOBACCO COMPANY; UST, INC ; THE
COUNCIL FOR TOBACCO RESEARCH;
THE TOBACCO INSTITUTE, INC ; HILL
& KNOWLTON, INC ,
Defendants

Law No CL 71048

PRELIMINARY
CASE MANAGEMENT ORDER

A. GENERAL TERMS

1 Purpose The purpose of this Preliminary Case Management Order is to secure the just, speedy and economical determination of this action in accordance with the Iowa Rules of Civil Procedure, which rules, except as otherwise provided by the Preliminary Case Management Order, or any subsequent case management order, shall govern this case

3259 11

B

2. Modification. This Preliminary Case Management Order may be modified by the Court sua sponte, upon motion of the parties for good cause shown, or by agreement of the parties with subsequent approval of the Court.

3. Substantive Issues of Law. Nothing set forth in this Preliminary Case Management Order shall be deemed to affect any substantive right or defense of any party to this matter or constitute any ruling or order on any question of law.

4. Caption. For convenience of the parties, the Court and the Clerk of Court, the caption to be used on all documents filed with the Clerk shall be: State of Iowa, Plaintiff v. R.J. Reynolds Tobacco Company, et al., Defendants, No. CL 71048. The parties shall not list each and every defendant in the caption.

5. Cooperation of Counsel. Counsel for the respective parties are directed to cooperate to the greatest extent possible to promote the expeditious and efficient handling of these proceedings. Among other things, such cooperation shall include, whenever feasible, the preparation and presentation of joint positions, claims, and defenses by the plaintiff and defendants who are aligned on respective sides.

6. Liaison Counsel. The following counsel are designated Liaison Counsel and their firms are designated Liaison Firms:

For the plaintiff:

E. Ralph Walker
Walker Law Firm, P.C.
2501 Grand Ave., Suite E
Des Moines, IA 50312-5311
PH: (515) 281-1488
FAX: (515) 281-1489

B

For the defendants:

Steve Nelson
Davis, Brown, Koehn, Shors & Roberts, P.C.
666 Walnut St., Suite 2500
Des Moines, IA 50309-3993
PH: (515) 288-2500
FAX: (515) 243-0654

And

Henry Harmon
Grefe & Sidney
2222 Grand Ave.
Des Moines, IA 50312
PH: (515) 245-4300
FAX: (515) 245-4452

7. Liaison Counsel Responsibilities. Liaison Counsel or their designees from their Liaison Firms shall be responsible for:

a. Coordination of dates, times and places for depositions, when necessary;
b. The signing of Court documents and pleadings on behalf of co-parties, but only upon authority of said co-parties;
c. Preparation and submission of the agenda for status conferences; and
d. Communication with the Court as to the scheduling of hearings.

8. Service of Pleadings, Motions, Order and Other Papers. All pleadings, motions, orders and other papers hereafter filed shall be served on attorneys of record in the manner required by the Iowa Rules of Civil Procedure

9. Status Conferences. General status conferences will be scheduled each month. Liaison Counsel shall meet and confer and submit a joint status conference agenda to be delivered to the parties and the Judge at least five court days prior to the status conference date. Unless otherwise agreed by counsel, no issue shall be considered at a status conference unless a motion has been filed and served at least

B

thirty-five (35) days prior to the status conference, has been fully briefed at least five (5) days prior to the status conference, and has been identified in a pre-conference agenda The following dates have been set for status conferences:

August 27, 1997	9 a.m.
September 29, 1997	9 a.m.
October 30, 1997	9 a.m.

The status conferences will be held at the Polk County Courthouse Courtroom 208, Des Moines, Iowa. If the parties think there are no issues for the Court to address, counsel shall notify the Court and the Court may cancel the status conference if the Court knows of no issues that need to be addressed. If Liaison Counsel thinks that more than three hours will be required for the status conference, Liaison Counsel shall promptly notify the Court and all other counsel. Additional dates for status conferences will be set by the Court at the October 30, 1997 Status Conference Liaison Counsel shall advise the Court of possible available dates for these conferences prior to October 30, 1997.

B. DOCUMENT PRESERVATION

10. Preservation. During the pendency of this litigation, and until a final order is entered by the Court closing this case, each of the parties herein and their respective officers, agents, servants, employees, and attorneys, and, additionally, all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or in any other fashion changing any and all

"documents" and "things" in actual or constructive care, custody, or control of such person, wherever such documents and things are physically located. Such persons are also enjoined from changing the location of any such documents and things to a location outside of the jurisdiction of the United States.

11. Documents and Things Defined. Documents and things shall include the original, all nonidentical copies, and all drafts of all recorded communications or information of any kind anywhere in the world whether on paper, videotape, audiotape, disk, in computer medium, by electronic mail, and/or any other storage medium, including but not limited to writings, drawings, graphs, charts, photographs, motion picture films, phonograph records, tape and video recordings, computer data, records, correspondence, memoranda, reports, studies, minutes, pamphlets, notes, letters, telegrams, messages (including reports, notes, and memoranda of telephone conversations and conferences), calendar and diary entries, records, data compilations, petitions, patents, advertisements and other data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices into reasonably usable form. All attachments and/or enclosures to a document will be deemed to be part of such documents.

12. Scope. This Order pertains only to documents and things containing information that may be relevant to, or may lead to the discovery of information relevant to, the subject matter of this action, including but not limited to: (1) manufacturing methodology, testing, marketing, sale and/or composition and properties of tobacco, tobacco products, paper, filters or any other materials contained in, relating to, or used

B

in the manufacturing, testing, marketing, sale, and/or composition and properties of tobacco and tobacco products; (2) any economic or financial information about the financial condition of each Defendant and any related parents, agents, alter egos, subsidiaries, and/or divisions whether or not such related entities are or have ever been involved in any way in the tobacco industry (as said term is defined in Plaintiff's Petition); (3) any claim of the plaintiff in this case; and (4) any defense urged by the defendants in this case.

13. Relevance. This Order pertains to documents and things which were written or generated after January 1, 1920. Any documents or things described or referred to in any discovery request made during this litigation and which otherwise is encompassed by this Paragraph shall, from the time of the request, be treated for purposes of this Order as containing such information unless and until the Court rules such information to be irrelevant. Nothing contained herein shall prevent a party from seeking to modify, expand, or restrict the scope of the documents or things described in this Paragraph by consultation and agreement with opposing counsel or by application to the Court; and all parties reserve all their rights in connection with any such request.

14. No Relief From Prior Responsibility. Nothing herein shall relieve any party from any liability, responsibility, or possible adverse presumption which would arise from the wrongful handling or destruction of documents or things prior to the date of this Order.

C. MOTION PRACTICE AND DISCOVERY

15. Governing Rules. All discovery shall be conducted according to and be

governed by the Iowa Rules of Civil Procedure, except as modified by this Order or subsequent court orders

16. Commencement of Discovery. Discovery limited to jurisdictional issues may proceed pursuant to the Court's order of May 14, 1997. Discovery on jurisdictional issues shall close September 10, 1997. All other discovery is currently stayed, and will remain stayed until further order of the Court

17. Form of Discovery/Deposition. The parties are free to serve written discovery (including interrogatories, requests for production, requests for admissions, and document production) on the issues raised in the motions. Depositions will not generally be held before written and document discovery is completed, as the party taking the deposition is entitled to these responses before having to take any depositions; however, depositions may be scheduled after conferring with Liaison Counsel or by order of the Court for good cause shown. The Court will entertain no protective order or objections to discovery on jurisdictional issues and any issues raised in any motions to dismiss based on alleged lack of personal jurisdiction. Nothing contained in this Order is intended to prevent the counsel for the parties from participating in any depositions taken by the same or other parties in other cases pending in this or other jurisdictions.

18. Stay of Discovery. The filing by a party of a motion for a protective order with respect to any discovery shall operate as an automatic stay of the discovery as to which the order is sought until said motion has been withdrawn or has been heard and decided. However, if any motion for a protective order with respect to a deposition

B

properly noticed pursuant to the provisions of this Order is not filed and served within ten (10) days of service of the notice of deposition, such motion for a protective order shall not operate as an automatic stay of such deposition.

19. Motions Generally. With respect to all motions (however titled) other than those specifically addressed in this Preliminary Case Management Order or other order of the Court, the opposing party shall have twenty (20) days after service of the motion to serve a resistance and any supporting authority. The moving party shall have ten (10) days from service of the resistance to serve a reply.

20. Contact with the Court. Opposing counsel shall be notified prior to contact with the Court and then contact with the Court shall be made jointly.

21. Jurisdictional Motions. The Motions to Dismiss for Lack of Personal Jurisdiction currently on file will be heard November 24 beginning at 9 a.m. The Court has reserved until November 25 at 5 p.m. to hear these motions. Defense counsel may decide the order in which the motions should be heard. Defendants' Liaison Counsel shall advise plaintiff's Liaison Counsel and the Court of the order of the motions at least five days in advance of the hearing. Counsel not directly involved in the motions need not attend the hearing.

22. Access to the Minnesota Depository. Within the next thirty days, Plaintiff and Defendants will further confer to determine if the Minnesota Depository should be part of the document production process in this action and if so, how that is to be accomplished. Prior to the Status Conference on August 27, 1997, the parties will, to the extent possible, submit a joint request concerning the Minnesota Depository to the

Court for inclusion in a subsequent case management order and submit any issues that remain unresolved to the Court for resolution.

23. Document Numbering. Any party producing documents shall number all produced documents as provided herein. Copies of any produced documents shall be marked by the producing party with an identifying number using either a Bates stamp or a computerized label that provides a unique identification number for the document. Defendants shall agree upon a consistent document numbering system. An explanation of the numbering system -- which shall allow identification of which party produced which documents -- shall be provided by the producing party. Documents produced by non-parties shall be numbered with a consistent identification system.

24. Documents and Things. Documents and things (sometimes referred to as just "documents") shall include the original, all nonidentical copies, and all drafts of all recorded communications or information of any kind anywhere in the world whether on paper, videotape, audiotape, disk, in computer medium, by electronic mail, and/or any other storage medium, including but not limited to writings, drawings, graphs, charts, photographs, motion picture films, phonograph records, tape and video recordings, computer data, records, correspondence, memoranda, reports, studies, minutes, pamphlets, notes, letters, telegrams, messages (including reports, notes, and memoranda of telephone conversations and conferences), calendar and diary entries, records, data compilations, petitions, patents, advertisements and other data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices into reasonably usable form, wherever

B

located, anywhere in the world. All attachments and/or enclosures to a document will be deemed to be part of such documents.

25. Document Indices. Each party shall produce an index of documents along with the production of its documents to the extent that each party has an existing index of the documents. To the extent that a party does not have an existing index at the time of production, such index shall be produced at the time it may be created. Such indices shall include only objective information, such as author, recipient, date and title of documents and shall not include any subjective information which may be arguably protected by the attorney-client or work-product privileges. For the purposes of this Preliminary Case Management Order, the term "indices" will include without limitation any listing of documents regardless of the terms used to identify the list. Examples of such terms include without limitation: data base, data bases, or work product devises.

26. Identity of Responsive Requests. Each party shall produce documents to correspond to the appropriate categories in the request for production. If a document is responsive to more than one request, the producing party shall so indicate.

27. Previously Produced Documents. The party producing the documents shall indicate if the document being produced has previously been produced in any other tobacco litigation and shall identify by case name, jurisdiction and date the case or cases in which the document was produced.

28. Representations Concerning Production of All Documents. For purposes of the hearings on the motions to dismiss, any document authored by an officer or employee of a party and/or produced by the party during the course of this litigation is,

in the form produced during discovery, deemed genuine, authentic, and a record of regularly-conducted business activities within the hearsay exception set forth in the Iowa Rules of Evidence, unless the producing party asserts an objection to the foundation of the document at the time of production

29 Privileged Documents Any response to a request for production of documents and things that a document or thing is being withheld from production based upon a claim of privilege shall designate specifically the document request number(s) to which the privileged document or thing is responsive. For each document identified as privileged, the privilege log shall contain the following information:

a. Document production number;
b. Date;
c. Author;
d. Recipients of copies (including name and relationship to parties (e.g., officer, director, attorney) at the time the document was received;
e. Type of document;
f. Subject matter of document
g. Nature of claimed privilege (e.g. attorney-client; work product);
h. Document request number to which alleged privileged document is responsive.

To the extent a claim of joint defense privilege is made, the party claiming the privilege shall provide a copy of the joint defense agreement that pertains to the documents or things for which the claim is made. Failure to provide such a written joint defense agreement shall constitute an insufficient assertion of the privilege.

30. Privilege Log - Production, Waiver. The privilege log shall be produced to the parties at the time of the response. Blanket claims of privilege without providing a privilege log shall be deemed a waiver of any and all privileges.

B

31. Privilege Log - Scope, Procedure. The privilege log shall include all documents withheld from production on grounds of privilege and otherwise responsive to a request for production to which the party is under an obligation under the Rules of Civil Procedure or applicable law to produce.

32. Non-Privileged Documents. No non-privileged document shall be withheld from production solely on the ground that it is attached or appended to a privileged document. When such documents are produced, the producing party shall indicate that such document is an attachment to a document withheld on the basis of privilege and shall identify the document to which it is attached as it is identified in the privilege log.

33. Redaction of Documents. There shall be no redaction of documents except on the basis of privilege or pursuant to a Protective Order agreed upon by the parties or ordered by the Court. If redacted, the document must be marked as redacted in the location on the document where it is redacted. Each and every redaction shall be listed in the privilege log unless otherwise agreed to by counsel or ordered by the Court.

PHASE I CASE MANAGEMENT ORDER

34. When the Court issues its final rulings on the Motions to Dismiss or shortly thereafter, the Court will also issue a Phase I Case Management Order dealing with discovery on the merits. The parties are encouraged to continue to discuss areas of disagreement concerning discovery sequence, content and methodology. Plaintiff and British American Tobacco Co. should confer on any special discovery provisions needed and send their suggestions to the Court by December 1, 1997. The parties are also encouraged to confer on scheduling depositions after January 1, 1998. In the

B

Phase I Case Management Order, the Court anticipates setting aside a minimum of 5-10 days each month for depositions in this case

Dated this 23rd day of July, 1997.

LINDA R. READE, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

Original filed.
Copies to:

Thomas J. Miller, Attorney General
Gordon E. Allen
Assistant Attorney General
Hoover State Office Bldg., 2nd Floor
Des Moines, IA 50309

Brent R. Appel
1600 Hub Tower
699 Walnut
Des Moines, IA 50309

Glenn Norris
2501 Grand Ave., Suite C
Des Moines, IA 50312

E. Ralph Walker
2501 Grand Ave., Suite E
Des Moines, IA 50312

Steven P. Wandro
2501 Grand Ave., Suite B
Des Moines, IA 50312

Gregory R. Brown
380 Capital Square
400 Locust St.
Des Moines, IA 50309

3359 1121

B

Fred L. Dorr
801 Grand, Suite 3100
Des Moines, IA 50309

Thomas A. Finley
4th Floor Equitable Bldg.
Des Moines, IA 50309

Dan Webb
35 W. Wacker Drive
Chicago, IL 60601

Henry Harmon
2222 Grand Ave.
Des Moines, IA 50312

Steven L. Nelson
666 Walnut St., Suite 2500
Des Moines, IA 50309-3993

Roger T. Stetson
2000 Financial Center
Des Moines, IA 50309

Thomas D. Waterman
Robert Van Voren
600 Norwest Bank Bldg.
Davenport, IA 52801-1987

J. Michael Weston
2720 First Ave., N.E.
PO Box 1943
Cedar Rapids, IA 52406-1943

John McClintock
218 Sixth Ave., 8th Fl
Des Moines, IA 50309

Richard Chabot
801 Grand, Suite 3500
Des Moines, IA 50309

3359 1122

B

PRETRIAL PROCEDURES IN IOWA-FIFTH EDITION

JUDGE STEPHEN P. CARROLL
JUDGE CARL PETERSEN
SECOND JUDICIAL DISTRICT

TABLE OF CONTENTS

This Fifth Edition would not have come into being without the able assistance of Law Clerks Molly A. Amman and Kris Brenneis.

I. Pleadings

A. Notice Pleading - IRCP 69

1. Purpose Function of pleading is to put other parties on notice of what the pleader intends to prove, and to define the issues. Treanor v. B.P.E. Leasing Inc., 158 N.W.2d 4, 7 (Iowa 1968); Hanson v. Lassek, 154 N.W.2d 871 (Iowa 1967).

2. Content. The pleader need only make a short and plain statement of a "claim" showing that he is entitled to relief, and demand judgment. Haugland v. Schmidt, 349 N.W.2d 121, 123 (Iowa 1984); Cunha v. City of Algona, 334 N.W.2d 591, 596 (Iowa 1983).

3. Sufficiency. The pleading is sufficient if it apprises of the incident out of which the claim arose and the general nature of the action. Northwestern National Bank v. Metro Center, Inc., 303 N.W 2d 395, 401 (Iowa 1981). Smith v. Smith, 513 N.W 2d 728 (Iowa 1994)

a. Even pleading a wrong theory is not necessarily fatal. Northwestern National Bank v. Metro Center, Inc., 303 N.W.2d 395, 401 (Iowa 1981)

b The petition need not plead ultimate facts or identify a specific legal theory Lake v. Schaffnit, 406 N.W.2d 437, 439 (Iowa 1987); Adams v. Mount Pleasant Bank & Trust Co., 355 N.W.2d 868, 870 (Iowa 1984).

B. Issues tried. While pleadings provide notice concerning the general nature of a case, plaintiffs may try their case with a more restricted theory of recovery, and issues raised by pleadings may be narrowed by pretrial conference. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984).

C. Exception. If the parties proceed without objection to try an issue, even though not presented by the pleadings, it amounts to a consent to try the issue and is then rightfully in the case. Dutcher v. Randall Foods, 546 N.W 2d 889 (Iowa 1996); Matter of Guardianship of Collins, 327 N.W.2d 230, 233 (Iowa 1982); Federated Mutual Implement & Hardware Ins. Co. v. Erickson, 110 N.W.2d 264, 270 (Iowa 1961)

D. Not Applicable. A strict pleading standard, not the notice pleading standard, is applicable to judicial review of agency decisions under the Administrative Procedures Act, Iowa Code Chapter 17A. Second Injury Fund of Iowa v. Klebs, 539 N.W.2d 178 (Iowa 1995).

II. Motions Attacking the Pleadings

A. Motions Combined and Waiver - IRCP 111 Motions challenging personal jurisdiction, to recast or strike, for more specific statement, or to dismiss for failure to state a claim must be combined in a single motion.

1. Waiver of Defenses.

a. If an IRCP 111(a) motion is filed before responsive pleading, the defense of

want of jurisdiction of the person, insufficiency of the original notice or service must be raised, or it is waived. Want of subject matter jurisdiction can be raised by motion at any time. IRCP 104(a).

b. Exception. A defense allowed not for the defendant's sake, but for the sake of the law itself and the purity of its administration, cannot be waived by pleading or failure to plead. For example, a defense that a contract is "invalid on grounds of public policy." 61A Am.Jur.2d Pleading § 397 (1981).

2. Timing of motion. A motion attacking a pleading must be filed prior to the filing of a responsive pleading. IRCP 85(a); Powell v. Khodari-Intergreen Co., 303 N.W.2d 171, 175 (Iowa 1981); Walker Shoe Store, Inc. v. Howard's Hobby Shop, 327 N.W.2d 725 (Iowa 1982)(filing answer to two counts of complaint and a motion to dismiss third count all as part of same instrument did not comply with Rule, and motion to dismiss was not timely because not filed before answer).

3. Number of motions allowed. Only one such motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter. IRCP 111; Larson v. Baker, 16 N.W.2d 262, 264 (Iowa 1944)

B Motion to Dismiss - IRCP 104(b).

1. Purpose. The purpose of a motion to dismiss for failure to state a claim is to test legal sufficiency of the complaint. Woods v. Schmitt, 439 N.W.2d 855, 859 (Iowa 1989). See also Carmichael v. Iowa State Highway Commission, 156 N.W.2d 332, 339 (Iowa 1968)

2. Specificity Motions to dismiss for failure to state a cause of action must clearly specify wherein the pleading attacked is insufficient. Moravek v. Davenport Community School Dist., 262 N.W.2d 797 (Iowa 1978); Turner v. Thorp Credit, Inc., 228 N.W.2d 85, 88 (Iowa 1975); Rick v. Boegel, 205 N.W.2d 713, 715 (Iowa 1973); IRCP 104(d). A motion not disclosing wherein the pleading is claimed to be insufficient should be overruled. Appling v. Stuck, 164 N.W.2d 810, 812 (Iowa 1969).

3. No Discretion. The granting or denial of a motion to dismiss does not rest in the discretion of the trial court; it turns on legal grounds and is therefore subject to review. Venard v. Winter, 524 N.W.2d 163 (Iowa 1994).

4. When sustainable. A motion to dismiss grounded on failure to state a cause of action is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted. Hunt v. State, 538 N.W.2d 659 (Iowa App. 1995); Woods v. Schmitt, 439 N.W.2d 855, 859-60 (Iowa 1989).

5. Construction of pleading. The pleading must be construed in the light most favorable to the pleader and the court should resolve all doubts and ambiguities in the pleader's favor. Hunt v. State, 538 N.W.2d 659 (Iowa App. 1995); Haupt v. Miller, 514 N.W.2d 905 (Iowa 1994); Holsapple v. McGrath, 521 N.W.2d 711 (Iowa 1994).

6. Facts admitted. Like the old demurrer, a motion to dismiss admits the

well-pleaded facts in the pleading assailed for the purpose of testing their legal sufficiency. Tate v. Derifield, 510 N.W.2d 885 (Iowa 1994) Even the most extravagant factual averment is dignified into a verity when exposed to a motion to dismiss. Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 647 (Iowa 1973).

a. Unsupported conclusions. Although well-pleaded allegations are to be taken as admitted, mere unsupported conclusions of fact or mixed fact and law are not admitted. Tamari v. Bache & Co. (Lebanon) S.A.C., 565 F.2d 1194, 1199 (7th Cir. 1977), cert. denied., 48 S.Ct. 1450; Murphy v. First National Bank of Chicago, 228 N.W.2d 372, 375 (Iowa 1975); Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 647 (Iowa 1973), cert. denied, 419 U.S. 830 (1974).

b. Allegations of Law. While allegations of fact are to be regarded as true, allegations of law are not. United States v. Tulare Lake Canal Co., 535 F.2d 1093, 1097 (9th Cir, l976), cert. denied, 429 U.S. 1121 (1977), reh'g denied, 430 U.S. 976 (1977); Briney v. Katko, 197 N.W.2d 351 (Iowa 1972).

c. Judicial notice The motion to dismiss cannot allege new facts not found in the pleadings unless judicial notice can be taken of the additional facts. Warford v. Des Moines Metropolitan Transit, 381 N.W.2d 622, 623 (Iowa 1986).

d. No evidentiary hearing. The general rule is that a motion to dismiss cannot be aided by an evidentiary hearing. Bruce v. Sarver, 472 N.W.2d 631 (Iowa App. 1991); Warford v. Des Moines Metropolitan Transit, 381 N.W.2d 622, 624 (Iowa 1986).

e. Facts not alleged in the pleadings. Motion to dismiss may not be supported by its own allegations of facts not contained in the petition. Estate of Dyer v. Krug, 533 N.W.2d 221 (Iowa 1995); Rick v. Boegel, 205 N.W.2d 713, 715 (Iowa 1973).

7. Not favored. Supreme Court does not recommend filing a motion to dismiss, the viability of which is in any way debatable; nor does it endorse sustaining such motions, even where the ruling is eventually affirmed. Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991). Dismissals of many of the weakest cases must be reversed on appeal. Id. This results in wasted judicial resources because two appeals result where one would have sufficed had the case been resolved by way of summary judgment or trial. Id.

a. Rarely not survive. Since the advent of notice pleading under rule 69(a), it is a rare case which will not survive a rule 104(b) motion. Smith v. Smith, 513 N.W.2d 728 (Iowa 1994) ("This case again underscores our disapproval of rushing to judgment by way of a pre-answer motion to dismiss.") As a result, disposition of unmeritorious claims in advance of trial must now ordinarily be accomplished by other pretrial procedures which permit narrowing of the issues and the piercing of bare allegations contained in the petition. Stessman v. American Black Hawk Broadcasting, Co., 416 N.W.2d 685, 688 (Iowa 1987). *See also* Unertl v. Bezanson, 414 N.W.2d 321, 323-24 (Iowa 1987)

b. Unnecessary. A motion to dismiss for failure to state a claim is now almost

B

as unnecessary as the similar obsolete pleading of demurrer. Burd v. Board of Education of Audubon County, 260 Iowa 846, 151 N.W.2d 457, 463 (1967). But it is not entirely obsolete. *See* Fitzpatrick v. State, 439 N.W.2d 663 (Iowa 1989); Davis v. Ottumwa YMCA, 438 N.W.2d 10, 13 (Iowa 1989).

8. Review.

a. Dismissal is not within the trial court's discretion. It turns on legal grounds and therefore is subject to appellate review. Venard v. Winter, 524 N.W.2d 163 (Iowa 1994); Decorah State Bank v. Zidlicky, 426 N.W.2d 388, 390 (Iowa 1988).

b. The well-pleaded facts are taken as true, and any ambiguity or uncertainty in the pleadings is resolved in favor of the party resisting the motion. Doerring v. Kramer, 556 N.W.2d 816 (Iowa App. 1996); Ladd v. Iowa West Racing Ass'n, 438 N.W.2d 600, 601 (Iowa 1986).

9. Conclusiveness of Dismissal. Decree of dismissal for failure to state a claim, since it does not involve a ruling on the merits, does not bar subsequent action where complaint is sufficient. 61A Am.Jur.2d Pleading § 229 (1981). Party may amend petition or plead over. Citizens for Washington Square v. Davenport, 277 N.W.2d 882, 884 (Iowa 1979); Nesper Sign and Neon Co. v. Nugent, 168 N.W.2d 805, 806 (Iowa 1969).

10. Timeliness of Motion. Motion to dismiss must be filed prior to answer. Walker Shoe Store, Inc. v. Howard's Hobby Shop, 327 N.W.2d 725, 726 (Iowa 1982). IRCP 85(a).

11 References

a. Key nos. Pleading § 352 et seq.; Pleading § 360; Pretrial Procedure 531 et seq.

b. 27 CJS Dismissal and Nonsuit § 45 et seq.

c Iowa Rules of Civil Pro. Ann., Rule 104.

d. 61A Am.Jur.2d Pleading § 226-29.

C Motion to Strike - IRCP 113.

1. Like Motion to Dismiss. A motion to strike an insufficient defense under Rule 104(c) is essentially the same as a motion to dismiss directed at the defense. Lindahl, 1 Iowa Practice (Rev. Ed.) § 12.18. A motion to strike should be treated as a motion to dismiss when made with respect to the entire claim. Raymon v. Norwest Bank Marion, Nat'l Ass'n, 414 N.W.2d 661, 665 (Iowa App. 1987).

2. Specificity A motion to strike must specify wherein the pleading attacked is insufficient IRCP 104(d).

a. "Not any proper reply" is not sufficiently specific. Johnson v. Cedar Memorial Park Cemetary Ass'n, 229 Iowa 749, 752, 295 N.W 136, 138 (1940).

b. "Not authorized under Section _____" was found to be indefinite and uncertain since it did not state why the pleading was not authorized under that section. The court, however, upheld the district court decision not to strike. Carr v. McCauley, 215 Iowa 298, 301, 245 N.W 290, 292 (1932). However, *see* Price v. King, Hartford Acc. & Indem. Co., Intervenor, 122 N.W 2d 318, 230, 255 Iowa 314 (Iowa 1963).

c. "Immaterial, irrelevant, surplusage and redundant" appears to be sufficient. Johnson v. Cedar Memorial Park Cemetary Ass'n, 229 Iowa 749, 752, 295 N.W 136, 138 (1940).

3. Discretion. The trial court has discretion in ruling on a motion to strike under Rule 113. Wagner v. Northeast Farm Service Co., 177 N.W.2d 1 (Iowa 1970); In re Primary Road No. Iowa 141, 253 Iowa 1130, 114 N W.2d 290, 292 (1962).

4. Matters Admitted. A motion to strike admits well-pleaded facts. IRCP 113 In re Primary Road No. Iowa 141, 253 Iowa 1130, 114 N.W.2d 290, 293 (1962) (IRCP 113); In re Carpenter's Estate, 210 Iowa 553, 561, 231 N.W 376, 380 (1930) (motion to strike defense).

5 Cautiously granted. Motions to strike from pleadings should be sustained only when the allegations in the pleading attacked had no possible relationship to the controversy. If there is any doubt as to whether under any contingency the pleaded allegations go to a material issue, the motion to strike should be denied. Parker v. Tuttle, 260 N.W.2d 843, 845 (Iowa 1977).

6. Conclusiveness. A judge has the power to change a prior ruling on a motion to strike. This holds even when the prior order was issued by another judge. Shoemaker v. City of Muscatine, 275 N.W.2d 206, 208 (Iowa 1979); Kuiken v. Garrett, 243 Iowa 785, 51 N.W.2d 149 (1952).

7 Extrinsic Evidence. Motions to strike improper and immaterial matter are directed to the pleadings as they stand. They cannot be aided by evidence. Kester v. Travelers Indemnity Co. of Hartford, Conn., 257 Iowa 1146, 136 N.W.2d 261, 264 (1965).

8. Grounds.

a. Repetitious allegations. Fosselman v. Waterloo Community School District, 229 N.W.2d 280, 284 (Iowa 1975).

b. Immaterial allegations. Hutchinson v. Des Moines Housing Corp., 84 N.W.2d 10, 13 (Iowa 1957); Johnstone v. Johnstone, 226 Iowa 503, 512, 284 N.W. 379, 384 (Iowa 1939).

c. Late pleading. Striking of reply which was not filed until nearly 17 months after answer was justified on ground of delay. Brown v. Schmitz, 237 Iowa 418, 22

B

N.W.2d 340, 342 (1946). Acquiescence in delay may result in waiver, though. Johnson v. Gib's Western Kitchen, Inc., 338 N.W.2d 872, 874 (Iowa 1983); City of Des Moines v. Barnes, 237 Iowa 6, 20 N.W 2d 895, 897 (1945).

d. Improper or unnecessary matters. Improper or unnecessary matter in a pleading may be stricken out on motion of the adverse party. Fosselman v. Waterloo Community School District, 229 N.W.2d 280, 284 (Iowa 1975); Murphy v. First Nat'l Bank of Chicago, 228 N.W.2d 372, 375 (Iowa 1975). IRCP 113.

e. Scandalous, indecent, and impertinent matter. It is not error to strike scandalous matter from a pleading. Speers v. Fortner, 6 Iowa 553 (1858). *See also* 23A N.W.Dig.2d Pleading Key No. 364(4) (1989); 30 N.W.Dig. Pleading Key No. 364(4) (1933); 61A Am.Jur.2d Pleading § 216 (1981).

10. References.

a. Comparable federal rule- FRCP 12(f)

b. Key Nos. Pleading 361 et seq.

c. 71 CJS Pleading § 463 et seq.

d. 61A Am.Jur.2d Pleading § 209-22.

D. Motion For More Specific Statement - IRCP 112. A party may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him or her to plead to it and for no other purpose

1. Purpose. A motion for more definite statement is designed to strike at unintelligibility rather than want of detail. It is inappropriate if the notice requirements of the pleading rules are met and the pleading fairly notifies the opposing party of the nature of the claim. Nelson v. Nelson Island Reclamation Dist Facilities Corp., 491 F. Supp. 1364, 1384-85 (N.D.Cal 1980); Fairmont Foods Company v. Manganello, 301 F. Supp. 832, 839 (S.D. N.Y. 1969); United States v. Georgia Power, 301 F. Supp. 538, 543-544 (N.D. Ga. 1969)

2. Not Favored. The notice pleading concept is used to secure the just, speedy and inexpensive determination of every action. Because of this, motions for a more definite statement are not favored. United States v. Georgia Power Co., 301 F Supp 538, 543-544 (N D. Ga. 1969). 61A Am.Jur 2d Pleading § 206 (1981).

3. Not discovery substitute. Evidentiary details can more appropriately be obtained through pretrial discovery procedures. Wunschel v. Hoefer, 241 N.W.2d 893, 896 (Iowa 1976); Hagenson v. United Tel. Co. of Iowa, 164 N.W.2d 853, 858 (Iowa 1968).

4. Specificity. The motion shall point out the insufficiency claimed and the particulars desired. IRCP 112; White v. Flood, 138 N.W 2d 863, 865, 258 Iowa 402 (Iowa 1965).

5 Discretion

a. A motion for more definite statement is addressed to the sound discretion of the court. Kroungold v. Triester, 407 F. Supp. 414, 420 (E.D. Penn. 1975). 61A Am.Jur.2d Pleading § 207 (1981).

b. Trial court should not impose unwarranted and unnecessary burden on plaintiff. Wunschel v. Hoefer, 241 N.W.2d 893, 895-96 (Iowa 1976).

6. When sustained. An order sustaining a motion for more specific statement should be entered only if the movant shows the pleading to which the motion is addressed is so indefinite that the party is unable to respond to it. Wunschel v. Hoefer, 241 N.W.2d 893, 896 (Iowa 1976).

7. Error in Order waived. When a party attempts to comply with order for more specific statement, claim of error in the order is waived. Wunschel v. Hoefer, 241 N.W.2d 893, 895 (Iowa 1976).

8. May not seek grounds for dismissal. A motion for more specific statement may not be used to compel a plaintiff to lay the groundwork for a defendant's motion to dismiss. Wunschel v. Hoefer, 241 N.W.2d 893, 896 (Iowa 1976); Goldstein v. Brandmeyer, 243 Iowa 679, 53 N.W.2d 268, 271 (1952).

9 Good faith effort. When (1) a plaintiff is ordered to make his or her petition more specific, and (2) the plaintiff is actually or reasonably unable to further specify, and if (3) a good faith effort to comply with the order is demonstrated; the party must be deemed to have complied with the order. Dismissal of the action is not appropriate in such circumstances. Wunschel v. Hoefer, 241 N.W.2d 893, 895 (Iowa 1976).

10. References.

a. Comparable federal rule- FRCP 12(e).

b. Key Nos. Pleading 367 et seq.

c. 71 CJS Pleading § 457 et seq.

d. 61A Am.Jur.2d Pleading § 206-08.

E. Time to Move - IRCP 85(a) & IRCP 104(b). Motions attacking a pleading must be served before responding to a pleading, or, if no responsive pleading is required by the rules, upon motion made by a party within 20 days after the service of the pleading on the party.

1. Service of Motion - IRCP 82.

a. Service upon a party represented by an attorney shall be made upon the attorney unless service upon the party himself (or herself) is ordered by the Court. IRCP 82(b).

b. Service may be (1) by mail, or (2) by delivering a copy in the manner described in the third sentence of IRCP 82(b). Service by mail is complete upon mailing. IRCP 82(b).

B

c. Whenever these rules require a filing within a certain time, the time requirement shall be tolled when service is made, provided the actual filing is done within a reasonable time. IRCP 82(d).

d. Time limits are extended three days when service of notice or other paper is by mail. IRCP 83(b).

e. Briefs or legal memoranda shall not be filed except in connection with a motion for summary judgment, unless the court orders otherwise. IRCP 82(d).

2. Motion to dismiss filed after answer. District court was without authority to rule on the defendants' oral motion as the defendants failed to move for dismissal under IRCP 104(b) prior to the filing of their answer. Powell v. Khodari - Intergreen Co., 303 N.W.2d 171, 175 (Iowa 1981).

a. With answer. A motion to dismiss filed as part of the answer is not timely filed. Motions to dismiss must be filed prior to responding to the pleading. IRCP 85(a).

b. More than one count. The defendant filing an answer to two counts of a complaint, and a motion to dismiss on the third count, are all part of the same pleading. The defendant did not comply with IRCP 85(a) (motions attacking a pleading must be served *before* responding to the pleading). Walker Shoe Store, Inc. v. Howard's Hobby Shop, 327 N.W.2d 725, 726 (Iowa 1982).

3. Purpose. This rule to benefit the Court in the prompt administration of justice, rather than parties who acquiesce to delay and then seek to profit from the violation. Bombei v. Schafer, 242 Iowa 619, 47 N.W.2d 842, 846 (1951).

4. Shortening time. The court may order any motion or pleading to be within a shorter time than required by the rules. Rule 85(e). However, "although time for appearance in mandamus was shortened under provisions of I.C.A. § 661.11 and defendant was required to appear at date earlier than that normally required, defendant was entitled to seven days after date set for hearing in which to plead. Lame v. Kramer, 145 N.W.2d 597 (Iowa 1966).

5. Extending time. For good cause, but not ex parte, and upon such terms as the court prescribes, the court may grant a party the right to file a motion, answer or reply where the time to file same has expired. IRCP 85(f); Sexton v. Clay Equipment Co., 242 Iowa 675, 47 N.W.2d 792 (1951)(where defendants' failure to plead promptly was due to inability of their counsel to secure from them information necessary to prepare counterclaim, trial court did not abuse its discretion by entering order which in effect granted defendants right to file answer and counterclaim 18 days after time to file had expired).

6 References.

a. Comparable federal rules- FRCP 6, 12(b), 12(f).

b. Key Nos. Pleading 360(2), 367(b), 365(3); Pretrial Procedure 673; Appeal and

Error 1039(1).

c. 71 CJS Pleading § 497 et seq.

III. Motion in Limine.

A. Definition. A term used to describe a written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements. State v. Miller, 229 N.W.2d 762, 767 (Iowa 1975).

B. Authority. The inherent power of the court to control and manage trials is sufficient authority for the use of motions in limine. State v. Johnson, 183 N.W.2d 194, 197 (Iowa 1971).

B

C. Purpose. The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel declaring a mistrial. State v. Davis, 240 N.W.2d 662, 663 (Iowa 1976). It also serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of the trial. Twyford v. Weber, 220 N.W 2d 919, 923 (Iowa 1974). The trial judge is thereby alerted to an evidentiary problem which may develop in the trial. State v. Johnson, 183 N.W.2d 194, 197 (Iowa 1971). It is a red flag to counsel that the evidence is not to be brought before the jury unless and until it is separately taken up with the court in the posture of the case at trial. State v. Langley, 265 N.W.2d 718, 721 (Iowa 1978). It is designed to preclude premature presentation of evidence. State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979). Motion in limine is not ordinarily employed to choke off entire claim or defense. McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989).

D Avoids inadvertence. The motion has the effect of advising the court and opposing counsel of the party's position on a particular matter and should effectively remove the problem when the argument is advanced by the offending party that the prejudicial evidence came in by sheer inadvertence. State v. Johnson, 222 N.W.2d 483, 487 (Iowa 1974); Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974).

E. Scope of Order. A court's order on a motion in limine is limited by the precise language and scope of the order. *See e.g.* State v. Hennessey, 405 N.W.2d 846, 848 (Iowa 1987); Hamann v. State, 324 N.W 2d 906, 913 (Iowa 1982); State v. McKee, 312 N.W.2d 907, 910-II (Iowa 1981).

F. Not a ruling on evidence. *A* motion in limine is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence. Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992); Twyford v. Weber, 220 N.W 2d 919, 923 (Iowa 1974); State v. Langley, 265 N W 2d 718, 721 (Iowa 1978).

G. Case should not be tried twice A party should not be required to try a case or defense twice - once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198, 201 (Iowa 1971).

H. Specific references The motion should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198, 201 (Iowa 1971). It is not ordinarily employed to choke off an entire claim or defense. McCracken v. Edward D. Jones & Co., 445 N W.2d 375, 379 (Iowa App. 1989).

I. Procedure.

1. Criminal cases. In criminal cases, the motion in limine must be raised prior to trial. Iowa R. Crim. Pro. 10(2)g.

2. Evidentiary hearing. Since no one knows exactly how the trial will proceed, trial courts would ordinarily be well advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion. Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198, 201 (Iowa 1971).

3. Ruling. When the motion is sustained, the order must be so worded as not to preclude the right of the parties affected thereby to make their record in the absence of the jury on any material evidentiary matters which they feel entitled to produce in support of their case in view of the trial record made at that point. Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974). There may be situations presented where the evidence or statements are so prejudicial that there can be no situation developed during the course of the trial in which such evidence could be logically claimed to be admissible. No further record is then necessary. Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974).

J. Preservation of error. Ordinarily the granting or rejecting of a motion in limine is not reversible error. State v. Delaney, 526 N.W.2d 170, 177 (Iowa App. 1994). The error comes, if at all, when the matter is presented at trial and the evidence is admitted or refused. State v. Langley, 265 N.W.2d 718, 720 (Iowa 1978).

1. Exception. An exception exists where such a motion is granted on a hearing which is evidentiary in nature, the court is completely advised of the factual situation, and nothing occurs at trial to change the status. State v. Langley, 265 N.W.2d 718, 720 (Iowa 1978). A slightly different characterization of this exception: when the prior ruling amounts to an unequivocal holding concerning the issue raised. State v. Delaney, 526 N.W.2d 170, 177 (Iowa App. 1994)(hearing was held, counsel presented legal arguments, and the trial court ruled the evidence would or would not be received).

2. When motion denied. Generally, however, when a motion in limine is overruled, in general, error is not preserved unless objection is made when the evidence is offered. State v. Delaney, 526 N.W.2d 170, 177 (Iowa App. 1994); State v. Latham, 366 N.W.2d 181, 183 (Iowa 1985); State v. Mendiola, 360 N.W.2d 780, 782 (Iowa1985); Berg v. Des Moines General Hosp. Co., 456 N.W.2d 173 (Iowa 1990).

3. When motion granted. When the motion is sustained and evidence is not offered, there is nothing preserved to review on appeal. 504 N.W.2d 135, Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135, 138 (Iowa App. 1993); Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992).

4. Failure to rule on motion. A court's failure to rule on the motion constitutes a denial since the purpose of the motion is to receive an advance ruling on anticipated objectionable material. State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971).

K. When to treat as a motion to suppress. When a motion in limine is more properly viewed as a motion to suppress, the court will treat it as a motion to suppress. In such case, an adverse ruling on the motion preserves error despite a failure to assert an objection when the evidence was offered at trial. State v. Feddersen, 230 N.W.2d 510, 512 (Iowa 1975).

L. References.

1. Key nos: Trial 9(1); Pretrial procedure 3; Crim. Law 632(4); Divorce 145; Fed. Civ. Pro. 2011.

2. 75 Am.Jur.2d Trial § 165.

B

IV. **Amendments to Pleadings - IRCP 88 & IRCP 89.**

A. Right to amend.

1. Before responsive pleading is served. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. IRCP 88. A motion is not a pleading. IRCP 109. In re Marriage of Schonts, 345 N.W.2d 145, 146 (Iowa App. 1983).

2. Where no responsive pleading is required. If the pleading is one to which no responsive pleading is required and the action has not been placed on the trial calendar, the party may so amend it at anytime within 20 days after it is served. IRCP 88.

3. All other cases. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. IRCP 88.

a. Purpose. The purpose of the leave of court requirement is to give defendants who have answered a right to object to amendments made which might affect their preparation for trial. Norwest Bank Marion, Nat'l Ass'n v. L T Enterprises, Inc., 387 N.W.2d 359, 365 (Iowa App. 1986)

b. Add new parties. When an amendment is sought to add new parties after issue has been joined by original defendants, permission of the Court is necessary. West v. Hawker, 237 N.W.2d 802, 807 (Iowa 1976). Amendment of petition to substitute for the plaintiff a real party in interest is permissible. M-Z Enterprises, Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408, 412 (Iowa 1982)

4 Failure to secure leave. Failure to secure leave of court, is without more, an insufficient reason to disregard a pleading. The irregularity of filing an amendment without leave of court is cured by the opponent responding thereto. Padzensky v. Kinzenbaw, 343 N.W.2d 467, 470 (Iowa 1984).

B. Leave freely given. Leave to amend, including leave to amend to conform to proof, shall be freely given when justice so requires. Rule 88; Medco Behavioral Care Corp. of Iowa v. State, Dept. of Human Services, 553 N.W.2d 553, 556 (Iowa 1996); Bremicker v. MCI Telecommunications Corp., 420 N.W.2d 427, 429 (Iowa 1988).

1. Amendments the rule. Amendments are the rule and denials the exception. In re Marriage of Fields, 508 N.W.2d 730 (Iowa 1993) (allowing amendments strongly encouraged, denying permission discouraged); Kitzinger v. Wesley Lumber Co., 419 N.W.2d 739, 741 (Iowa App. 1987); Bremicker v. MCI Telecommunications Corp., 420 N.W.2d 427, 429 (Iowa 1988)

2. Liberally grant. While trial courts should liberally grant amendments, it is well within the trial court's discretion to deny the motion to amend when it was asked to rule on such motion the day of the trial. Norwest Bank Marion, Nat'l Ass'n v. L T Enterprises, Inc., 387 N.W.2d 359, 365 (Iowa App. 1986).

C. Discretion. The trial court has considerable discretion in allowing amendments. Whalen v. Connelly, 545 N.W.2d 284, 293 (Iowa 1996); Porter v. Good Eavespouting, 505 N.W.2d 178 (Iowa 1993) (Trial court will be reversed only when clear abuse of discretion is shown); Chao v. Waterloo, 346 N.W.2d 822, 825 (Iowa 1984); Kitzinger v. Wesley Lumber Co., 419 N.W.2d 739, 742 (Iowa App. 1987).

D. When allowed. Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence. Alllison-Kesley Ag Center v. Hildebrand, 485 N.W.2d 841 (Iowa 1992); Lake v. Schaffnit, 406 N.W.2d 437, 441 (Iowa 1987); Peterson v. Petersen, 355 N.W.2d 26, 27-28 (Iowa 1984).

E. Conditions. In allowing an amendment under Rule 88, the trial court may impose terms as a condition of the allowance. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976).

F. Changes of Issues.

1. Amendment not allowed. The courts have held that amendments should not be allowed after a responsive pleading has been filed if they substantially change the issues. Glenn v. Carlstrom, 556 N.W.2d 800, 804 (Iowa 1996)(eve of trial); Bremicker v. MCI Telecommunications Corp., 420 N.W.2d 427, 429 (Iowa 1988); Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223, 225 (Iowa App. 1984); Kitzinger v. Wesley Lumber Co., 419 N.W.2d 739, 741-42 (Iowa App. 1987) (attempt to amend petition to change breach of warranty claim to a tort action). The court also must consider other factors such as whether the non-amending party would be prejudiced. Willson v. Des Moines, 386 N.W.2d 76, 84 (Iowa 1986), cert. denied, 479 U.S. 948, 107 S. Court. 432, 93 L.Ed.2d 382. For amendment after the entry of a default judgment, *see* Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223 (Iowa App. 1984).

2. Rationale. The rationale for the rule disallowing an amendment which substantially changes the issues is that such an amendment would surprise the responding party and thereby prejudice his case. Kitzinger v. Wesley Lumber Co., 419 N.W.2d 739, 741 (Iowa App. 1987); Kitzinger v. Wesley Lumber Co., 419 N.W.2d 739, 741 (Iowa App. 1987).

3. Substantial discovery. The court may consider the fact that substantial discovery has taken place in considering whether to grant a motion to amend, even though the motion to amend changes the theories. Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 692 (Iowa App. 1984).

G. Negligence of movant. If it is found that the movant is negligent in asserting an amendment, the motion should not be allowed. Davis v. Ottumwa YMCA, 438 N.W.2d 10, 14 (Iowa 1989).

H. Relation back. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. IRCP 89.

1. Purpose. The rule is based upon a concept that once litigation involving particular

B

conduct or given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction or occurrence as set forth in the original pleading. 1976 Comment to IRCP 89; 2 IRCP Annot. Rule 89 (1989 Supp., 1970).

2. Timing. Amendment should not be granted on the eve of trial or later when it will substantially alter any issue in the case. Glenn v. Carlstrom, 556 N.W.2d 800, 804 (Iowa 1996); In re Marriage of Titterington, 488 N.W.2d 176 (Iowa App. 1992). However, the timing of an attempt to amend is not the determinative factor; instead, the critical determination is whether the proposed amendment substantially changes the issues before the court. Allison-Kesley Ag Center v. Hildebrand, 485 N.W.2d 841 (Iowa 1992).

3. Amendment changing party.

a. Rule. An amendment changing the party against whom a claim is asserted relates back if the "same transaction" provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. IRCP 8. Jacobson v. Union Story Trust & Savings Bank, 338 N.W.2d 161, 164 (Iowa 1983) (IRCP 89 not satisfied, so amendment could not relate back); Porter v. Good Eavespouting, 505 N.W.2d 178 (Iowa 1993).

b. Requirements. The threshold requirement for relation back under Rule 89 is that the claim pleaded in the amendment arose from the conduct, transaction, or occurrence described in the original pleading. If the amendment is made to substitute plaintiffs and the correct defendant is already in the case, the rule also requires that within that period of the statute of limitations the defendant had received sufficient notice of the action to avoid prejudice in maintaining a defense. Courts have applied three tests to determine if the latter requirement is met: (1) whether defendant received adequate notice before the statute ran, (2) whether defendant would be prejudiced by the amendment, and (3) whether the original and new plaintiffs have an "identity of interest". Notice and prejudice to the defendant are the key questions. M-Z Enterprises, Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408, 411 (Iowa 1982); *see also* Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994), cert. den. 115 S. Court. 1958, 131 L.Ed.2d 850.

c. Correcting Names. The above rule also applies to amendments correcting names. Grant v. Cedar Falls Oil Co., 480 N.W.2d 863 (Iowa 1992).

l. Effect. Pleadings that have been superseded remain a part of the record in the case, even though withdrawn, and may be introduced in evidence against the party filing them. Admissions in a pleading that have been superseded are not conclusive upon the party making them. The party may show they were made inadvertently or by mistake. Bigelow v. Williams, 193 N.W.2d 521, 524 (Iowa 1972) (quoting Shipley v. Reasoner, 87 Iowa 555, 557,

54 N.W. 470, 471 (1893)). However, a petition which has been superseded or withdrawn cannot be considered in determining whether substituted or amended petition states a cause of action. Bigelow v. Williams, 193 N.W.2d 521, 524 (Iowa 1972).

J. Delay as grounds for denial. A long delay in filing the amendment is sufficient ground for the trial court, in its discretion, not to permit it. Farmers Ins. Group v. Merryweather, 214 N.W.2d 184, 188 (Iowa 1974)(two year delay); Briney v. Tri-State Mut. Grain Dealers Fire Ins. Co., 254 Iowa 673, 117 N.W.2d 889, 892 (Iowa 1962) (one and one-half year delay); Russell v. Chicago, Rock Island & Pacific Railroad Co., 251 Iowa 839, 102 N.W 2d 881, 885 (1960) (three and one-half year delay).

K. Necessity for amendment. Denial of a motion to amend is proper when the claim is adequately covered by another pleading. National Properties Corp. v. Polk County, 386 N.W.2d 98, 107 (Iowa 1986).

L. Related Rules.

1. Pleading over. A party may be permitted or required to plead further by an order or ruling. IRCP 86. If the losing party repleads within the time limits set out by the court or the seven days provided under rule, the order is not considered final; if the losing party fails to plead further, it is deemed to have elected to stand on the pleadings and the order becomes final. Tigges v. Ames, 356 N.W 2d 503, 508 (Iowa 1984)

2. Supplemental pleading. By leave of court, upon reasonable notice and upon such terms as are just, or by written consent of the adverse party, a party may serve and file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. IRCP 90. *See also* Johnston v. Percy Construction, Inc., 258 N.W 2d 366, 370-371 (Iowa 1977).

a. Purpose. The purpose of the rule is to permit the pleading to be brought up to date as to new developments since the prior pleading was filed. 1976 Comment to IRCP 90; 2 IRCP Annot. Rule 90 (1989 Supp., 1970)

b. Generally preferable. It is within the discretion of the trial court to grant leave to file supplemental pleadings. Moser v. Thorp Sales Corp., 312 N.W.2d 881, 894-95 (Iowa 1981). It is generally preferable to allow supplemental pleadings and amendments than to deny them. Id. at 896.

3. Special action. In any case of mandamus, certiorari, appeal to the district court, or for specific equitable relief, where the facts pleaded and proved do not entitle the petitioner to the specific remedy asked, but do show petitioner entitled to another remedy, the court shall permit the petitioner on such terms, if any, as it may prescribe, to amend by asking for such latter remedy, which may be awarded. IRCP 107; Moderate Income Housing, Inc. v. Board of Review, 393 N.W.2d 324, 326-27 (Iowa 1986) (rejected mandamus and remanded to allow for an amendment of the petition).

4. Pretrial conference. The necessity or desirability of amending pleadings by

B

formal agreement or pretrial order may be considered at pretrial conference. IRCP 136(b)(4), 136(c)(2). A pretrial order can operatively amend a pleading. Brunson v. Winter, 443 N.W.2d 717, 719 (Iowa 1989); Gray v. Schlegel, 265 N.W.2d 156 (Iowa 1978).

5. Issues tried by consent. When deciding motions for new trial (IRCP 244) or for judgment n.o.v., issues tried by express or implied consent, but not embraced by the pleadings, shall be treated as though they had been pleaded. Either party may then amend his pleadings to conform to such issues and the evidence upon them, but failure to so amend shall not affect the result of the trial. IRCP 249.

a. When tried by consent. Where parties proceed without objection to try an issue, even though not presented by the pleadings, it amounts to consent to try such issue and it is then rightfully in the case. Dutcher v. Randall Foods, 546 N.W.2d 889, 893 (Iowa 1996). *See also* Allison-Kesley Ag Center, Inc. v. Hildebrand, 485 N.W.2d 841 (Iowa 1992).

b. When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The court shall freely allow pleadings to be amended in such circumstances. IRCP 106.

M. References.

1. Comparable federal rule: FRCP 15(a), (c), (d)

2. Key Nos.: Pleading 229 et seq.; Fed. Civ. Pro. 821 et seq ; Limitation of Actions 121(2), 125; Parties 322.

3. 71 CJS Pleading § 275 et seq.; 35 CJS Fed. Civ. Pro. § 322

d. 61A Am.Jur.2d Pleading § 306-38.

V. Setting Aside Defaults - IRCP 236.

A. Setting aside default - IRCP 236.

1. Within 60 days after judgment. Rule 236 is used to set aside a default within 60 days after entry of judgment. IRCP 236. Thereafter, Rules 251 to 253 must be used. State, ex rel. Hunter, 501 N.W.2d 533 (Iowa 1993); Hastings v. Espinosa, 340 N.W.2d 603, 609 (Iowa App. 1983).

2. Purpose. The purpose of Rule 236 is to allow a determination of controversies on their merits, rather than on the basis of non-prejudicial inadvertence or mistake. Whitehorn v. Lovik, 398 N.W 2d 851, 853 (Iowa 1987)

3. Discretion. Trial courts are vested with broad discretion in ruling on motions to set aside a default. Such rulings will be reversed on appeal only for an abuse of discretion. Generally, abuse will be found only where there is a lack of substantial evidence to support the trial court's ruling because the trial court's findings of fact in

deciding the motion have the force of a jury verdict. Millington v. Kuba, 532 N.W.2d 787, 791 (Iowa 1995). The appellate courts are more reluctant to interfere with the grant of such a motion than with its denial. Central Nat. Ins. Co. of Omaha v. Insurance Co. of North Am., 513 N.W.2d 750 (Iowa 1994).

4. Determined at law. A proceeding to set aside a default judgment under Rule 236 is a proceeding at law. Bank of Craig, Craig, Mo. v. Hughes, 398 N.W. 2d 216, 217 (Iowa App. 1986). The Supreme Court will uphold the trial court's ruling even when the court has made no findings of fact or has based its ruling on different ground. Central Nat. Ins. Co. of Omaha, *supra*.

5. Trials favored. Courts look with favor upon trials and the rights of a litigant should not be denied proper hearing by strict application of legal formalities. Hannan v. Bowles Watch Band Co., 180 N.W.2d 221, 222 (Iowa 1970). The rules of civil procedure governing the procedures by which a court may dismiss pending litigation are to be liberally construed and applied to the end that meritorious trials may be had. Schmidt v. Marshalltown Board of Appeals, 403 N.W.2d 797, 799 (Iowa App. 1987).

6. "Good cause." "Good cause" for setting aside a default judgment is a sound, effective, truthful reason. It is something more than an excuse, a plea, apology, extenuation or some justification for the resulting effect. Ward v. Pohren, 436 N.W.2d 380, 381 (Iowa App. 1988). Good cause also includes a claimed defense asserted in good faith. Central Nat. Ins. Co. of Omaha v. Insurance Co. of North Am., 513 N.W.2d 750 (Iowa 1994).

a. Burden of proof. The burden is on movant to plead and prove good cause to set aside the default or judgment thereon. Ward v. Pohren, 436 N.W.2d 380, 381 (Iowa App. 1988).

b. Grounds. Good cause must be based on one of the grounds listed in IRCP 236: mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty. Ward v. Pohren, 436 N.W.2d 380, 381 (Iowa App. 1988). Good cause does not exist without a meritorious defense. Hastings v. Espinosa, 340 N.W.2d 603, 609 (Iowa App. 1983); Central Nat. Ins. Co. of Omaha, *supra*.

c. Distinctions drawn. The courts have drawn distinctions between justifications which amount to no more than excuse, plea, or apology, and those reasoned explanations which affirmatively show that the movant intended and set out to defend but failed to do so because of some misunderstanding, accident, mistake or excusable neglect. Whitehorn v. Lovick, 398 N.W.2d 851, 854 (Iowa 1987).

d. Not a blameless party. IRCP 236 does not contemplate a blameless party. It contemplates that some fault actually exists. Whitehorn v. Lovick, 398 N.W 2d 851, 854 (Iowa 1987).

e. Intend to defend. If defendants intended to defend but because of a good faith mistake were unable to do so, the default may be set aside. Ward v. Pohren, 436 N.W 2d 380, 381 (Iowa App. 1988).

f. Promptness. The fact that defendant moved promptly to set aside the default

B

is of significance in determining whether good cause has been shown. Paige v. Chariton, 252 N.W.2d 433, 437 (Iowa 1977).

g. Lack of understanding of legal effect. A lack of understanding as to the legal effect of a notice in a civil action will not excuse one from taking affirmative action to obtain an understanding and to make an attempt to appear. Ward v. Pohren, 436 N.W.2d 380, 381 (Iowa App. 1988).

h. Mistake of counsel. Lack of understanding by counsel or failure of counsel to read the Rules of Civil Procedure does not constitute "good cause" to set aside a default judgment. Dew v. American Heritage Life Ins. Co., 431 N.W.2d 8, 10 (Iowa App. 1988).

I. Unavoidable casualty. Unavoidable casualty means some casualty or misfortune growing out of conditions or circumstances that prevented the party or the party's attorney from doing something that, except therefor, would have been done. Central Nat. Ins. Co. of Omaha v. Insurance Co. of North Am., 513 N.W.2d 750 (Iowa 1994)

7. Negligence The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. Dealers Warehouse Co. v. Wahl & Associates, 216 N.W.2d 391, 394-395 (Iowa 1974).

a. But see Hannan v. Bowles Watch Band Co., 180 N.W.2d 221, 223 (Iowa 1970), in which the court affirmed the setting aside of a default judgment where the evidence supported a finding of negligence, but did not support a finding of inexcusable neglect. The inherent difficulties associated with running a business were deemed to be legitimate factors to assess in determining the effect to be given a business' inadvertent or negligent failure to handle a matter within the time allowed.

b. Litigant's error. Where the failure to appear is attributable solely to the litigant's error, then the court is less likely to set aside the judgment. Ward v. Pohren, 436 N.W.2d 380, 381 (Iowa App 1988).

8. Excusable neglect. In determining "excusable neglect" the district court should focus on the following four factors: (1) did the defaulting party actually intend to defend (whether the party moved promptly to set aside the default is significant), (2) does the defaulting party assert a claim or defense in good faith, (3) did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake, and (4) relief should not depend on who made the mistake. Central Nat. Ins. Co. of Omaha v. Insurance Co. of North Am., 513 N.W.2d 750 (Iowa 1994).

9. Ignoring rules. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them. Dealers Warehouse Co. v. Wahl & Associates, 216 N.W.2d 391, 395 (Iowa 1974).

10. Court may impose terms. The setting aside of a default may be on such terms

as the court prescribes. Rule 236. The court has discretion to impose reasonable terms on the setting aside of a default as justified by facts of the case. In re Marriage of Hobart, 375 N.W.2d 290, 292 (Iowa App. 1985).

11. Effect of filing an IRCP 236 motion. Filing of a Rule 236 motion does not affect the finality of that judgment or the running of the time for filing an appeal. It does, however, restore the district court's power and authority over the controversy to the extent that, for good cause shown, the judgment can be set aside. Snyder v. Allamakee County, 402 N.W.2d 416, 419 (Iowa 1987).

B. Related rule-judgment vacated or modified. There are distinct differences between a motion to set aside default and a motion to vacate judgment. *See* In re Marriage of Heneman, 396 N.W.2d 797, 799-800 (Iowa App. 1986) (need greater amount of evidence to vacate final judgment than to set aside default); H & S Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa App. 1984).

C. References.

1. Comparable federal rule: FRCP 55(c).

2. Key Nos.: Judgment 135-77; Appeal and Error 957.

3. 49 CJS Judgment § 286, 33 et seq.

d. 46 Am.Jur 2d Judgments § 686

VI. Dismissal for Want of Prosecution and Reinstatement - IRCP 215.1

A. Dismissal and Continuance.

1. Policy. It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed, and in most instances within a shorter time. Rule 215.1

2. Purpose. The purpose of Rule 215.1 is to promote expeditious trial of cases on the merits by clearing the docket of dead cases and assuring "the timely and diligent prosecution of those cases that should be brought to a conclusion." O'Brien v. Mullapudi, 405 N.W.2d 815, 816 (Iowa 1987).

3. Strictly construed. Rule 215.1 formalities must be strictly observed as a prerequisite to dismissal of a case under the rule. Erickson by Erickson v. Salama, 379 N.W.2d 904, 907 (Iowa 1986).

The rules of civil procedure governing the procedures by which a court may dismiss pending litigation are to be liberally construed and applied to the end that meritorious trials may be had. Not every noncompliance with the rules of civil procedure is excusable. Where a party has ignored plain mandates of a rule with ample opportunity to abide by them, a dismissal of that party's action is warranted. Where,

B

however, the actions of the party demonstrate that the noncompliance with the rule was due to excusable oversight or mistake, the court should not dismiss the case outright, but rather should favorably weigh such circumstances in favor of that party and against dismissal. Schmidt v. Marshalltown Board of Appeals, 403 N.W.2d 797, 799-800 (Iowa App. 1987).

4. Shield, not a sword. Rule 215.1 was intended to be a shield, not a sword. It was not designed as a technicality to trap a diligent party and prevent him from having a day in court. Gold Crown Properties, Inc. v. Iowa District Court for Pottawattamie County, 375 N.W.2d 692, 698 (Iowa 1985).

5. Continuance. The automatic dismissal pursuant to Rule 215.1 is not discretionary with the trial court, but the court does have discretion to grant continuances for just cause upon timely application. Netteland v. Farm Bureau Life Ins. Co., 510 N.W.2d 162, 167 (Iowa App. 1993). IRCP 215.1 motions for continuance should not be set by the court or the court administrator for a date which is after the mandatory dismissal date. Doland v. Boone County, 376 N.W.2d 870, 873 (Iowa 1985); *see also* Sanchez v. Kilts, 459 N.W.2d 646 (Iowa App. 1990).

6. Dismissal automatic without continuance. Without a proper continuance, the dismissal of a cause noted for trial or dismissal is mandatory and automatic. Baty v. West Des Moines, 259 Iowa 1017, 147 N.W.2d 204, 208 (1966).

a. Rationale. The impetus to move cases would be lost if dismissals were selected on a case by case basis. When the time for dismissal arrives, the case is dismissed automatically without formal action by either the court or the clerk. Failure to note the dismissal of record does not save the case. Greif v. K-Mart Corp., 404 N.W.2d 151, 153-54 (Iowa 1987).

b. Party's responsibility. It is the party's responsibility, not the court's, to obtain an order of continuance before the automatic dismissal occurs. Greif v. K-Mart Corp., 404 N.W.2d 151, 154 (Iowa 1987). To avoid the mandatory dismissal under the rule before the date of dismissal, the court must either (a) enter an order granting the continuance or (b) take the application under advisement. Tiffany v. Brenton State Bank, 508 N.W.2d 87 (Iowa App. 1993).

7. Effect of exemption from IRCP 215.1. If there is an appeal, or if other IRCP 215.1 grounds for exemption are established, the rule is inapplicable. Thus, there is no dismissal to hang in suspension over the case. In that situation, a notice under IRCP 215.1 must be sent anew after the grounds for exemption are removed. Allied Gas & Chemical Co. Inc. v. Federated Mut. Ins. Co., 365 N.W.2d 26, 31 (Iowa 1985).

8. Continuance or reinstatement does not remove case from rule. When a case subject to IRCP 215.1 is either continued or reinstated following dismissal for lack of prosecution, the case is not removed from the operation of Rule 215.1 but is simply given a later deadline for trial or other disposition. Sanchez v. Kilts, 459 N.W.2d 646, 649 (Iowa App. 1990); Sladek v. G & M Midwest Floor Cleaning, Inc., 403 N.W.2d 774, 776-77 (Iowa 1987).

9. No continuances without Application and Notice. A case may not be continued after a 215.1 notice has been given without an order of court upon application and notice. Greif v. K-Mart Corp., 404 N.W 2d 151, 154 (Iowa 1987).

10. Jurisdiction retained. Where a motion for continuance is filed and submitted on notice before the IRCP 215.1 deadline for trial, continuance or dismissal, jurisdiction is retained by the trial court while it has such motion under advisement. However, when the motion is denied, the six month reinstatement period runs from the IRCP 215.1 date, not from the date the order of denial is entered. Fankell v. Schober, 350 N.W.2d 219, 223 (Iowa App. 1984).

11. Assignment not duty of Court. It is not the duty of either the clerk or the trial court to assign the case for trial or see that it is tried. Parties who receive the notice are charged with protecting their rights. They must see that the case is assigned and tried or suffer the consequences of dismissal. Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901, 904 (1963).

12. Notice mandatory. IRCP 215.1 imposes a mandatory duty upon clerks of trial courts to give notice by mail or delivery in accordance with IRCP 82 prior to August 15th. Kiertzner v. Ehrp, 218 N.W.2d 587, 590 (Iowa 1974).

a. Date for Notice. Notice must be mailed prior to August 15th. Notice mailed on August 15th is too late and is ineffective under the Rule. Smith v. Korf, Diehl, Clayton & Cleverley, 329 N.W.2d 669, 671 (Iowa 1983).

b. All attorneys receive notice. Where plaintiffs are represented by multiple counsel from different law firms, it is necessary that each be served with notice of 215.1 dismissal. Erickson by Erickson v. Salama, 379 N.W.2d 904, 906-07 (Iowa 1986).

c. Clerk's failure. If the clerk gives one timely 215.1 notice, try or dismiss status is triggered, and no new notice is required in following years. Rhiner v. Arends, 292 N.W.2d 399, 401-02 (Iowa 1980).

13. Not an Adjudication on Merits. Any dismissal without prejudice pursuant to IRCP 215.1 in an action that has been previously dismissed is not an adjudication on the merits against the plaintiff. Pollock v. Deere & Co., 282 N.W.2d 735, 737-38 (Iowa 1979).

14. Try-or-dismiss date. It is common practice for the court to provide that the date certain be a try-or-dismiss date. The effect of such an order is to transfer the date of mandatory dismissal, otherwise set for January 1st by the Rule, to an automatic dismissal date as set in the try-or-dismiss order. Sanchez v. Kilts, 459 N.W.2d 646, 649 (Iowa App. 1990).

15. Severance of third party claims. Severance of third party claims for separate trial does not make IRCP 215.1 inapplicable to the third party claims. Muscatine v. U.S. Enviro-Con., Inc., 374 N.W 2d 405, 409 (Iowa 1985).

B

B. Reinstatement.

1. Reinstatement only as provided by IRCP 215.1. Once a case is dismissed under IRCP 215.1, it can be reinstated only by timely application and order as provided for in the rule itself. Brown v. Iowa District Court for Polk County, 272 N.W.2d 457, 459 (Iowa 1978).

a. Purpose. The reinstatement provisions of IRCP 215.1 ease the plight of the dismissed plaintiff by allowing the party back into court on a proper showing under the rule. O'Brien v. Mullapudi, 405 N.W.2d 815, 816 (Iowa 1987).

b. Oral application. An oral application for reinstatement under IRCP 215.1 will suffice if notice to opposing counsel or parties, and creation of a record (the reasons for preferring written applications) are satisfied. Doland v. Boone County, 376 N.W.2d 870, 874-75 (Iowa 1985).

2. Application must be filed within six months. An application to reinstate under IRCP 215.1 must be filed within six months from the date of dismissal, otherwise the dismissal is final. Dible v. State, 557 N.W.2d 881, 883 (Iowa 1996).

a. Time of ruling. It is not required that the application be ruled on prior to expiration of the six month period. Dolezal Commodities, Inc. v. Cedar Rapids, 387 N.W.2d 572, 574-75 (Iowa 1986).

b. Authority to reinstate. When the six-month time limitation is satisfied, the district court has authority to reinstate a case that has been dismissed for lack of prosecution, both when the dismissal resulted directly from a Rule 215.1 notice sent by the clerk of court and when the dismissal was a self-fulfilling provision in an order that had earlier continued or reinstated the case. Sladek v. G & M Midwest Floor Cleaning, Inc., 403 N.W.2d 774, 777 (Iowa 1987).

3. Prerequisite. A prerequisite to either mandatory or discretionary reinstatement is a showing by plaintiffs of reasonable diligence in preparing and pursuing the case for trial. Tiffany v. Brenton State Bank of Jefferson, 508 N.W.2d 87, 90 (Iowa App. 1993 The burden is on the movant to prove an adequate reason for reinstatement. Tiffany v. Brenton State Bank, 508 N.W.2d 87 (Iowa App. 1993).

4. Mandatory reinstatement. Mandatory reinstatement is required upon a showing that the dismissal was a result of "oversight, mistake or other reasonable cause". O'Brien v. Mullapudi, 405 N.W.2d 815, 816-17 (Iowa 1987); Sladek v. G & M Midwest Floor Cleaning, Inc., 403 N.W.2d 774, 778 (Iowa 1987) (and "the exercise of reasonable diligence").

a. Oversight. "Oversight" has been defined as "something overlooked"; an "omission or error due to inadvertence." "Inadvertence" in turn is defined as "lack of care or attentiveness." Oversight is similar to excusable neglect but negatively, it is not gross neglect or willful procrastination. Sladek v. G & M Midwest Floor Cleaning, Inc., 403 N.W.2d 774, 777 (Iowa 1987).

b. Same interpretation as Rule 236 (Setting Aside Default). The court has been

liberal in affirming determinations of default-voiding mistake, inadvertence, and excusable neglect in Rule 236 appeals. The same policy shall be followed, within the scope of permissible review, with respect to reinstatement under the Rule 215.1 amendment. Dolezal Commodities, Inc. v. Cedar Rapids, 387 N.W.2d 572, 575 (Iowa 1986).

c. Review. A review of a mandatory reinstatement determination is not de novo, as in equity, but as in a law proceeding. Whether the facts and inferences found constitute "inadvertence," "mistake" or "other reasonable cause" is not a factual but a legal question on review. O'Brien v. Mullapudi, 405 N.W.2d 815, 817 (Iowa 1987) (quoting Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972)).

5. Discretionary reinstatement. In addition to the mandatory reinstatement provisions, IRCP 215.1 provides for discretionary reinstatement. Tiffany v. Brenton State Bank, 508 N.W.2d 87 (Iowa App. 1993); Rath v. Sholty, 199 N.W.2d 333, 335-36 (Iowa 1972).

a. Discretion. Upon plaintiff's failure to prove grounds for mandatory reinstatement, the district court then must consider a discretionary determination concerning reinstatement. In making this determination, the court must consider whether plaintiff or plaintiff's counsel has shown reasonable diligence in preparing and pursuing the case for trial. O'Brien v. Mullapudi, 405 N.W.2d 815, 819 (Iowa 1987). The court must balance the tensions between protecting each plaintiff's day in court, and the "useful purpose" of IRCP 215.1 in preventing unnecessary delay and compelling expeditious determinations of the issues. Sladek v. G & M Midwest Floor Cleaning, Inc., 403 N.W.2d 774, 778 (Iowa 1987).

b. Abuse of discretion. "Abuse of discretion" does not necessarily imply a dishonest motive or act; it is not ordinarily a term of reproach. It arises from action beyond the bounds of fair discretion, exceeding the bounds of reason. It has been defined as an "erroneous conclusion and judgment, one clearly against the logic and effect of the facts and circumstances before the court, or reasonable, probable, and actual deductions to be drawn therefrom." Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23, 32, 60 A.L.R. 2d 1354 (1956). *See also* Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, 243 (Iowa 1984).

c. Attorney errors versus client error. In general, the distinction between client error and attorney error is relevant in determining whether a default judgment should be overturned. It would not seem to be the sole factor, however; rather it is part of the overall situation which might include prompt attention to the default, existence of a meritorious defense, appellate court's reliance on trial court's discretion and the policy of trial on the merits. Furthermore, there are limits to the extent to which the distinction will be carried. The problem thus is not so much who made the cause for dismissal but the substance of the cause. Matter of Estate of Bearbower, 376 N.W.2d 922, 924 (Iowa App. 1985).

6. References.

a. Comparable federal rule: FRCP 41(b).

B

b. Key Nos.: Pretrial Procedure 551, 581-602, 676, 694, 697.

c. CJS Dismissal and Nonsuit 60, 65.

d. 24 Am.Jur.2d Dismissal, Discontinuance, and Nonsuit § 48-64, 90-93.

VII. Summary Judgment - IRCP 237 - IRCP 240.

A. Purpose. The purpose of summary judgment is to avoid a trial where no genuine issue of material fact exists. Amco Insurance Co. v. Stammer, 411 N.W.2d 709, 711 (Iowa App. 1987). Summary judgment is used to avoid useless trials and streamline the litigation process. Diamond Products Co. v. Skipton Painting & Insulating, Inc., 392 N.W.2d 137, 138 (Iowa 1986). A trial as defined by civil procedure rules is a hearing on the merits of a controversy after the opportunity for preliminary proceedings has passed; thus, summary judgment is not a trial within the meaning of the rules. State v. Greenley, 336 N.W.2d 414, 416 (Iowa 1983).

B. Standard. Summary judgment is proper when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Matter of Estate of Daily, 555 N.W.2d 254, 256 (Iowa App. 1996); Mewes v. State Farm Auto Ins. Co., Inc., 530 N.W.2d 718 (Iowa 1995); First Nat. Bank in Fairfield v. Kenny, 454 N.W.2d 589, 591 (Iowa 1990).

1. Facts. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. Anderson v. Liberty Lobby, Inc., 447 U. S. 242, 247-48, 106 S. Ct. 2505, 91 L.Ed.2d 202, 211 (1986).

a. Material. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law. Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988).

b. Genuine. The requirement of "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Jones v. Palmer Communications Inc., 440 N.W.2d 884, 889 (Iowa 1989); Junkins v. Brandstad, 421 N.W.2d 130, 132 (Iowa 1988).

2. Not to decide merits. In ruling on a motion for summary Judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does. Daboll v. Hoden, 222 N.W.2d 727, 731 (Iowa 1974); Matter of Estate of Henrich, 389 N.W.2d 78, 80 (Iowa App. 1986).

3. Legal Consequences. When, under the entire record, the only conflict concerns the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Schlueter v. Grinnell Mut. Reinsurance Co., 553 N.W.2d 614, 615 (Iowa App. 1996); Hameed v. Brown, 530 N.W.2d 703 (Iowa 1995)

4. Entire record. In order to rule upon such a motion, the court must examine the entire record before it, including the pleadings, admissions, depositions, answers to

interrogatories, affidavits, if any, and other pretrial documents. Carr v. Bankers Trust Co, 546 N.W.2d 901, 903 (Iowa 1996); Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459, 461 (Iowa 1995); First Nat. Bank in Fairfield v. Kenny, 454 N.W.2d 589, 591 (Iowa 1990). In summary judgment context, matters before the court are those which are on file when the hearing is held; however, a district court may, in its discretion, allow late filings. Hall v. Barrett, 412 N.W.2d 648, 652 (Iowa App. 1987).

5. Facts constituting a defense. When an examination of the record discloses any allegations of ultimate fact which if found true would constitute a good defense to the action, summary judgment must be overruled. Roberts v. Moore, 445 N.W.2d 384, 385 (Iowa App. 1989).

6. Different inferences. Even where the facts are not in dispute, summary judgment is inappropriate where reasonable minds could draw different inferences from them. Shaw v. Soo Line Railroad, 463 N.W.2d 51, 53 (Iowa 1990); First Nat. Bank in Fairfield v. Kenny, 454 N.W.2d 589, 591 (Iowa 1990). However, an inference based on speculation or conjecture does not generate a material fact dispute. In weighing the inferences drawn from the facts, the task is not to weigh them against each other, but to weigh each against the abstract standard of reasonableness, casting aside those that do not meet the test and concentrating on those that do. Butler v. Hoover Nature Trail, Inc., 530 N.W.2d 85 (Iowa App. 1994).

7. Available only to moving party. Summary judgment is available to either party on motion, but it is to be granted only to the party who has moved for it and only after notice and hearing on that motion. Iowa Dept. of Health v. Hertko, 282 N.W.2d 744, 754 (Iowa 1979); Estate of Campbell, 253 N.W.2d 906, 907-08 (Iowa 1977).

8. Similar to Motion for Directed Verdict. Summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Slaymaker v. Archer-Daniels-Midland Co., 540 N.W.2d 459, 461 (Iowa 1995); Scheckel v. Jackson County, Iowa, 467 N.W.2d 286, 289 (Iowa App. 1991).

9. Federal Cases Persuasive. IRCP 237 is patterned after FRCP 56. Court finds federal cases interpreting FRCP 56 persuasive in their interpretation of IRCP 237. Shaw v. Soo Line RR, 463 N.W.2d 51, 54 (Iowa 1990); Seidler v. Vaughn Oil Co., 468 N.W.2d 474, 475 (Iowa App. 1991).

C. Burden.

1. Initially on Movant. The burden of showing the nonexistence of an issue of material fact is upon the moving party. Matter of Estate of Daily, 555 N.W.2d 254, 256 (Iowa App. 1996); Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995)

2. Burden shifts. After the movant satisfies the initial burden of production, the burden shifts to the resisting party to then set forth specific facts showing there is a genuine issue for trial. James v. Swiss Valley Ag Service, 449 N.W.2d 886, 888 (Iowa App. 1989).

B

D. Evidence.

1. Construing evidence. The evidence should be construed in the light most favorable to the resisting party. Double D Land and Cattle Co., Inc. v. Brown, 541 N.W.2d 547, 550 (Iowa App. 1995). Scheckel v. Jackson County, Iowa, 467 N.W.2d 286, 289 (Iowa App. 1991).

2. Scintilla. More than a "scintilla" of evidence is required to generate a genuine issue of material fact. James v. Swiss Valley Ag Service, 449 N.W.2d 886, 889 (Iowa App. 1989); Matter of Estate of Henrich, 389 N.W.2d 78, 81 (Iowa App. 1986).

3. Sufficiency of pleading. Allegations contained in a pleading which have not been withdrawn or superseded are conclusive admissions of the facts stated and may be utilized by an opposing party in support of a motion for summary judgment. Sheerin v. Holin Co., 380 N.W.2d 415, 417 (Iowa 1986).

4. Need for Affidavits. The parties are not mandated by the rule to file affidavits but are authorized to do so. IRCP 237(a), (b). Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978). An IRCP 237(a) or (b) motion may be made "with or without supporting affidavits". If the resisting party files an affidavit, it *must* be filed with the resistance. IRCP 237(c).

a. Proper Approach. The proper approach is to make a motion for summary judgment and support it with evidence such as affidavits. IRCP 237(a), (c), (e). Diamond Products Co. v. Skipton Painting & Insulating, 392 N.W.2d 137, 139 (Iowa 1986).

b. Requirement of personal knowledge. Affidavits must be made on personal knowledge. Mere conclusions and beliefs are insufficient. Facts must be such as would be admissible in evidence. IRCP 237(e); Willets v. City of Creston, 433 N.W.2d 58, 63 (Iowa App. 1988).

c. Late filing. The trial court had discretion to permit the late filing of an affidavit upon motion by plaintiff and a showing of excusable neglect. Schroeder v. Fuller, 354 N.W.2d 780, 782 (Iowa 1984); IRCP 83(a).

d. Oral testimony. The court may permit affidavits to be supplemented by oral testimony. Rule 237(e); Fees v. Mutual Fire & Automobile Ins. Co., 490 N.W.2d 55 (Iowa 1992)

7. Requirement of Expert Testimony in Products Liability Cases. When technical issues are involved (issues beyond common knowledge and experience) in a products liability or a products-related case, expert testimony is required to generate a jury issue. James v. Swiss Valley Ag Service, 449 N.W.2d 886, 890 (Iowa App. 1989).

E. Resisting party. When a motion is made and supported, the resisting party may not rest on mere allegations or denials but must set forth specific facts showing a genuine issue for trial. IRCP 237(e); Bitner v. Ottumwa Community School Dist., 549 N.W.2d 295, 299 (Iowa 1996); Schuling v. Tilley, 454 N.W.2d 899, 900 (Iowa 1990). The challenger must come

foward with specific facts constituting competent evidence in support of the claim advanced. Bitner v. Ottumwa Community School Dist., 549 N.W.2d 295, 299 (Iowa 1996); Winkel v. Erpelding, 526 N.W.2d 316 (Iowa 1995); Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995).

1. Affidavits. Unless the movant's showing is sufficient, there is no burden on the opposing party to file affidavits showing that he or she has a cause of action or even to file counter affidavits at all. Jensen v. Turnbridge Ltd. Partnership, 505 N.W.2d 500, 502 (Iowa App. 1993); Amco Insurance Co. v. Stammer, 411 N.W.2d 709, 712 (Iowa App. 1987).

2. Do not try credibility of affidavits. Questions of credibility of affidavits or evidence do not concern the trial court. If the affidavit of defense shows a substantial issue of fact, summary judgment should not be ordered even though the affidavit be disbelieved. 3 Iowa R.Civ P. Anno. 496 (1970).

3. Legal Conclusions. The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justifying denial of summary judgment. Bradshaw v. Wakonda Club, 476 N.W.2d 743, 745 (Iowa App. 1991); Amco Insurance Co. v. Stammer, 411 N.W.2d 709, 711 (Iowa App. 1987)

4. Good Defense. The resisting party must show that the fact at issue is such that if decided in its favor it would be a good defense to the action. Willow Tree Investments, Inc. v Wagner, 453 N.W.2d 641, 642 (Iowa 1990).

5. Fatal. It can be fatal to the party resisting the summary judgment motion to rely alone on a perceived weakness in the movant's contention. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985).

6. Resisting party may have discovery. A party against whom a summary judgment motion is made should first be allowed to discover the facts if he or she desires. IRCP 237(e), (f).

a. Opportunity to meet issues. Summary judgment is a substitute for trial, but the procedure must not be so summary as to deprive a litigant of a reasonable opportunity to meet the issues presented in the motion. Miller v. Continental Insurance Co., 392 N.W.2d 500, 503 (Iowa 1986).

b. Motion to compel. If there is no substantial prejudice to the movant in delaying a disposition on the motion for summary judgment and the facts sought in the motion to compel are crucial to the opposing party's claims, the motion to compel may be ruled upon before the motion for summary judgment. Miller v. Continental Insurance Co., 392 N.W.2d 500, 503 (Iowa 1986). *Compare* Krueger v. Iowa Rails to Trails, Inc., 435 N.W.2d 391, 393 (Iowa App. 1988) (material sought in motion to compel not crucial, so no error in first ruling on motion for summary judgment).

F. Partial summary judgment. A party may seek summary judgment upon all or any part of a claim, counterclaim, or cross-claim. IRCP 237(a)-(b). Claims or counterclaims may be disposed of by partial summary judgment or even tried separately, resulting in separate

B

judgments of the same action. Neylan v. Moser, 400 N.W.2d 538, 541 (Iowa 1987). Summary judgment may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages. IRCP 237(c); Hertz Farm Management Inc. v. Twito, 434 N.W.2d 907, 909 (Iowa App. 1988).

G. Distinct from Motion to Dismiss. Unlike the federal rules, the Iowa rules do not provide for treating a motion to dismiss as a motion for summary judgment. Warford v. Des Moines Metropolitan Transit, 381 N.W.2d 622, 624 (Iowa 1986). Recently, however, the Court has indicated a willingness to treat a motion to dismiss as a motion for summary judgment in limited situations. Id.; *see* Tigges v. City of Ames, 356 N.W.2d 503, 510 (Iowa 1984) (form must give way to substance); Troester v. Sisters of Mercy Corp., 328 N.W.2d 308, 311 (Iowa 1982) (motion to dismiss founded on facts that arose after pleadings had been filed was treated as summary judgment).

H. IRCP 179(b) motions. If summary judgment is rendered on the entire case, Rule 179(b) shall apply. IRCP 237(c). However, a motion to reconsider may properly be granted for a partial summary judgment prior to final judgment on the entire case. Iowa Elec. Light and Power Co. v. Lagle, 430 N.W.2d 393, 396 (Iowa 1988). When ruling on this motion, the trial court should not consider affidavits which were first filed with the motion to reconsider and had not been submitted prior to the trial court granting summary judgment. Stockdale, Inc. v. Baker, 364 N.W.2d 240, 244 (Iowa 1985).

I. Change of Venue.

1. IRCP 167 & 168. The process of making up the issues for purposes of applying IRCP 168(c) includes procedural devices for narrowing the issues, including motions for summary judgment. Consequently, the Court may address a motion for summary judgment prior to considering a motion for change of venue based upon IRCP 167 and 168. Midthun v. Pastemak, 420 N.W.2d 465, 467-68 (Iowa 1988).

2. IRCP 175(a). If the motion for change of venue is made under IRCP 175(a), however, the motion for change of venue should be considered first. Summary judgment presupposes that the action was brought n the proper county. Nagle Lumber Co. v. Better Built Homes, 160 N.W.2d 446, 447 (Iowa 1968).

J. Not proper in administrative review proceedings. In contested case review proceedings, there is no right to move for summary judgment because the district court is limited to the record made before the agency. Black v. University of Iowa, 362 N.W.2d 459, 463 (Iowa 1985).

K. Torts. Issues of negligence, contributory negligence and proximate cause are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner. Schermer v. Muller, 380 N.W.2d 684, 687 (Iowa 1986). Intentional torts are generally poor candidates for summary judgment because of the subjective nature of motive and intent, but the rule is not absolute. Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 338 (Iowa 1991).

1. Inappropriate. Summary judgment may be inappropriate when the reasonableness of conduct must be determined from evidence which is largely circumstantial, as when a plaintiff relies entirely on direct evidence. Direct and

circumstantial evidence are equally probative, and generally questions of negligence, contributory or comparative negligence, and proximate cause are for the jury. Schermer v. Muller, 380 N.W.2d 684, 687 (Iowa 1986).

2. Appropriate. The preliminary question of whether a duty was owed may properly be resolved by summary judgment. Martinko v. H-N-W Associates, 393 N.W.2d 320, 321 (Iowa 1986).

3. Defamation. Summary judgment is afforded a unique role in defamation cases. The trial court should decide whether allowing the case to go to a jury would, in the totality of the circumstances, endanger first amendment freedoms. Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989); Marks v. Estate of Hartgerink, 528 N.W.2d 539 (Iowa 1995).

L. References.

1. Comparable Federal Rule: 56.

2. Key Nos. Judgment 178 et seq.

3. 49 CJS Judgments 219 et seq.

4. 73 Am.Jur.2d Summary Judgments §§ 1-44.

VIII. Separate Adjudication of Law Points-IRCP 105.

A. General use. IRCP 105 allows a party to obtain an adjudication of "any point of law raised in any pleading which goes to the whole or any material part of the case." Brunson v. Winter, 443 N.W.2d 717, 719 (Iowa 1989); Iowa Electric Light & Power v. Wendling Quarries, 389 N.W.2d 847, 848 (Iowa 1986).

1. Based on record. The adjudication may be based only on the uncontroverted facts in the record or pleading. Heine v. Allen Memorial Hosp. Corp., 549 N.W.2d 821, 823 (Iowa 1996); Leydens v. City of Des Moines, 484 N.W.2d 594 (Iowa 1992)

2. No material fact dispute or independent legal issue. Pretrial determination of a legal question pursuant to IRCP 105 may be useful and quite proper when no material facts are in dispute or when a legal issue is "independent of a disputed factual issue and a ruling favorable to the applying party will necessarily be dispositive of the case in whole or in part." Equilease Corp. v. Smith, 405 N.W 2d 803, 807 (Iowa 1987); *Also* Heine v. Allen Memorial Hosp. Corp., 549 N.W.2d 821, 823 (Iowa 1996).

3. Fact Issues. If the pleadings reveal fact issues with respect to the law points, disposition under Rule 105 is generally inappropriate unless the parties stipulate the required facts. Brunson v. Winter, 443 N.W.2d 717, 719 (Iowa 1989).

B. Not discretionary. Ruling on an application for adjudication of law points is not discretionary. The district court "must on application of either party" rule on legal points raised in a pleading if the points go to the case in its entirety or a material part thereof. IRCP

B

105; Iowa Bankers v. Iowa Credit Union Dept., 335 N.W.2d 439, 448 (Iowa 1983)

1. Prejudice no bearing. Prejudice to the applicant does not bear on the issue whether to rule on the application. Lundy v. Iowa Dept. of Human Services, 376 N.W.2d 893, 895 (Iowa 1985); Iowa Bankers v. Iowa Credit Union Dept., 335 N.W.2d 439, 448 (Iowa 1983).

2. Correction of error. The trial court can correct an error of law made in a prior adjudication of law points. *See* Woods v. Schmitt, 439 N.W.2d 855, 865-66 (Iowa 1989).

C. Law of the case. A final order becomes "the law of the case" in all further proceedings absent an appeal. Bruner v. Varley, 411 N.W.2d 150, 155 (Iowa 1987). This is true whether or not it is correct on the general principles of law. Woods v. Schmitt, 439 N.W.2d 855, 865-66 (Iowa 1989).

1. Subsequent Supreme Court decisions. Although a Rule 105 adjudication is a guide by which the parties to an action may determine their conduct in future proceedings, the rule does not bar modification of a prior adjudication of law points in order to conform to subsequent decisions of the Iowa Supreme Court while the case is pending. Home Federal Savings & Loan Ass'n of Algona v. Campney, 357 N.W.2d 613, 622 (Iowa 1984).

2. Not substantive law. The law of the case doctrine is a rule of practice, not a principle of substantive law. It is more important to apply a correct interpretation of a statute than to rigidly adhere to the law of the case doctrine. Woods v. Schmitt, 439 N.W.2d 855, 866 (Iowa 1989).

D. Final Order. Where a ruling on an application to adjudicate law points under IRCP 105 disposes of the entire case, it is an appealable final order. In re Estate of Schield, 300 N.W.2d 302, 304 (Iowa 1981). Nevertheless, a Rule 179(b) motion to enlarge or amend findings of fact or conclusions of law is ineffective to challenge a Rule 105 adjudication or to delay appeal therefrom. Easter Lake Estates, Inc. v. Polk County, 444 N.W.2d 72, 74 (Iowa 1989).

IX. Discovery - IRCP 121 - IRCP 134

A. Purpose. Discovery is designed to enable preparation for trial, as well as to aid in development of proof. The very purpose of the modern rule allowing prior discovery is to learn the facts so that the Court can apply the appropriate substantive rule of law. Barks v. White, 365 N.W.2d 640, 643 (Iowa App. 1985). Discover rules are designed to promote orderly and timely administration of justice. Vague or incomplete answers to interrogatories and last minute substantive changes to the method of establishing damages, virtually foreclosing discovery by the opposition, are repugnant to these goals. Wagner v. Miller, 555 N.W.2d 246 (Iowa App. 1996).

B. Liberally construed. The Court's policy is to encourage parties to agree on informal discovery. The discovery rules should be liberally construed to effectuate disclosure of all relevant and material information to the parties. The Court has also recognized the principle that the public has a right to every man's evidence. Roosevelt Hotel Ltd. Partnership v.

Sweeney, 394 N.W.2d 353, 356 (Iowa 1986).

1. Does not allow order of waivers. The physician-patient privilege does not allow the Court to force a patient to execute a waiver authorizing defendant's counsel to communicate privately with or to obtain information of patient's earlier medical history from health care providers. Roosevelt Hotel Ltd. Partnership v. Sweeney, 394 N.W.2d 353, 357 (Iowa 1986). See also Morrison v. Century Engineering, 434 N.W.2d 874, 877 (Iowa 1989).

2. Law favors full access. The law favors full access to relevant information. State v. National Dietary Research, Inc., 454 N.W 2d 820, 823 (Iowa 1990).

C. Discretion. The trial court has wide discretion in its rulings on discovery issues and will be reversed only when an abuse of discretion is found. Hutchinson v Smith Laboratories Inc., 392 N.W.2d 139, 141 (Iowa 1986); Williams v. Dubuque Racing Ass'n, 445 N.W.2d 393, 394 (Iowa App. 1989).

1. Abuse. Abuse of discretion occurs when such discretion exercised on grounds or for such reasons clearly untenable or to an extent clearly unreasonable. State v. National Dietary Research, Inc., 454 N.W.2d 820, 823 (Iowa 1990).

2. Incorrect legal standard. It is an abuse of discretion to fail to apply a correct legal standard. In re Marriage of Meredith, 394 N.W.2d 336, 338 (Iowa 1986).

3. Discretion generally upheld. The Courts of this State have been slow to find an abuse of discretion and generally have done so only in cases involving dismissal. In Interest of D.L., 401 N.W.2d 201, 202-203 (Iowa App. 1986).

D. Scope of discovery - IRCP 122. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. IRCP 122 (a), (c). The scope of discovery is not limited to evidence that would be admissible at trial. Mason v. Robinson, 340 N.W.2d 236, 239 (Iowa 1983). Matter is discoverable, regardless of its relevance and admissibility, if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. State ex rel. Shanahan v. Iowa Dist. Court for Iowa County, 356 N.W.2d 523, 530 (Iowa 1984).

1. Privileged material in general.

a. Burden of proof. One resisting discovery through assertion of a privilege has the burden of showing that privilege exists and applies. Hense v. G.D. Searle Co., 452 N.W.2d 440, 445 (Iowa 1990).

b. Construed narrowly. Because any privilege is an exception to our rules governing discovery, an asserted privilege is to be construed narrowly. Hutchinson v. Smith Laboratories, Inc., 392 N.W.2d 139, 141 (Iowa 1986)

c. Based on statute. When the asserted privilege is based on a statute, the terms of the statute define the reach of the privilege. AgriVest Partnership v. Iowa Production Credit Ass'n, 373 N.W 2d 479, 483 (Iowa ____)

2. Trial preparation materials. A party may obtain documents prepared in anticipation of litigation only upon showing that he or she has substantial need of the materials in preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means IRCP 122(c); Hense v. G.D. Searle & Co.,N.W.2d 450, 445 (Iowa 1990); Rhiner v. City of Clive, 373 N.W.2d 466, 478 (Iowa 1985).

a. Burden of proof. The requesting party has the burden of showing substantial need and undue hardship. Berg v. Des Moines General Hosp. Co., 456 N.W.2d 173, 176 (Iowa

b. Discretion. Courts have broad discretion in determining whether the required showing has been made; such discretion is abused if it is clear the judge has applied an improper standard, failed to follow established legal rules, or has based the decision on a record devoid of facts to support the decision. Berg v. Des Moines General Hosp. Co., 456 N.W.2d 173, 176 (Iowa 1990)

c. Not a rule of evidence. While IRCP 122(c) may preclude production of a document, it does not preclude the introduction of documents once they have been discovered. Young v. Gibson, 423 N.W.2d 208, 210 (Iowa App. 1988).

E. Supplementing responses - IRCP 122(d) and 125(c).

1. Incorrect response A party is under a duty to correct an interrogatory response once that party learns that the original response was incorrect. IRCP 122(d)(2)(A); Kaiser Agricultural Chemicals, Inc. v. Peters, 417 N.W.2d 439 (Iowa 1987).

2. Correct when made. A party has a duty to amend a response that was correct when made but no longer is true and failure to amend would amount to a knowing concealment. IRCP
122(d)(2)(B); Hariri v. Morse Rubber Products Co., 465 N.W.2d 546, 549-50 (Iowa App. 1990).

3. Purpose. The purpose of IRCP 122(d) is to avoid surprise and permit the issues to become both defined and refined before trial. Hariri v. Morse Rubber Products Co., 465 N.W 2d 546, 550 (Iowa App. 1990).

4. Expert witnesses. A party responding to an interrogatory has a continuing duty to supplement a response concerning the identity, subject matter, and substance of testimony of an expert witness. Krugman v. Palmer College, 422 N.W 2d 470, 474 (Iowa 1988), cert. denied 109 S Ct. 370, 102 L.Ed.2d 359 See IRCP 125(c).

a. When supplement. Supplementing interrogatories concerning expert witnesses must take place as soon as practicable but in no event less than thirty days prior to the beginning of trial except on leave of Court. Mills v. Iowa Dep't of Transp., 462 N.W.2d 300, 302 (Iowa App. 1990); IRCP 125(c).

b. Lack of additional reports. Lack of additional reports does not excuse or negate the defendant's duty to supplement responses. Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100, 109 (Iowa 1986)

c. More on experts and failure to supplement. See "H. Discovery of Experts - IRCP 125" below.

F. Protective Orders - IRCP 123

1. Good cause shown. By its terms Rule 123 authorizes a protective order when good cause is shown for finding that disclosure should be prevented or restricted to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense." Berg v. Des Moines General Hosp. Co., 456 N.W.2d 173, 177 (Iowa 1990). Farnum v. G.D. Searle & Co., 339 N.W.2d 384, 398 (Iowa 1983).

2. Three criteria. In evaluating the factual showing to establish good cause as to a claim of trade secret or confidential information, a trial court should employ three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression. State v. National Dietary Research, Inc., 454 N.W.2d 820, 823 (Iowa 1990); Farnum v. G.D. Searle & Co., 339 N.W.2d 384, 389-90 (Iowa 1983).

3. Particularized showing. The party seeking a protective order must make a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements in order to establish good cause. State v. National Dietary Research, Inc. 454 N.W.2d 820, 823 (Iowa 1990).

4. Undue burden and expense. Ordinarily, a claim of undue burden and expense is not a sufficient reason for precluding discovery of relevant materials, but may be a basis for limiting discovery. Where compliance with a request would require an unreasonable amount of time and an unreasonable expenditure of money, a protective order is appropriate. Berg v. Des Moines General Hosp. Co., 456 N.W.2d 173, 177 (Iowa ____).

5. Protective order inappropriate. If disclosure is otherwise warranted, it should not be precluded merely because of a party's desire to keep adverse information from reaching the public or to bar the information from being used in other cases. Farnum v. G.D. Searle & Co., 339 N.W.2d 384, 390 (Iowa 1983). Also, the court should not shield a party by including it in a protective order when the party has failed to comply with its duty under IRCP 126(a) to respond to interrogatories. State v. National Dietary Research, Inc., 454 N.W.2d 820 (Iowa 1990)

G. Sequence and timing of discovery - IRCP 124. IRCP 124 provides that the methods of discovery may be used in any sequence unless the Court upon motion orders otherwise "for the convenience of parties and witnesses and in the interests of justice." Farley v. Seiser, 316 N.W.2d 857, 859 (Iowa 1982).

H. Discovery of Experts - IRCP 125. The mere designation of the name of the expert does not satisfy the requirements of the discovery rule. Mills v Iowa Dep't of Transp., 462 N.W.2d 300, 302 (Iowa App. 1990).

1. Two-step discovery process. A two-step discovery process is available for experts who are expected to testify. The first step is propounding interrogatories to ascertain

B

the identities of the experts, the subject matter of their expected testimony, their qualifications, and their mental impressions and opinions. The second step permits a party, without leave of Court, to engage in discovery by other means in lieu of or in addition to interrogatories. IRCP 125(a)(1) and (2). The two-step process is not mandatory; failure to utilize every available procedure does not excuse another party's duty to supplement discovery responses. *See* Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100, 109 (Iowa 1986).

2. Purpose of disclosure The purpose of requiring disclosure of expert witnesses is to prevent unfair surprise to the other party, Jones v. Blair, 387 N.W.2d 349, 354-355 (Iowa 1986), and to allow the parties to formulate their positions on as much evidence as is available. Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 422 (Iowa ____).

a. Failure to identify. Failure of defendants to identify expert witness in their interrogatories did not require limitation of witness' testimony when the witness was plaintiff's own witness and defendants had no intention of calling him as an expert. Jones v. Blair, 387 N.W.2d 349, 354 (Iowa 1986).

b Disclosure not required. The factual knowledge, mental impressions, and opinions of a treating physician are not "acquired in anticipation of litigation or for trial" so IRCP 125 disclosure is not required. Day by Ostby v. McIlrath, 469 N.W 2d 676, 677 (Iowa 1991).

3. Supplementing responses

a. Duty to supplement. See "E. Supplementing responses- _CP 122(d) and 125(c)" above.

b. Failure to supplement. Violation of the duty to supplement may result in exclusion of the evidence regardless of the subjective intent behind the failure to supplement. The rule bars the result without regard to cause, except for those causes beyond the party's control. *See* Kilker by and through Kilker v. Mulry, 437 N.W.2d 1, 5-6 (Iowa App. 1988).

4. Sanctions. Failure to comply with the rule may result in sanctions, which are implicit in the rule. Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 421 (Iowa 1985).

a. Exclusion. Exclusion of an expert as a witness is the most severe sanction and should not be imposed lightly. Exclusion is justified only when prejudice would result. Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 421 (Iowa 1985).

b. Alternatives. Other sanctions are available such as a continuation of the trial, limitation of testimony, exclusion of the evidence, or other action which the Court deems appropriate. *See* Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 421 (Iowa 1985); In Interest of D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). Limiting testimony of an expert witness to the technical confines of the party's interrogatory answer specifying the substance of the expert's opinion is not an

abuse of discretion. Bratton v. Bond, 408 N.W.2d 39, 42 (Iowa 1987).

c. Rebuttal witness. trial court did not abuse its discretion in excluding testimony of defendant's rebuttal expert where defendant did not amend its answer to interrogatory requiring it to name its rebuttal witness until one day before trial, and defendant's expert was aware of the subject matter of the plaintiff's expert's testimony months previous. Carter v. Wiese Corp., 360 N.W.2d 122, 136 (Iowa App. 1984).

I. Requests for Admissions - IRCP 127 & 128. The purpose underlying requests for admission is to expedite trial by limiting the matters in controversy between the parties. An admission relieves a party of the cost of proving the fact or issue. It reduces the time necessary to try a case and may eliminate trial entirely if the admitted matters resolve the case by summary judgment or settlement. A party responding to a request for admissions has three choices: admit, object, or deny. Koegel v. R Motors, Inc., 448 N.W.2d 452, 456 (Iowa 1989)

1. Admission. An admission conclusively establishes what requested. Koegel v. R Motors, Inc., 448 N.W.2d 452, 456 (Iowa 1989).

2. Denial. A denial places that matter in issue. Denial triggers the enforcement provisions of the rule if the matter is proven at trial. One enforcement provision is allowance of attorney fees and costs incurred in proving the matter as provided in IRCP 134(c). Koegel v. R Motors, Inc., 448 N.W.2d 452, 456 (Iowa 1989).

3. May withdraw or amend admissions An application should be granted when (1) the presentation of the merits of the action will be subserved thereby; and (2) the parties who obtained the admissions failed to satisfy the Court that withdrawal or amendment will prejudice them in maintaining the action or defense on the merits. Allied Gas Chemical v. Federated Mutual Insurance, 365 N.W.2d 26, 31 (Iowa 1985).

4 Relation to summary judgment. To the extent that answers to requests for admissions under IRCP 128 relieve the requesting party from proving the facts which are admitted, logically follows that such answers also preclude the answering party from establishing facts inconsistent with said admissions. Webster City Production Credit Ass'n v. G. O. Implement, Inc., 310 N.W.2d 541, 543 (Iowa App. 1981).

5 Failure to respond. The price of ignoring request for admissions is to have the matter stand as admitted, not to have the case dismissed. Postma v. Sioux Center News, 393 N.W.2d 314, 316 (Iowa 1986).

J. Sanctions - IRCP 134.

1. Purpose and scope. Sanctions under IRCP 134(b)(2) should serve a three-fold purpose: (1) to insure that a party will not profit from its failure to comply; (2) to provide a specific deterrence and to seek compliance with the court's discovery order; and (3) to provide deterrence in the instant case and in litigation generally. Kendall Hunt Pub. Co. v. Rowe, 424 N.W.2d 235, 242 (Iowa 1988). IRCP 134(b) does not cover situations where the responding party initially makes incomplete or evasive answers or where his productions are incomplete. In those situations, the

B

requesting party's remedy is a motion to compel a more detailed answer or production under IRCP 134(a). Schwartzenbach v. Schwarzenbach, 446 N.W.2d 475, 478 (Iowa App. 1989).

2. Two categories. Our decisions involving discovery sanctions have been divided into two categories: (1) violation of a trial court discovery order, and (2) violation solely of a rule of civil procedure relating to discovery. Farley v. Ginther, 450 N.W.2d 853, 856 (Iowa 1990); Postma Sioux Center News, 393 N.W.2d 314, 318 (Iowa 1986).

a Orders. A party's disobedience of discovery orders need not be willful in order to bring about sanctions under the rule. Rumley v. City of Mason City, 320 N.W.2d 648, 652 (Iowa App. 1982)

b. Rules. A violation of a discovery rule alone may warrant sanctions; violation of a court order is not a prerequisite for imposition of sanctions. Kilker by and through Kilker v. Mulry, 437 N.W 2d 1, 4 (Iowa App. 1988).

3. Failure to make good faith response. More than failure to make a good faith response under IRCP 127 is needed in order to recover sanctions under IRCP 134(c); it must be shown that the party failing to admit had no reasonable grounds to prevail on the matters covered by the requests for admissions. Koegel v. R Motors, Inc., 448 N.W.2d 452, 457 (Iowa 1989)

4 Discretion. A trial court has wide discretion when imposing a sanction for failure to adequately follow discovery procedures. Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 640 (Iowa 1988).

a Abused. An abuse of discretion occurs when the ruling rests on grounds or reasons clearly untenable or unreasonable. Squealer Feeds v. Pickering, 530 N.W.2d 678, 681 (Iowa 1995). The Trial Court will be reversed only when that discretion is abused to the prejudice of the sanctioned party. Bindel v. Larrington, 543 N.W.2d 912 (Ia. Court. App. 1995) In ruling on sanctions pursuant to IRCP 134 (c), the court has a duty to set out specifically those denials the court regards as untrue, and the reasons why the court regards them as untrue. Failure to do so is an abuse of discretion. Koegel v. R Motors, Inc., 448 N.W.2d 452, 458 (Iowa 1989)

b. Narrowed for dismissal or default. Dismissal is a discovery sanction generally used when a party has violated a trial court's order. Suchow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 426 (Iowa 1982) Where, however, the trial court selects dismissal of the action or default as the appropriate discovery sanction, the range of discretion is narrowed and the sanction must be due to willfulness, fault, or bad faith. Farley v. Ginther, 450 N.W.2d 853, 856 (Iowa 1990); Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235, 240 (Iowa 1988).

c. Abuse rarely found. An abuse of discretion is rarely found. Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100, 108 (Iowa 1986). The Supreme Court has been slow to find an abuse of discretion and has found an abuse usually in cases involving dismissal. Barks v. White, 365 N.W.2d 640, 644 (Iowa

Court. App. 1985). It is an abuse of discretion by the trial court not to make a finding of willfulness, fault, or bad faith. 2049 Group Ltd. v. Galt Sand Company, 526 N.W.2d 876 (Ia. App. 1994).

5. Penalties.

a. Exclusion of testimony. Exclusion of expert testimony is within the realm of sanction alternatives. Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100, 108 (Iowa 1986). This is true even if it ultimately results in summary judgment against the sanctioned party. Farley v. Ginther, 450 N.W.2d 853, 856-57 (Iowa 1990).

b. Dismissal. In order to justify dismissal of the action, a party's non-compliance must be due to willfulness, fault or bad faith. Munzenmaier v. City of Cedar Rapids, 449 N.W.2d 369, 371 (Iowa 1989); Postma v. Sioux Center News, 393 N.W.2d 314, 318 (Iowa 1986).

c. Which to apply. When no court order has been disobeyed a sanction less than dismissal "may" be indicated, and dismissal is the sanction "generally used when a party has violated a trial court's order." H & S Ltd. v. Andreola, 363 N.W.2d 592, 596 (Iowa Court. App. 1984). Dismissal and entry of default should be the rare judicial act; although not precluded as sanctions, other alternatives should be considered absent bad faith on the part of the client. See Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235, 240-41 (Iowa 1988).

d. Suspension of prejudgment interest not available. Suspension of prejudgment interest is not available to the trial court as a sanction under IRCP 134(b)(2). Adams by Adams v. Johnson, 445 N.W.2d 422, 424 (Iowa Court. App. 1989)

e. It is error for the court to exclude lay witnesses as a sanction for failure to comply with discovery. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994)

f. 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 lawyer. Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235, 240 (Iowa 1988).

6. Hearing necessary. It is implicit in IRCP 134(b) that before sanctions can be imposed the affected party must be afforded the opportunity for a hearing. Schwarzenbach v. Schwarzenbach, 446 N.W.2d 475, 477 (Iowa Court App. 1989). Schwarz v. Meyer, 500 N.W.2d 87 (Ia. Court. App. 1993).

K. Motion to Compel versus Summary Judgment. A motion to compel discovery should be considered on its merits and ruled upon by the district court prior to disposition of a motion for summary judgment where the facts are particularly within the knowledge of the other party, may be crucial to the plaintiff's claims, and there is no substantial prejudice to defendant in delaying disposition on the motion for summary judgment until the motion to compel has been considered. Miller v. Continental Insurance Co., 392 N.W.2d 500, 503 (Iowa 1986). When the material sought is not crucial to the main issue, however, the court

B

does not have to consider a motion to compel before ruling on a motion for summary judgment. Krueger v. Iowa Rails to Trails, Inc., 435 N.W.2d 391, 393 (Iowa App. 1988).

L. Expenses.

1. Motion to compel. Although the rule does allow a moving party to seek expenses from "the party or deponent whose conduct necessitated the motion," it also states that if the court finds that "the opposition to the motion was substantially justified," expenses will not be awarded. IRCP 134(a)(4); Miller v. Continental Insurance Co., 392 N.W.2d 500, 504 (Iowa 1986).

2. Requests for admission. Denial of a request for admission on a matter later proven at trial, may lead to an allowance of attorney fees and costs incurred in proving the matter. 134(c); Koegel v. R Motors, Inc., 448 N.W.2d 452, 456 (Iowa 1989). Under IRCP 134, as incorporated by IRCP 127, a party may appeal be granted reasonable attorney's fees in connection with the appeal aw well as proceedings in the district court. Allied Gas & Chemical v. Federated Mutual Insurance Co., 365 N.W.2d 26, 32 (Iowa 1985). The Court is to make specific findings as to the amounts of costs and attorney fees incurred in proving matters that should have been admitted. Koegel v. R Motors, Inc., 448 N.W.2d 452, 456 (Iowa 1989).

M. References.

1. Comparable Federal Rule: 26 through 37

2. Key nos.: Pretrial Procedure 11 et seq.

3. 27 CJS Discovery 1 et seq

4. 23 Am Jur.2d Discovery 1 et seq.

XI. Sanctions - IRCP 80

A. Purpose. IRCP 80(a) was adopted "with the intent to discourage frivolous lawsuits and to deter the misuse of pleadings and motions." State ex rel. Iowa DHS v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991) Under IRCP 80(a), the signer must certify: (1) that he has read the Petition, (2) that he has concluded after reasonable inquiry into the facts and law that there is adequate support for the filing, and (3) that he is acting without any improper motive. Weigel v. Weigel, 467 N.W.2d 277, 280 (Iowa 1991).

B. Inquiry Element. The inquiry element requires that signer certify that to the best of his knowledge, information, and belief, formed after reasonable inquiry, the pleading, motion, or other paper is (1) well-grounded on the facts and (2) warranted either by existing law or by a good faith argument for the extension, modification, or reversal of existing law.
5A C. Wright & A. Miller, Federal Practice and Procedure, Section 1335, at 59. Schettler v. Dist. Court for Carroll County, 509 N.W.2d 459, 465 (Iowa 1993).

C. Reasonableness Element. The reasonableness of the attorney's inquiry into the facts and law may depend on such factors as the time available to the signer for investigation; whether the signer had to rely on a client for information as to the facts underlying the

pleading, motion, or other paper; whether the pleading, motion or other paper was based on a plausible view of the law; or whether the signer depended on forwarding counsel or another member of the bar. Century Prods., Inc. v. Sutter, 837 F.2d 247, 250-51 (6th Cir. 1988); also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359, 379 (1990).

1. Fact inquiry. Reasonable inquiry into the facts requires more than exclusive reliance on the client's statement of what happened. Fields v. Iowa District Court for Polk County, 468 N.W.2d 38, 39-40 (Iowa 1991) In determining whether a reasonable inquiry into facts has been made, the Court considers all relevant circumstances including:

a. the amount of time that was available to the signer to investigate the facts;
b. the complexity of the factual and legal issues in question;
c. the extent to which pre-signing investigation was feasible;
d. the extent to which pertinent facts were in possession of opponent or third parties or otherwise not readily available to the signer;
e. the knowledge of the signer;
f. the extent to which counsel relied upon his or her client for the facts underlying the pleading, motion or other paper;
g. the extent to which counsel had to rely upon his or her client for facts underlying the pleading, motion or other paper;
h. whether the case was accepted from another attorney and, if so, at what stage of the proceedings;
I. the extent to which counsel relied upon other counsel for the facts underlying the pleading, motion or other paper;
j. the extent to which counsel had to rely upon other counsel for the facts underlying the pleading, motion or other paper;
k. the resources reasonably available to the signer to devote to the inquiry;
l. the extent to which the signer was on notice that further inquiry might be appropriate.

Mathias v. Glandon, 448 N.W.2d 443, 446 (Iowa 1989).

2. Law inquiry. To determine whether a reasonable inquiry into the law has been made, the Court considers all relevant circumstances including:

a. the amount of time that was available to the signer to research and analyze the relevant legal issues;
b. the complexity of the factual and legal issue in question;
c. the clarity or ambiguity of existing law;
d. the plausibility of the legal positions asserted;
e. whether the signer is an attorney or pro se litigant;
f. the knowledge of the signer;
g. whether the case was accepted from another attorney, and, if so, at what stage in the proceedings;
h. the extent to which counsel relies upon other counsel to conduct the legal research and analysis underlying the position asserted;
I. the extent to which counsel had to rely upon other counsel to conduct the legal research and analysis underlying the position asserted;
j. the resources reasonably available to the signer to devote to the inquiry;
k. the extent to which the signer was on notice that further inquiry might be appropriate.

B

Mathias v. Glandon, 448 N.W.2d 443, 446-47 (Iowa 1989).

D. Objective standard. Compliance is judged by an objective standard of reasonableness under the circumstances. State ex rel. Iowa DHS v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991). In other words, whether a reasonable attorney would have brought suit if confronted with the same circumstances. Fields v. Iowa District Court for Polk County, 468 N.W.2d 38, 39 (Iowa 1991). The reasonableness of the attorney's judgment must be viewed as of the time the paper in question was filed, not with hindsight gained through hearing evidence at trial. Mathias v. Glandon, 448 N.W.2d 443, 447 (Iowa 1989)

E. Improper purpose. The "'improper purpose clause seeks to eliminate tactics that divert attention from the relevant issues, waste time, and serve to trivialize the adjudicatory process.'" Hearity v. Iowa District Court for Fayette County, 440 N.W.2d 860, 864 (Iowa 1989) (quoting Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483, 490 (1986-87)).

F. Who bears responsibility. A represented party bears responsibility for sanctions under the Rule as well as counsel. State ex rel. Iowa DHS v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991). Section 619.19, Code of Iowa. The subjective intent of a represented party cannot be the subject of sanctions. Weigel v. Weigel, 467 N.W.2d 277, 281 (Iowa 1991). As "signer" of pleadings, IRCP 80 "reasonableness" requirements apply also to pro se litigants. Citizens State Bank v. Harden, 439 N.W.2d 677, 682 (Iowa Court. App 1989).

G. When evaluate conduct. Conduct of the attorney must be evaluated at the time of signing. There is no continuing duty under the rule to dismiss the suit if the attorney later learns the case is meritless. The rule applies, however, to each paper signed and each filing must reflect a reasonable inquiry into the facts and law. Mathias v. Glandon, 448 N.W.2d 443, 447 (Iowa 1989).

H. When available. The rule does not set a deadline limiting the time in which motions for sanctions must be filed. A request for sanctions should be made at the earliest possible time to facilitate judicial economy and effective determination of issues. See Darrah v. Des Moines General Hospital, 436 N.W.2d 53, 55 (Iowa 1989).

1. Without undue delay. Rule 80(a) motions must be filed expeditiously without undue delay; however, many considerations militate against a requirement that the motion be filed within a time frame shorter than the expiration of the time for appeal from the final judgment. Hearity v Board of Supervisors for Fayette County, 437 N.W.2d 907, 909 (Iowa 1989).

2. After voluntary dismissal. The Court retains jurisdiction to rule on a Rule 80(a) motion after a voluntary dismissal when based upon filings made while the case was pending and the motion is raised shortly after the voluntary dismissal. Darrah v. Des Moines General Hospital, 436 N.W.2d 53, 55 (Iowa 1989).

3. After affirmed on appeal. A motion requesting sanctions, filed 33 days after the case was affirmed on appeal, was held untimely in Franzen v. Deere & Co., 409 N.W.2d 672, 675 (Iowa 1987) (limited to its facts by Darrah, 436 N.W.2d at 55)

4. Collateral issue. The issue of sanctions is a separate, collateral and independent issue to the lawsuit. Rulings deciding sanction issues are separately appealable as a final judgment and do not act to extend the time limits for appeal on the main case. Board of Water Works Trustees v. City of Des Moines, 469 N.W.2d 700, 702 (Iowa 1991).

I. Violation. Determining whether a violation has occurred lies in the discretion of the District Court. K. Carr v. Hovick, 451 N.W.2d 815, 818 (Iowa 1990). However, guidelines for this determination have been enumerated (as shown above). Id. Additionally, because of the rule's substantial similarity to FRCP 11, federal decisions may be examined for guidance. State ex rel. Iowa DHS v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991). The Rule does not require a finding that the attorney's conduct be willful. Matter of Estate of Lau, 442 N.W.2d 109, 112 (Iowa 1989).

Once a violation is found, sanctions are mandatory. K. Carr v. Hovick, 451 N.W.2d 815, 818 (Iowa 1990). The Trial Court has discretion in determining the appropriateness of a sanction. Fields v. Iowa District Court for Polk County, 468 N.W.2d 38, 39 (Iowa 1991). Rule 80 provides sanctions for the filing of frivolous suits, but it does not provide an independent basis for dismissal. K. Carr v. Hovick, 451 N.W.2d 815, 817 (Iowa 1990).

J. Due process requirements. Before imposing sanctions, an alleged offender must be afforded due process, meaning: (1) fair notice, and (2) an opportunity to be heard. K. Carr v. Hovick, 451 N.W.2d 815, 817-18 (Iowa 1990).

1. Notice. The attorney must at least be on notice that sanctions are under consideration. Ideally, notice would also state the reason why sanctions are under consideration and the type of sanction being considered. K. Carr v. Hovick, 451 N.W.2d 815, 818 (Iowa 1990).

2. Opportunity to be heard. Whether to hold a hearing on sanctions under consideration is within the Court's discretion and depends upon the type of violation involved. K. Carr v. Hovick, 451 N.W.2d 815, 818 (Iowa 1990).

a. Hearing required. A hearing is ordinarily required when the sanction is based on bad faith. Hearing is also appropriate whenever it would assist the Court in consideration of the sanction issue or would significantly assist the alleged offender in presentation of his or her defense.

b. Hearing not required. Hearing is not necessary when the attorney is sanctioned for filing frivolous motions not grounded in law or fact, and where the judge imposing sanctions participated in the proceedings. K. Carr v. Hovick, 451 N.W.2d 815, 818 (Iowa 1990).

K. Penalty. Sanctions may include the reasonable expenses incurred as a result of the pleading or motion and may include reasonable attorney's fees. Breitbach v. Christenson, 541 N.W.2d 840, 845 (Iowa 1995); I.R.C.P. 80(a).

B

L. References.

1. Comparable Federal Rule: 11

2. Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483 (1986-87).

3. Note, Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through Analysis of Federal and State Civil Procedure Rules, 72 Iowa L. REV. 701 (1987).

Motion to Dismiss - IRCP 104(a) (Motion to Dismiss for abusive delay in completing service of original notice and petition)

A. The Rules

1. Rule 104(a) The defense of insufficiency of service of the original notice must be raised by a pre-answer motion to dismiss.

2. Rule 48. The filing of the petition with the clerk commences a civil action.

3. Rule 49(a) The plaintiff filing the petition is required to deliver to the clerk written directions for the service of the original notice and a copy of the petition.

4 Rule 49(b) The petition, original notice, and directions for service must be "forthwith" delivered for service on the defendant.

5. Federal Rule 4(m). If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time

6 No deadline. The Iowa rules do not provide a deadline for completing service of process.

B. Analysis - See Alvarez v. Meadow Lane Mall, 560 N W 2d 588 (Iowa 1997) (decided March 26, 1997)

1 Was the delay presumptively abusive?

a Yes.

1 Bean v. Midwest Battery and Metal, Inc., 449 N W 2d 353 (Iowa 1989) (8-month delay).

2. Dennis v. Christianson, 482 N W 2d 448 (Iowa 1992) (2-year delay)

3. Turnbull v. Horan, 522 N W 2d 860 (Iowa App 1994) (4-month delay)

4 Henry v. Shober (filed July 23, 1997, Iowa Supreme Court) (169-day delay)

b No.

1 In re Estate of Steinberg, 443 N.W 2d 711 (Iowa 1989) (37-day delay)

2. If so, the burden shifts to the plaintiff to prove the delay was justified

a If delay not justified, case should be dismissed for abusive delay in completing service

b If delay justified, case should not be dismissed.

B

c. Bright Line "Any delay beyond 120 days indicates the plaintiff filed the petition, not to seriously institute litigation, but rather to "ice" the statute of limitation for a later determination on whether to proceed with suit." Alvarez v. Meadow Lane Mall, 560 N W 2d 588, 591 (Iowa 1997)

d. Exception An "intentional" delay may provide a predicate for dismissal, even if the period of delay is not presumptively abusive See Alvarez at p 591, referring to the case of Scieszinski v. City of Wilton, 270 N W.2d 450 (Iowa 1978) (3-month delay) (petition filed and plaintiff then obtained an ex-parte court order requiring the clerk to seal the petition, motion, order, and original notice)

C. Other Cases

1. Dennis v. Christianson, 482 N.W.2d 448 (Iowa 1992)

2. Taylor v. Wiebold, 390 N W 2d 128 (Iowa 1986)

3 Becker v. Star Auto, Inc., 376 N W.2d 645 (Iowa App. 1985)

B

MOTION PROCEDURE

1. Clerk of Court holds all motions for fourteen days.

2. Day 14 - law clerk picks up motions and resistances.

3. Day 15 - routine motions go to administrative judge with proposed order.

4. Potentially dispositive motions without resistances generate "warning shot" indicating date of submission without hearing.

5. Resisted, non-routine motions presented to administrative judge for consultation or proposed order.

6. Administrative judge decides to: (a) generate ruling without hearing; (b) assign to another judge for ruling; (c) set for hearing.

B

IN THE DISTRICT COURT OF IOWA IN AND FOR _____ COUNTY

_____	)	
_____	)	
Plaintiff(s),	)	No _____
v	)	
_____	)	
	)	PRETRIAL ORDER
_____	)	AND JURY TRIAL ORDER
Defendant(s)	)	

Jury trial is set for _____ at _____m _____ days are estimated for trial
Pretrial conference is set for _____ at _____ m

It is further ordered as follows:

1. All nondispositive pretrial motions, except limines, must be filed at least two weeks before the final pretrial conference.

2. Motions in limine must be filed at least ten days prior to the final pretrial conference. Resistances to said motions must be in writing filed at least the day before the final pretrial conference. Motions and resistances must include authorities. Limine motions will be ruled upon by the trial judge without hearing unless the court, in its discretion, schedules the matter for hearing.

3. Any party intending to offer an exhibit into evidence at the time of trial shall have such exhibit marked by proper designation prior to the commencement of the pretrial conference. At the time of the pretrial conference such exhibits or copies thereof shall be presented to opposing counsel for examination and classifying. The only exhibits exempted are those which will be used for impeachment purposes only or those exhibits which are too difficult to transport because of size or weight.

4. Each party shall file a written pretrial statement at least one week before the pretrial conference setting forth the party's assertion as to each of the following matters:

a. A brief synopsis of the case.
b. All facts which can be admitted or facts which a party wants another party to stipulate to.
c. Specific legal theories of recovery or defense including elements of each cause of action or affirmative defense and specifications of negligence or fault.
d. An itemized list of all damages sought.
e. A list of all witnesses intended to be called at trial, including experts and those witnesses who will be testifying by deposition only, together with a brief synopsis of their testimony.
f. In the event this matter is settled prior to the pretrial conference, counsel shall promptly notify the court administrator.

Clerk to notify all counsel of record and unrepresented parties.

Dated: _____,199____.

_____
ASSISTANT COURT ADMINISTRATOR
SIXTH JUDICIAL DISTRICT OF IOWA

8-27-97
AdGrp14*

7a-5

B

IN THE DISTRICT COURT OF IOWA IN AND FOR LINN COUNTY

Plaintiff,	)	No.
v	)	
	)	ORDER
Defendant.	)	

On _____, 199___, the undersigned considered the Motion for _____ Summary Judgment filed by _____ on _____ and the Resistance thereto filed by _____ on _____.

A summary judgment may be granted when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See First National Bank in Fairfield v Kenny, 454 N.W 2d 589 (Iowa 1990).

After a review of the Motion, Resistance, all the supporting documentation and the file itself, the Court now finds there is a genuine factual dispute as to _____ _____ _____, therefore the Motion cannot be granted.

_____ Motion for Summary Judgment is now overruled and denied.

Clerk to notify.

Dated: _____

_____
JUDGE, SIXTH JUDICIAL DISTRICT OF IOWA

3d

B

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

Plaintiff,	)	No
vs	)	
	)	**ORDER**
Defendant	)	

On this _____ day of , 1997, the Court noted that a Motion for Summary Judgment was filed by on Plaintiff has not responded in the time allowed by IRCP 237.

IT IS THEREFORE ORDERED that the matter shall be submitted to the Court on 10 days, 1997 for decision without oral argument

Clerk to Notify

_____

JUDGE OF THE SIXTH JUDICIAL DISTRICT

B

IOWA DISTRICT COURT

SIXTH JUDICIAL DISTRICT

Benton, Iowa, Johnson, Jones, Linn and Tama Counties

Office Of

DISTRICT COURT ADMINISTRATOR

Linn County Courthouse
P.O. Box 5488
Carroll Edmondson **Cedar Rapids, IA 52406-5488** **Ph: 319-398-3920**
FAX 319-398-4054

TO: Linn County Attorneys

FROM: Carroll Edmondson, District Court Administrator C.R.E.

RE: Caseflow Management Procedures

DATE: September 4, 1997

Based on its recent experience, the district court has modified some of its caseflow management procedures for Linn County. These modifications are as follows:

1. Attorneys will no longer have to certify that discovery has been completed. The district court administrator's office will monitor the discovery deadlines set at the case status conference and inform the court when these deadlines have expired. Unless the court has received a request for an extension of discovery, the court will then issue an order closing discovery and schedule either a settlement conference for standard cases or a trial setting conference for expedited cases.

2. The court has limited the authority of the district court administrator staff to schedule civil trials more than 120 days from the trial setting conference or settlement conference. Normally, the court administrator will schedule trials within 30 to 90 days of the trial setting conference or settlement conference. Any requests for a trial date more than 120 days out will be referred to the administrative judge for a decision.

3. All civil motions, including motions in limine, must be filed at least 14 days before the final pretrial conference and all resistances to those motions must be filed at least three days before the final pretrial conference. The court will be amending its pretrial and jury orders to include this requirement.

We are very appreciative to those attorneys who showed up on August 27 to discuss the caseflow management procedures. We were very pleased with the suggestions we received for further improvements to the program.

We look forward to your continued cooperation.

CRE/lm

cc: Administrative Judges
Jane Sweaney
Ann Carson
Dee Gross
Clerks of District Court

B

SECTION 4

PROPOSAL FOR ESTABLISHING A DIFFERENTIATED CASE MANAGEMENT SYSTEM FOR CIVIL CASES

I. GOALS

1. Attain and maintain a current docket.

2. Set firm trial dates with no continuances except for extraordinary circumstances.

3. Set realistic and manageable hearing/trial schedules.

4. Distribute judicial workload equitably among district court judges

5. Establish an active case supervision role for the court in monitoring the progress of each case from filing until disposition.

II. PROPOSAL

Within 120 days of the filing of the Petition, the court administrator will hold a case status conference with each party's legal counsel. To assist the court administrator, the parties' counsel will submit a case information questionnaire to the court administrator prior to the conference. At the case status conference, or shortly thereafter, the court will assign the case to one of three distinct tracks: 1) an "expedited" track, 2) a "standard" track, or 3) a "complex" or special assignment track.

III. EXPEDITED TRACK

1. Indicia of cases that would qualify for the expedited track are:

   a. Two parties;
   b. Simple issues with no cross-claims or counterclaims;
   c. No additional parties foreseen;
   d. All discovery can be completed within 6 months;
   e. No substantive motions will be filed
   f. Minimal number of witnesses

2. "Expedited track" cases will be administered as follows:

   a. At the 120-day cases status conference, the court will assign cases to the expedited track based on its screening criteria and information it receives about the case from counsel.

   b. Within 180 days after the filing of the Petition, the parties must certify to the court that discovery is completed and the case is ready for trial.

   c. A trial setting conference will be held 190-240 days after the Petition is filed.

   d. Pretrial proceedings will take place as they do at present. However, due to the non-complex nature of these cases, three to four cases will be set for pretrial conference at the same time.

   f. At the pretrial conference, all jury instructions will be presented to the court, preferably on a computer disk specified by the court.

   g Expedited cases will be scheduled 50-110 days from the trial setting conference in a manner that will assure that the maximum number of cases will be tried or settled. Cases will be assigned in order of priority so litigants can monitor their position on the calendar.

IV. COMPLEX TRACK

1. Cases designated by the court as "complex" cases will be specially assigned to a specific judge. It is anticipated that each judge will have no more than 10 cases specially assigned.

2. "Complex" cases will have the following attributes:

   a. A civil case whose trial is anticipated to last more than 10 trial days;

   b Highly complex and multiple issues are involved,

B

c. The subject matter of the case is in an area of the law which lends itself to continuing factual development and legal analysis such as:

1. Anti-trust, anti-competition/intellectual property/business tort;
2. Professional negligence;
3. Product liability cases; and
4. Certain employment law cases.

c. Multiple parties are involved and others contemplated;

d. Extensive discovery is required;

e. Substantive motions are contemplated; and

f Multiple and out-of-state expert witnesses will testify at the trial.

2. Before a case is specially assigned, there will be an additional case screening process. At the 120-day case status conference, the parties should present information to the court administrator demonstrating that the case meets the criteria for a complex track assignment. Based on this information, the court will determine whether the case should be specially assigned as a complex case. If the court decides that the case qualifies as a complex case, the chief judge or assignment judge will assign the case to a designated judge. The court is encouraged to utilize a random selection method which equalizes assignments.

3. Within 30 days after the special assignment, counsel and the assigned judge will meet or discuss by telephone the nature of the case, discovery issues involved, protective orders, if necessary, and establish deadlines in the case.

4. The parties will contact either in person or by telephone with the assigned judge at his or her discretion to discuss case progress. At these conferences, the court will also hear any pending motion and discuss any discovery problems that have arisen. Copies of all filings in the case will be sent directly to the assigned judge as well as the clerk.

5. Within 420 days after the filing of a Petition, the parties must certify that the case is ready for trial. However, in exceptional cases where good cause exists, the judge may extend this deadline.

6. Thirty days thereafter a settlement conference will be scheduled. If the case does not settle at the settlement conference, the court will schedule

the case for trial. The pretrial conference will be held within 20-80 days of the settlement conference and the trial will be scheduled within 30-90 days of the settlement conference.

V. STANDARD TRACK

1. The majority of the civil cases will be assigned to the "standard track." Criteria which will be used to identify standard track cases include the following:

   a. Moderate to extensive discovery with depositions;
   b Likelihood of more than two parties;
   c. Use of expert witnesses;
   d. Personal injuries with significant medical claims;
   e Liability issues; and
   f. May involve significant cross-claims and counterclaims.

2. Standard track cases will be administered as follow:

   a At the 120 day case status conference, the court will assign cases to the standard track based on its screening criteria and information it receives about the case from counsel.

   b. Within 300 days after filing of the Petition, the parties must certify to the court that discovery is complete and the case is ready for trial.

   c A settlement conference will be scheduled 30 days after the court receives certification that the case is ready for trial. If the case does not settle at the settlement conference, the court will schedule the case for trial.

   d. The final pretrial conference will be held within 20-110 days of the settlement conference and the trial will be scheduled within 30 to 120 days of the settlement conference.

VI. IMPLEMENTATION

It is recommended that the three tier track system be piloted in Linn County for two calendar years before it is implemented throughout the entire district. An implementation committee consisting of judges, court personnel, and

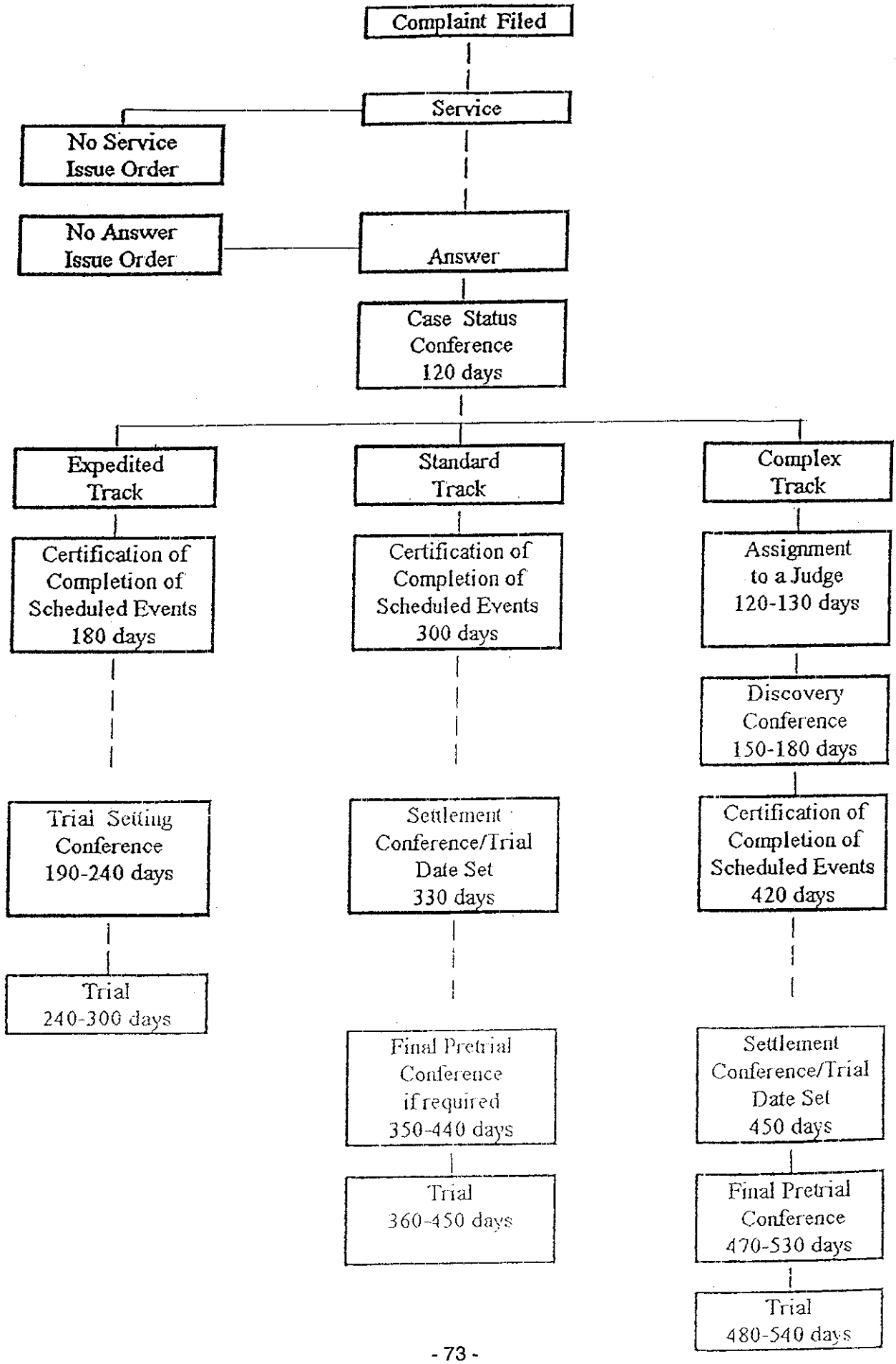
B

attorneys should meet regularly to assess the system and make recommendations to the court for modifications and improvements.

It is also recommended that the changes to the civil processing system be thoroughly disseminated to the bar before implementation. Members of the committee should make presentations to the bar about its implementation and solicit constant feedback from the bar after its implementation.

CIVIL CASE PROCESSING EVENTS

B



C

MAXIMIZING JUROR EFFECTIVENESS:

APPLYING ADULT EDUCATION THEORY TO LITIGATION PRACTICE

Celeste F. Bremer
Chief U.S. Magistrate Judge
S. D. Iowa

C

THEORIES OF ADULT EDUCATION

APPLIED TO LITIGATION

- LIFE CYCLE
- STAGES OF COGNITIVE DEVELOPMENT
- LEARNING STYLES

LIFE CYCLES

ERIK ERIKSON (1963)

- AGE - LINKED
- CYCLICAL GROWTH AND DEVELOPMENT
- RECURRING THEMES
  - IDENTITY
  - COMMITMENT
  - GENERATIVITY

IDENTITY

- Process that spans life cycle
- Understanding one's values, beliefs, vocation
- Core self-image
- Continuity

COMMITMENT

- Relationships with others important
- Trust
- Perception of fairness

GENERATIVITY

- Caring for welfare of others
- Readiness to care for next generation
- Preserve important social institutions
- Contribute to development of society

COGNITIVE DEVELOPMENT

William Perry (1970)

- Stages of Development
- How people become more complex
- How individuals process information
- How individuals interpret world

C

STAGES

Dualism/Received Knowledge

- We-right-good vs Other-wrong-bad
- Right answer for everything
- Little capacity for reflection

STAGES

Multiplicity/Subjective Knowledge

- Everyone has right to own opinion
- No right or wrong answers
- Begin to become more independent and reflective

STAGES

Relativism/Procedural Knowledge

- Determine context
- Better at analysis
- Truth and value defined
- Empathize
- Sophisticated critique

STAGES

Commitment/Constructed Knowledge

- Ability to deal with paradox
- Make decisions in absence of complete information
- Tolerate ambiguity
- Willing to go beyond familiar
- Carry out multiple roles

EXPERIENTIAL LEARNING

Kolb (1984)

- Learning is a process
  - Concrete
  - Reflective
  - Abstract Conceptualization
  - Active Experientation
- Two dimensions
  - Prehension (grasping)
  - Transforming

LEARNING STYLES

FOUR DISTINCT STYLES

- DIVERGERS
  - Concrete and reflective
- ASSIMILATORS
  - Reflective and abstract
- CONVERGERS
  - Abstract Conceptualization
- ACCOMODATORS
  - Concrete, action-oriented

LEARING STYLES

CONCRETE EXPERIENCE

- Prior experience recalled
  - Emphasize timeline, events
- Learner experiences new idea physically or emotionally
  - Draw parallel between known and unknown content
- Must engage/involve
- Let them provide the context
  - You provide the rules/abstractions

LEARNING STYLES

REFLECTIVE OBSERVATION

- Encourage processing
- Make connections with prior experiences
  - Review what's known and associate with new info
  - Illustrate patterns, trends
- Demonstrate different perspectives
- Develop shared understanding
  - Future application

C

LEARNING STYLES

ABSTRACT CONCEPTUALIZATION

- New information in print, media, lectures
- Provide context for new ideas
  - Is there a grouping by common characteristic
  - Can you emphasize similarities
  - Adults learn faster when frame of reference provided
- Are rules clearly stated?
  - Are there classifications more important than specific facts?
- Allow time to process
  - Start with easier components
  - Build to more complex content

LEARNING STYLES

ACTIVE EXPERIMENTATION

- Diagram
- Illustrate
- Trying out new theories in problem-solving
  - Rearranging concepts, data
- Demonstrate, hands-on
- Simulations
  - Application to problem

PIKE'S LAWS

Some Guy Named Pike

- Adults are babies with big bodies
  - They will give you passive learning because that's what we train them to expect
- People don't argue with their own data
  - Let them draw their own conclusions
  - Make it participatory
- Learning is directly proportional to fun level
  - Reduce discomfort, fear, anxiety
- Learning has not taken place until behavior changes

SETTING THE STAGE

MAXIMIZING ADULT LEARNIG

- Adult-to-Adult Relationship
  - Don't talk down
  - Share information about yourself
  - Allow them to talk
  - Involve them in process management (breaks, etc)
  - Monitor satisfaction with progress, techniques

C

SETTING THE STAGE

MAXIMIZING ADULT LEARNING

- Use Nonverbal Communication
  - Be a good listener
  - Watch for discomfort, anxiety
- Provide multiple learning options
  - Accommodate different styles, abilities
  - Adjust the pace
  - Involve learners as resources: collaborators
  - Create a participatory environment
  - Model learning styles
  - Practice decision-making

EXPERIENTIAL LEARNING THEORY AND LEARNING STYLES

C

Learning occurs as a melding of two dimensions:
- Prehending or taking in information
- Transforming or processing information

The prehending dimension is made up of a concrete-abstract dialectic.
The transforming dimension is made up of a reflective-active dialectic.

These dialectics are called learning modes:
- Concrete Experience
- Reflective Observation
- Abstract Conceptualization
- Active Experimentation

Learning involves all four of these modes.

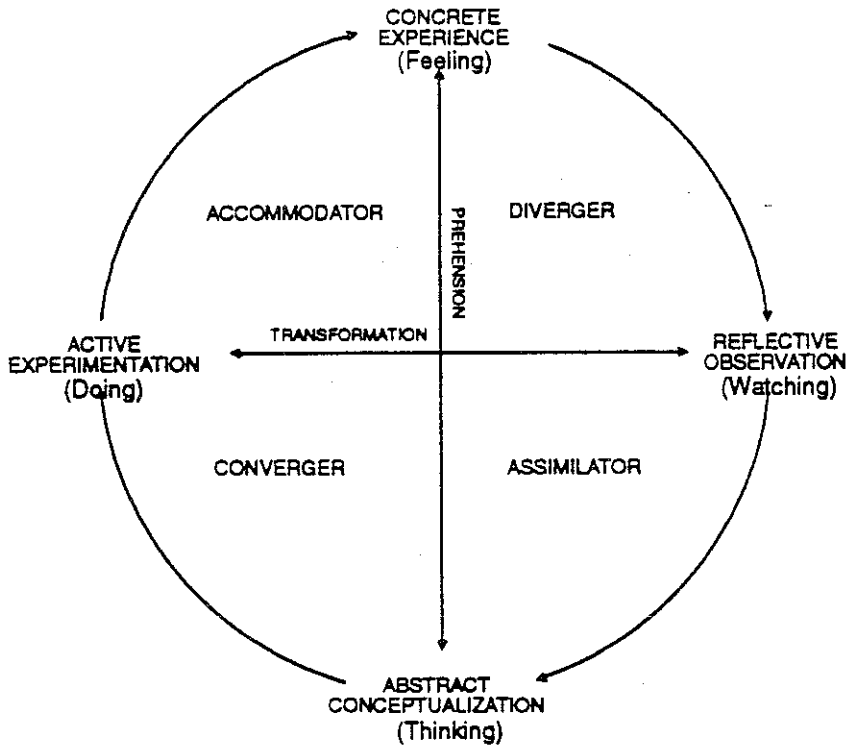
Each of us has a preference for concrete or abstract.
Each of us has a preference for reflective or active.
The combination of these preferences is called our learning style.

A learner who prefers concrete and reflective is a diverger.

A learner who prefers abstract and reflective is an assimilator.

A learner who prefers abstract and active is a converger.

A learner who prefers concrete and active is an accommodator.



Adapted from: David A. Kolb, "Learning styles and disciplinary differences," in A.W. Chickering and others, *The Modern American College*, San Francisco: Jossey-Bass Publishers, Inc., 1981.

Patricia H. Murrell, Center for the Study of Higher Education, The University of Memphis, Memphis, TN 38152

INTELLECTUAL AND ETHICAL DEVELOPMENT

C

Dualism

Right vs. wrong
Black vs. white
Good vs. bad
Learning seen as information exchange
Authority has *the* answer
Multiple alternatives are not recognized
Learner has trouble with reflection, comparison, analysis
Right answers exist somewhere for every problem

"Just tell me the answer."

Multiplicity

Multiple alternatives are all right
Diversity is acceptable
Knowledge is viewed in quantitative terms
Amount of work done or time spent is seen as key
No opinion can be called wrong
Learner acknowledges no responsibility to support opinion with facts

"Everyone has a right to his/her own opinion."

Relativism

Marks qualitative shift in person's thinking
Analysis and synthesis mastered
Comfortable with different perspectives and able to make judgements about the relative merits of each
More internally directed
Persons making judgements take into account the context
Capacity for empathy present
Appreciation for individual differences is evident
Everything is relative but not equally valid

"I see that I'm going to have to make my own decisions in an uncertain world with no one to tell me I'm right."

Commitment

Making decisions or choices or commitments in absence of clear or complete information
Ability to deal with paradox
Tolerant of ambiguity
Recognition that commitments do not settle things or make them easier
Continual seeking and processing
Wholehearted while tentative

"I see that I shall be tracing this whole journey over and over, but each time, I hope, more wisely."

W G Perry, Jr (1970) *Forms of intellectual and ethical development in the college years: A scheme.* New York: Holt, Rinehart & Winston

WAYS OF KNOWING

C

- **Silence**
  Experience of self as mindless and voiceless with no capacity for knowing.
  Can't receive knowledge from others or generate it for oneself.
  Learning is based on showing.
  Self is viewed as subject to whims of external authority.

- **Received Knowing**
  Learns from listening to authorities who know the truth.
  Don't create knowledge themselves or recognize that authorities create knowledge.
  Truth is absolute, concrete, factual.
  Knowledge exists independent of those who seek to understand it.

- **Subjective Knowing**
  Knowledge is based on intuition and personal experience.
  One can create one's own knowledge and truth.
  Distrust of external authorities because truth is personal and can be known only by attending to one's own experiences and inner feelings.

- **Procedural Knowing**
  Knowledge is perceived as objective: a deliberate and systematic use of reason.
  Recognition of multiple interpretations dependent on perspective.

  Separate Mode: focus on evaluating and judging points of view or arguments.
  Objectivity achieved by adhering to impersonal standards, and
  Self is kept separate from the process.
  Feelings cloud thought.
  Goal: to construct truth--to prove, disprove and convince.

  Connected Mode: focus on experiencing another's perspective.
  Effort made to understand another's reality, and to be understood.
  Objectivity achieved through adopting the other's perspective.
  Feelings illuminate thought.
  Goal: to construct meaning.

- **Constructed Knowing**
  Knowledge is to be constructed and the knower seen as shaping the known.
  Integration of separate and connected modes of discourse.
  Goal: to understand the contexts out of which ideas arise, and to take responsibility for examining, evaluating, and developing systems of thought.
  To care about thinking/think about caring.

Adapted by Jackie Weinstock from Belenky, M. B., Clinchy, B. M., Goldberger, N. R., & Tarule, J. M. (1986). *Women's ways of knowing: The development of self, voice, and mind.* New York: Basic Books.

LEARNING MODES AND CAPACITIES FOR LIVING

C

Concrete Experience

- Contributes to increased affective functioning
- Enlarges repertoire of appropriate emotional responses
- Promotes managing emotions
- Promotes higher order sentiments, including capacity for intimacy
- Highly differentiated feelings
- Promotes valuing

Reflective Observation

- Sharpens perceptual capabilities
- Potential for reducing stereotypes and prejudices
- Promotes capacity for empathy
- Increases perspective taking
- Contributes to ability to discern and assign meaning
- Increases tolerance

Abstract Conceptualization

- Develops sophisticated symbolic proficiency
- Enables us to think in abstractions
- Permits appreciation for many higher order concepts (i.e., God, love, Justice)
- Helps in discriminating between facts
- Helps in defining reality
- Sharpens analytical and digital thinking
- Increases capacity for logic

Active Experimentation

- Increases behavioral complexity
- Helps refine actions, nuance
- Behavior becomes more congruent with knowledge
- Develops self-control
- Actions become more appropriate for circumstance
- Control of temper and violent behavior

As one matures and transits the circle repeatedly, constantly recycling and integrating the dialectic conflicts among the four modes, one moves to greater creativity and growth. The capacities increasingly impact on each other and contribute to each other, i.e., as one's perceptual capacities increase, so does one's behavioral repertoire.

The circle thus becomes a helix or a cone, the four modes positioned at some distance forming the floor, and with distance decreasing as the modes are engaged at increasing levels of sophistication and complexity.

David A. Kolb, EXPERIENTIAL LEARNING. Englewood Cliffs, NJ: Prentice-Hall, 1984. 2/5/92

TEACHING STRATEGIES AND THE LEARNING CIRCLE

Direct or Concrete Experience
Activities which involve the learner in the experience either physically or emotionally. Hands-on, uses the senses, engages the learner affectively. May have to be vicarious experience. "Here and now" data.

- Recalling past experience
- Role play
- Demonstration
- Observation
- Case studies
- Films
- Interviews
- Self-tests

Reflections on Experience
Activities which require the learner to step back and look at experience, get perspectives of others, make connections to other experiences.

- Structured small group discussions
- Reflective papers
- Journals
- Copying notes
- Asking learners how they react to a session
- Asking learners to make connections to other learning
- Asking learners to discuss class session with other people
- Socratic dialogue
- Formulating questions

Abstractions or Principles
Information from authoritative sources. Using research and specialized knowledge from the law and other disciplines to develop principles. "There and then" data.

- Print (benchbooks, journal articles and other readings)
- Authoritative guidelines (checklists, rules, procedural steps, chronologies)
- Lectures
- Films
- Quick reference guides
- Forms, charts, documents
- Flowcharts

Application
Opportunities for the learners to try out principles or theories in problem-solving

- Role play
- Individual and group projects
- Video-taping of practice session
- "What if" situations
- Devising plans of action
- Problem-solving activities

Claxton, C.S., and P. H. Murrell. 1992. Education for development: Principles and practices in judicial education: JERITT monograph three. East Lansing, MI: Judicia. Education Reference, Information and Technical Transfer Project

C

SEPARATE AND CONNECTED TEACHING

CONVEYING INFORMATION	PROBLEM POSING
ONE-WAY COMMUNICATION	DIALOGUE
TEACHER SPEAKS	STUDENT DEVELOPS VOICE
ORIENTED TO DISCIPLINE	ORIENTED TO STUDENTS' EXPERIENCE
BEGINS WITH ABSTRACT	BEGINS WITH EXPERIENCE
DISINTERESTED VIEW OF STUDENT	VIEWS STUDENTS IN THEIR TERMS
EXPOSURE TO DISCIPLINE	CONNECTIONS BETWEEN EXPERIENCE AND THEORY
OBJECTIVITY VALUED	SUBJECTIVITY VALUED
COMPETITIVE AND INDIVIDUALISTIC	COLLABORATIVE

1997 LEGISLATIVE UPDATE
BY
ROBERT M. KREAMER

D

I am pleased to report that the 1997 session of the Iowa Legislature was a landmark session of accomplishment for the Iowa Defense Counsel Association. The Iowa Defense Counsel Association, along with other organizations interested in tort reform and leveling the playing field in civil litigation, successfully promoted the legislative approval of House File 693.

Success in this legislative effort began last November with the 1996 general election where control of the Iowa Senate switched from a 27-23 Democrat margin to a 29-21 (later 28-22 with a mid-session resignation) Republican margin. This control switch in the Senate was major because prior tort-reform efforts had been thwarted for several years and, with the election of new leadership, this issue would now be given the opportunity for discussion and debate. In this same election, however, control of the Iowa House of Representatives by Republicans was narrowed from a 63-27 margin to 54-46.

The next steps taken in obtaining the successful passage of House File 693 were meetings with other interest groups sharing our belief that tort reform was needed to provide both individuals and businesses a more fair and reasonable civil justice system in Iowa. From these meetings a game plan was developed to educate and inform legislators why tort reform was necessary and to overcome the substantial opposition expected from the Iowa Trial Lawyers Association, labor unions and other organizations. After many meetings, hearings and drafting revisions, House File 693 was brought to the floor of the Iowa House of Representatives and on April 1st, after eight hours of debate, was passed on a vote of 55-44. Despite numerous attempts to eliminate or weaken provisions by the opposition during debate, there were no amendments adopted to House File 693 that were opposed by the Iowa Defense Counsel Association. Representative Jeff Lamberti did a superior job of floor-managing this legislation.

In the Senate there also were several meetings and hearings on House File 693 and debate was finally held on April 18th. After a particularly emotional and long debate, almost five hours, tort reform successfully passed the Senate on a 30-17 vote. Freshman Senator Larry McKibben did an excellent job of floor-managing the legislation and again every attempt by the opposition to weaken the bill failed.

The final step in the long and difficult journey of House File 693 occurred on May 29th when Governor Terry E. Branstad enthusiastically signed this bill into law.

Of the seven major components to this legislation, five were initiated by and were a part of the 1997 legislative program of the Iowa Defense Counsel Association. These IDCA-sponsored issues contained in House File 693 are:

1. Reduction of the statutory 10% interest provision on judgments found in Iowa Code Section 535.3 to the average auction price of fifty-two (52) week United States treasury bills settled immediately prior to the date of judgment plus two (2) percent.

2. Iowa Code Section 622.10 was amended to allow defendants easier acccess to plaintiff's medical records upon the commencement of a civil action.

3. The Iowa Supreme Court case of Brandt v. Bockholt, 532 N.W. 2d 81 (1995) was overturned by allowing all awards of future damages to be reduced to present value.

4. The Iowa Supreme Court case of Schwennen v. Abell, 430 N.W. 2d 98 (1988) was overturned by providing that the percentage of fault assigned to the person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium.

5. Eliminate joint and several liability in all awards of non-economic damages.

The remaining two components of House File 693 were:

1. A fifteen-year statute of repose was established for products liability actions.

2. A statute of limitations of age 10 was established for actions based on alleged medical malpractice committed on minors age eight or under.

It should be noted that there are different effective dates for the various sections of House File 693 and I would direct your attention to Section 16 to determine the specific effective date of interest to you.

It is not often that a lobbyist gets the pleasure of giving a report such as this to a client. It should be emphasized that there were many people who played a major role in helping win passage of this landmark legislation, but special thanks go to Mark Tripp, legislative chair-person, and all of the Board of Directors of the Iowa Defense Counsel Association for their continual support and assistance throughout the session. This team effort is responsible for the most significant tort reform ever successfully promoted by the IDCA.

Finally, for allowing me the opportunity and privilege to represent you before the Iowa General Assembly, THANK YOU!

Bob Kreamer

Robert M. Kreamer

RMK:cc

HOUSE FILE 693

AN ACT

RELATING TO CIVIL ACTIONS AND STATUTES OF LIMITATIONS IN CIVIL ACTIONS, THE RATE OF INTEREST ON JUDGMENTS AND DECREES, PROCEDURES FOR FURNISHING PATIENT RECORDS OF PLAINTIFFS, COMPARATIVE FAULT IN CONSORTIUM CLAIMS, DAMAGES IN CIVIL ACTIONS, JOINT AND SEVERAL LIABILITY, AND PROVIDING EFFECTIVE DATES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 135.11, Code 1997, is amended by adding the following new subsection:

NEW SUBSECTION. 18A. Consult with the office of statewide clinical education programs at the university of Iowa college of medicine and annually submit a report to the general assembly by January 15 verifying the number of physicians in active practice in Iowa by county who are engaged in providing obstetrical care. To the extent data are readily available, the report shall include information concerning the number of deliveries per year by specialty and county, the age of physicians performing deliveries, and the number of current year graduates of the university of Iowa college of medicine and the university of osteopathic medicine and health sciences entering into residency programs in obstetrics, gynecology, and family practice. The report may include additional data relating to access to obstetrical services that may be available.

Sec. 2. Section 535.3, subsection 1, Code 1997, is amended by striking the subsection and inserting in lieu thereof the following:

1. Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13, except for interest due pursuant to section

85.30 for which the rate shall be ten percent per year.

Sec. 3. Section 535.3, subsection 2, Code 1997, is amended by striking the subsection.

Sec. 4. Section 535.3, subsection 3, Code 1997, is amended to read as follows:

3. Interest on periodic payments for child, spousal, or medical support shall not accrue until thirty days after the payment becomes due and owing and shall accrue at a rate of ten percent per annum thereafter.

Sec. 5. Section 614.1, Code 1997, is amended by adding the following new subsection:

NEW SUBSECTION. 2A. WITH RESPECT TO PRODUCTS.

a. Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product. This subsection shall not affect the time during which a person found liable may seek and obtain contribution or indemnity from another person whose actual fault caused a product to be defective. This subsection shall not apply if the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm.

b. (1) The fifteen-year limitation in paragraph "a" shall not apply to the time period in which to discover a disease that is latent and caused by exposure to a harmful material, in which event the action shall be deemed to have accrued when the disease and such disease's cause have been made known to the person or at the point the person should have been aware of the disease and such disease's cause. This subsection shall not apply to cases governed by section 614.1, subsection 11.

(2) As used in this paragraph, "harmful material" means silicon gel breast implants, which were implanted prior to July 12, 1992; and chemical substances commonly known as asbestos, dioxins, tobacco, or polychlorinated biphenyls, whether alone or as part of any product; or any substance which is determined to present an unreasonable risk of injury to health or the environment by the United States environmental protection agency pursuant to the federal Toxic Substance Control Act, 15 U.S.C. § 2601 et seq., or by this state, if that risk is regulated by the United States environmental protection agency or this state.

Sec. 6. Section 614.1, subsection 9, Code 1997, is amended to read as follows:

9. MALPRACTICE.

a. ~~Those~~ Except as provided in paragraph "b", those founded on injuries to the person or wrongful death against any physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action, whichever of the dates occurs first, but in no event shall any action be brought more

than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death.

b. An action subject to paragraph "a" and brought on behalf of a minor who was under the age of eight years when the act, omission, or occurrence alleged in the action occurred, shall be commenced no later than the minor's tenth birthday or as provided in paragraph "a", whichever is later.

Sec. 7. Section 614.8, Code 1997, is amended to read as follows:

614.8 MINORS AND PERSONS WITH MENTAL ILLNESS.

a. The times limited for actions ~~herein~~ in this chapter, except those brought for penalties and forfeitures, ~~shall be~~ are extended in favor of ~~minors and~~ persons with mental illness, so that they shall have one year from and after the termination of ~~such~~ the disability within which to commence ~~said~~ an action.

b. Except as provided in section 614.1, subsection 9, the times limited for actions in this chapter, except those brought for penalties and forfeitures, are extended in favor of minors, so that they shall have one year from and after attainment of majority within which to commence an action.

Sec. 8. Section 622.10, Code 1997, is amended to read as follows:

622.10 COMMUNICATIONS IN PROFESSIONAL CONFIDENCE -- EXCEPTIONS -- REQUIRED CONSENT TO RELEASE OF MEDICAL RECORDS AFTER COMMENCEMENT OF LEGAL ACTION -- APPLICATION TO COURT.

1. A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the

person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, physician assistants, advanced registered nurse practitioners, mental health professionals, or to the stenographer or confidential clerk of any physicians or surgeons, physician assistants, advanced registered nurse practitioners, or mental health professionals, in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.

3. a. In a civil action in which the condition of the plaintiff in whose favor the prohibition is made is an element or factor of the claim or defense of the adverse party or of any party claiming through or under the adverse party, the adverse party shall make a written request for records relating to the condition alleged upon the plaintiff's counsel for a legally sufficient patient's waiver under federal and state law. Upon receipt of a written request, the plaintiff shall execute the patient's waiver and release it to the adverse party making the request within sixty days of receipt of the written request. The patient's waiver may require a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional to do all of the following:

(1) Provide a complete copy of the patient's records including, but not limited to, any reports or diagnostic imaging relating to the condition alleged.

(2) Consult with the attorney for the adverse party prior to providing testimony regarding the plaintiff's medical history and the condition alleged and opinions regarding health etiology and prognosis for the condition alleged subject to the limitations in paragraph "c".

b. If a plaintiff fails to sign a waiver within the prescribed time period, the court may order disclosure or compliance. The failure of a party to comply with the court's order may be grounds for dismissal of the action or any other relief authorized under the rules of civil procedure.

c. Any physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional who provides records, provides information during consultation, or otherwise responds in good faith to a request pursuant to paragraph "a" shall be immune with respect to all civil or criminal penalties, claims, or actions of any kind with respect to this section.

d. Any physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional who provides records or consults with the counsel for the adverse party shall be entitled to charge a reasonable fee for production of the records, diagnostic imaging, and consultation. Any party seeking consultation shall be responsible for payment of all charges. The fee for copies of any records shall be based upon actual cost of production.

e. Defendant's counsel shall provide a written notice to plaintiff's counsel in a manner consistent with the Iowa rules of civil procedure providing for notice of deposition at least ten days prior to any meeting with plaintiff's physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional. Plaintiff's counsel has the right to be present at all such meetings, or participate in telephonic communication with the physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional and counsel for

the defendant. Plaintiff's counsel may seek a protective order structuring all communication by making application to the court at any time.

f. The provisions of this subsection do not apply to actions or claims brought pursuant to chapter 85, 85A, or 85B.

4. If an adverse party desires the oral deposition, either discovery or evidentiary, of a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional to which the prohibition would otherwise apply or the stenographer or confidential clerk of a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional or desires to call a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional to which the prohibition would otherwise apply or the stenographer or confidential clerk of a physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional as a witness at the trial of the action, the adverse party shall file an application with the court for permission to do so. The court upon hearing, which shall not be ex parte, shall grant permission unless the court finds that the evidence sought does not relate to the condition alleged and shall fix a reasonable fee to be paid to the physician or surgeon, physician assistant, advanced registered nurse practitioner, or mental health professional by the party taking the deposition or calling the witness.

5. For the purposes of this section, "mental health professional" means a psychologist licensed under chapter 154B, a registered nurse licensed under chapter 152, a social worker licensed under chapter 154C, a marital and family therapist licensed under chapter 154D, a mental health counselor licensed under chapter 154D, or an individual holding at least a master's degree in a related field as deemed appropriate by the board of behavioral science examiners.

6. ~~No~~ A qualified school guidance counselor, who has met the certification and accreditation standards of the department of education as provided in section 256.11, subsection 10, who obtains information by reason of the counselor's employment as a qualified school guidance counselor shall not be allowed, in giving testimony, to disclose any confidential communications properly entrusted to the counselor by a pupil or the pupil's parent or guardian in the counselor's capacity as a qualified school guidance counselor and necessary and proper to enable the counselor to perform the counselor's duties as a qualified school guidance counselor.

Sec. 9. Section 624.18, Code 1997, is amended to read as follows:

624.18 ~~DISTINCTION BETWEEN DEBT AND~~ DESIGNATION AND CALCULATION OF DAMAGES.

1. In all actions where the plaintiff recovers a sum of money, the amount to which the plaintiff is entitled may be awarded the plaintiff by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

1A. In all personal injury actions where the plaintiff recovers a sum of money that, according to special verdict, is intended, in whole or in part, to address the future damages of the plaintiff, that portion of the judgment that reflects the future damages shall be adjusted by the court or the finder of fact to reflect the present value of the sum.

2. Under no circumstances shall there be a reduction to present value more than one time by either the trier of fact or the court.

Sec. 10. Section 668.3, subsection 1, Code 1997, is amended to read as follows:

1. a. Contributory fault shall not bar recovery in an action by a claimant to recover damages for fault resulting in death or in injury to person or property unless the claimant

bears a greater percentage of fault than the combined percentage of fault attributed to the defendants, third-party defendants and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the claimant.

b. Contributory fault shall not bar recovery in an action by a claimant to recover damages for loss of services, companionship, society, or consortium, unless the fault attributable to the person whose injury or death provided the basis for the damages is greater in percentage than the combined percentage of fault attributable to the defendants, third-party defendants, and persons who have been released pursuant to section 668.7, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person whose injury or death provided the basis for the damages.

Sec. 11. Section 668.3, subsection 2, paragraph b, Code 1997, is amended to read as follows:

b. The percentage of the total fault allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover damages for loss of consortium, services, companionship, or society. For this purpose the court may determine that two or more persons are to be treated as a single party.

Sec. 12. Section 668.3, subsection 8, Code 1997, is amended to read as follows:

8. In an action brought pursuant to this chapter the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings on each specific item of requested or awarded damages indicating that portion of the judgment or decree awarded for past damages and that portion of the judgment or decree awarded for future damages. All

awards of future damages shall be calculated according to the method set forth in section 624.18.

Sec. 13. Section 668.4, Code 1997, is amended to read as follows:

668.4 JOINT AND SEVERAL LIABILITY.

In actions brought under this chapter, the rule of joint and severable liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties. However, a defendant found to bear fifty percent or more of fault shall only be jointly and severally liable for economic damages and not for any noneconomic damage awards.

Sec. 14. Section 668.13, subsection 3, Code 1997, is amended to read as follows:

3. Interest shall be calculated 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 fifty-two week United States treasury bills settled immediately prior to the date of the judgment plus two percent. The state court administrator shall distribute notice monthly of that rate and any changes to that rate to all district courts.

Sec. 15. If any provision of this Act or the application thereof to any person is invalid, the invalidity shall not affect the provisions or applications of this Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are severable.

Sec. 16. EFFECTIVE DATES. Sections 2, 3, 4, 8, 9, 10, 11, 12, 13, and 14 of this Act shall apply to actions filed after July 1, 1997. Section 5 of this Act shall apply to actions filed after July 1, 1997, except that any cause of action having actually accrued as of the date of enactment of this Act shall be preserved according to the law applicable to the statute of limitations in effect at the time of accrual.

Sections 6 and 7 of this Act shall apply to all causes of action accruing on or after July 1, 1997, and to all causes of action accruing before July 1, 1997, and filed after July 1, 1999.

RON J. CORBETT
Speaker of the House

MARY E. KRAMER
President of the Senate

I hereby certify that this bill originated in the House and is known as House File 693, Seventy-seventh General Assembly.

ELIZABETH ISAACSON
Chief Clerk of the House

Approved _____, 1997

TERRY E. BRANSTAD
Governor

MOVING ON:
FORMER EMPLOYMENT AND PRESENT COMPETITIVE RESTRAINT

Mark L. Zaiger
Shuttleworth Ingersoll, P.C.
Cedar Rapids, Iowa

E

INTRODUCTION

Employment carries with it aspects that are purely professional and, at the same time, aspects that make it fairly personal in nature. Obviously, the concept of pay for labor places employment firmly in the business world. A number of factors, however, make it highly personal in nature. Ultimately, much of our waking time is spent at work. Many (if not most) of our personal relationships originally stem from business or work.[1] The law has always acknowledged the personal aspect of the employment relationship. For example, courts will not enforce contracts of employment with an order for specific performance. D. Dobbs, Handbook on the Law of Remedies §12.26 at 993 (1973).

Legal rights within the employment relationship also are changing. Iowa formally adheres to the at will employment doctrine. French v. Foods, Inc., 495 N.W.2d 768, 769 (Iowa 1993); Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989). Nonetheless, employment litigation mushrooms. Some--mainly employers--are coming to believe that the exceptions now overpower the rule. Starting with the enactment of traditional labor (union) legislation, Congress, state legislatures and municipalities have enacted a large number of

---

[1] Of course, the "personal" aspects of employment are almost wholly dependent upon individuals involved, the size of the work place and the work "atmosphere". Failing to acknowledge the personal side distorts reality. In fact, many of us choose, or remain in, our particular employment setting based upon reasons that are at least as heavily "personal" as "business".

statutory exceptions to at will employment. These exceptions constitute clearly articulated public policy limitations upon an employer's ability to terminate the employment relationship.[2]

The courts, also, have eroded the concept of at will employment, which is, itself, based fundamentally upon the notion of parties' freedom to contract. In a series of decisions, the Iowa Supreme Court has authorized new causes of action for termination of the employment relationship based upon "pseudo" contract principles. See, e.g., French v. Foods, Inc., 495 N.W.2d 768, 770 (Iowa 1993); McBride v. City of Sioux City, 444 N.W.2d 85, 90 (Iowa 1989); Cannon v. National By-Products, Inc., 422 N.W.2d 638, 640 (Iowa 1988) (employment handbook claims). The court has also recognized a cause of action for wrongful termination in violation of public policy. See, e.g., Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988). Concurrent with the rise in government involvement in business has been a general lessening of parties' unfettered right to contract as they choose.

The expansion of employee rights and growing restrictions on employers' ability to terminate the employment relationship have led to increased employment and labor litigation. Because such litigation usually relates to a breakdown of personal relationships also, court battles are frequently fought in highly charged and personal terms. Such cases are often similar to litigation concerning the dissolution of marriage or family relations matters.

The general observations clearly hold true with respect to litigation aimed at restricting a former employee's activities competitive with the previous employer's business. Even before the rapid advancement of employee rights (and the increased technological complexity of the

---

[2] See, e.g., Labor Management Relations Act, 29 U.S.C. §158(a)(1), (3), (4); Fair Labor Standards Act, 29 U.S.C. §§215(a)(3), 216(b); OSHA, 29 U.S.C. §660(c); Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e-2, 2000e-3(a); ADEA, 29 U.S.C. §§623, 631, 633(a); ADA, 42 U.S.C. §12112(a); ERISA, 29 U.S.C. §§1140, 1141; Iowa Civil Rights Act of 1965, Iowa Code §216.6; Iowa Code §642.21(2) (garnishment limitation); Iowa Code §730.4(1)-(6) (polygraph protection); Iowa Code §730.5 (drug testing); Iowa Code §88.9(3) (occupational safety). Local ordinances throughout the state, in addition, contain specific prohibitions restricting an employer's right to discharge an employee. See e.g., Chapter 69, no. 66-80, Ordinances of City of Cedar Rapids

business world), questions concerning an ex-employee's right to compete were litigated. Some time ago, rules were established by the courts. At least ostensibly, those rules still govern. Changes in society's view of the employment relationship, however, and changes in the legal rules governing employment have affected (usually tacitly) judicial analysis of some of the legal issues. The result has been a large and growing body of case law and legal precedent. See, e.g., Covenants Not to Compete, a State-by-State Survey, ABA Section of Labor and Employment Law (1991 & 1996 Supp.); Empirical Study, a Statistical Analysis of Non-Competition Clauses in Employment Contracts, 15 J. Corp. L. 483, 485 (1990). That authority, however, based upon analysis of individual fact settings--and generally by courts in equity--is exceedingly diverse, divergent and contradictory. Despite (or perhaps because of) the abundance of legal precedent, commentators have decried the "exceptional degree of unpredictability" with respect to the area Non-Competition Clauses, supra, 15 J. Corp. L. at 486.[3]

Any lawyer participating in litigation seeking to impose competitive restrictions on individuals must understand and appreciate the overriding feature of such litigation--unpredictability. Attempts to analyze given factual settings solely by reference to reported decisions in Iowa or elsewhere can, at best, be only partially successful. Such an approach, likely, will be misleading and, ultimately, expensive. However, since case law is what is available for analysis, this paper will set forth some of the various articulated considerations of Iowa courts with respect to competition questions and practical contexts in which those traditionally articulated considerations arise. In large part because of the shortcomings of

[3] As noted by the Iowa Supreme Court, there "is a fair consensus on the rules governing restraints on competition in employment contracts, but difficulty frequently arises in applying the rules to individual cases." Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983). In Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1256 (N.D. Iowa 1995), Judge Bennett quoted a 1952 Ohio decision in which the court referred to case law on non-competition agreements as a " ' sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything ' " (citation omitted). Unpredictability has led to at least

contract-based competitive restrictions litigation, other legal theories are becoming increasingly popular. This paper will also address alternative litigation approaches.

COVENANTS NOT TO COMPETE

A. LEGITIMATE COMPETITION ABSENT CONTRACTUAL RESTRAINT

There is not much case law directly articulating what constitutes non-actionable post-employment competition generally, although the cases in which courts have held covenants not to compete unenforceable, discussed below, demonstrate situations in which courts have found competition to be non-actionable. As a general matter, tort law suggests the limits of appropriate competition.[4] Other factors being equal,[5] conduct that does not constitute tortious interference with existing or professional prospective contractual relations is otherwise legitimate. See, e.g., Nesler v. Fisher & Co., 452 N.W.2d 191, 194-95 (1990); C.F. Sales, Inc. v. Amfert, Inc., 344 N.W.2d 543, 555 (Iowa 1983); Toney v. Casey's General Stores, Inc., 460 N.W.2d 849 (Iowa 1990). In general, Iowa follows the Restatement (Second) of Torts definition of improper conduct. See Hunter v. Board of Trustees, 481 N.W.2d 510, 518 (Iowa 1992); Restatement (Second) of Torts §767. The Restatement also assists in determining the scope of permissible competition.

> One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to hamper competition unduly, the rule stated in this Section entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services.

---

one effort to attempt to assess as many as 35 separate variables affecting judicial outcomes in non-competition cases. Non-Competition Clauses, supra, 15 J. Corp. L. at 533, App. B.

4 Trade secrets litigation is addressed separately below.

5 This analysis does not in any way attempt to encompass anti-trust or trade restriction considerations.

Restatement (Second) of Torts §768, Comment (b)

Within the context of this statement favoring competition, contractual restrictions on an employee's ability to compete after the employment relationship has terminated have, fairly understandably, been viewed with lack of full approval. Although the view of the courts may be changing, generally contractual covenants not to compete have been looked upon by the Iowa courts with disfavor. "We start with a basic tenet that restraints on competition and trade are disfavored in the law. Exceptions are made under narrowly prescribed limitations." Uptown Food Store, Inc. v. Ginsberg, 255 Iowa 462, 467, 123 N.W.2d 59, 62-63 (1963); see also Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986) ("agreements in restraint of trade are generally disfavored").[6]

B. REASONABLENESS AS THE STANDARD DETERMINING ENFORCEABILITY

Before 1971, Iowa followed the traditional approach, striking down in their entirety contractual restrictions on post-employment competition that the court found in any respect to be overbroad. See, e.g., Smith v. Stowell, 256 Iowa 165, 125 N.W.2d 795 (1964). In Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 369 (Iowa 1971), the Iowa Supreme Court rejected the all-or-nothing approach and, to that extent, overruled earlier case law. Under Ehlers, the court adopted the:

---

[6] However, the Iowa Supreme Court has also noted that there is " 'no public policy or rule of law which condemns or holds in disfavor a fair and reasonable agreement [restricting competition], and such a contract is entitled to the same reasonable construction and the same effective enforcement that are accorded to business obligations in general ' " Kunz v. Bock, 163 N.W.2d 442, 445 (1969) (quoting Sickles v. Lauman, 185 Iowa 37, 169 N.W. 670 (1918).

In Dental Prosthetic Services, Inc. v. Hurst, 463 N.W.2d 36, 39 (Iowa 1990), the court attempted to synthesize these two views of no compete agreements, deciding that a covenant not to compete in the employment setting "being in restraint of trade and personal liberty, should not be construed to extend beyond its fair import." The case itself illustrates that the test does not provide much guidance. Expert testimony was presented at trial whether defendant's premises were 50 or 52 miles from plaintiff's. 463 N.W.2d at 38. The court held that plaintiff failed to prove defendant's location was within the 50 miles prohibited under the agreement. Id. Thereafter, the court construed the contractual prohibition against engaging in business "directly or indirectly within a radius of 50

> rule that unless the facts and circumstances indicate bad faith on the part of the employer, we will enforce non-competitive covenants **to the extent that they are reasonably necessary to protect his legitimate interests without imposing undue hardship on the employee when the public interest is not adversely affected.**

188 N.W.2d at 370 (emphasis added). In other words, the court will tailor a covenant not to compete so that it can be enforced.[7]

1. **Factors determining reasonableness.**

Determining reasonableness is, necessarily, dependent upon the specific facts and circumstances of a given case. Adding to the complexity of analysis is the clearly stated position of the Iowa Supreme Court that the:

> reasonableness of the restraint and the validity of the covenant seldom depend exclusively on a single fact. Rather, all the facts must be considered and weighed carefully, and each case must be determined in its entire circumstances. Only then can a reasonable balance be struck between the interests of the employer and the employee.

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 382 (Iowa 1983); Baker v. Starkey, 259 Iowa 480, 495, 144 N.W.2d 889, 897-98 (Iowa 1966).

In applying the reasonableness standard, the court will seek to:

> maintain[] a proper balance between the interests of the employer and the employee. Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain.

---

miles" not to include "delivering" to, "calling" upon or "servicing" customers "at their place of business", even where the customer's place of business is within 50 miles. Id. at 39.

[7] Even under the Ehlers rule, however, lawyers involved in no compete litigation must be mindful that the proponent of the contractual restriction must ask the court for partial enforcement and modification of the agreement. Failure to do so may, in effect, result in reversion to the all-or-nothing approach. See Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986) ("while Ehlers allows for modification of such agreements, it does not require a court to do so sua sponte.").

Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); see Mutual Loan Co. v. Pierce, 245 Iowa 1051, 1055, 65 N.W.2d 405, 407 (1954). The burden to establish reasonableness, quite appropriately, rests with the employer seeking to enforce the restriction. Iowa Glass, 338 N.W.2d at 381.

E

In determining the reasonableness of the covenant not to compete, the court "will apply a three-prong test: (1) Is the restriction reasonably necessary for the protection of the employer's business; (2) Is it unreasonably restrictive of the employee's rights; and (3) Is it prejudicial to the public interest?" Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986).

2. **Employer's interest.**

Factors considered generally in trying to evaluate the employer's interest include long term customer relationships, good will, and the employee's access to confidential information or trade secrets, customers lists, unique training and skills. A. Valiulis, Covenants Not to Compete, Forms, Tactics and the Law 15-16 (1985); 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §512 (1971). As the Iowa Supreme Court has stated in Iowa Glass, however, "proximity to customers is only one aspect. Other aspects, including the nature of the business itself, accessibility to information peculiar to the employer's business and the nature of the occupation which is restrained, must be considered along with matters of basic fairness." 338 N.W.2d at 378.

The courts tend to uphold restrictive covenants when the employee is in a position of close customer relationship and has the opportunity to pirate customers from the employer at the termination of employment. See, e.g., Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1270, 1273-74 (N.D. Iowa 1995); Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). However, an employer is

not "entitled to an injunction without some showing that defendant, when he left plaintiff's employment, pirated or had the chance to pirate part of plaintiff's business; or it can reasonably be expected some of the patrons or customers he served while in plaintiff's employment will follow him to the new employment." Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 408 (Iowa 1954).

Many of the cases in which covenants not to compete have been enforced fall into a category the Supreme Court has called "route cases," in which covenants are enforced (if otherwise reasonable in time and geographic area) because "the employee has had a close contact with the employer's customers and it is only fair on termination of his employment, there be an interval when a new employee will be able to get acquainted with the customers." Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 409 (Iowa 1954); see e.g., Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972) (restriction enforced where employee was given a designated area in which he routinely serviced his employer's customers); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971) (restriction enforced where there was close client contact).

Similarly, in Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 323 (Iowa 1967), the Supreme Court held the restrictive covenant enforceable involving competition within ten miles of any town the former employee had serviced for three years because the employee was given an established route where he regularly serviced company accounts. See also, Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224 (N.D. Iowa 1995) (preliminary injunction granted to enforce two year, "assigned territory" covenant); Presto-X-Co. v. Ewing, 442 N.W.2d 85, 88 (Iowa 1989) (covenant enforced with respect to customers); Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988) (damages recoverable against dentist who violated 2 year, 25 mile, patients only restriction). Further, in Orkin, the court relied on the fact that the employee had

received substantial technical training concerning pest control. Id. at 324. See also Cogley Clinic v. Martini, 253 Iowa 541, 544, 112 N.W.2d 678, 679-80 (1962) (medical clinic incurred $10,000 cost to train new doctor; doctor's acquaintance and familiarity with patients, referral doctors, hospital personnel and local procedures all arose through his association with clinic); Dain Bosworth, Inc. v. Brandhorst, 356 N.W. 2d 590, 593 (Iowa App. 1984).

Where there is less contact with existing or established customers or clients, the court is reluctant to uphold restrictions. For example, in Iowa Glass Depot v. Jindrich, 338 N.W.2d 376 (Iowa 1983), the court declined to enforce a restriction, contrasting the customers in "route cases" with Glass Depot's customers and clients. Although Mr. Jindrich had substantial contact with clients and customers, his employer's "business in Iowa City did not lend itself to the type of close personal relationship with the customers that a normal route salesman ordinarily would develop." 338 N.W.2d at 384. The court in Iowa Glass also found it significant that there was no pirating of customers, or specialized training offered to the employee beyond a Dale Carnegie course. 338 N.W.2d at 382-83. See also Mutual Loan Co. v. Pierce, 65 N.W.2d 405 (Iowa 1954). Pierce involved an employee of a small loan company, the services of which consisted mainly of collecting delinquent accounts. The court found it significant that there was no meaningful and steady contact with the loan company's customers. 65 N.W.2d at 409-11.

3. Employee's interest that is restricted or impaired.

Injunctive actions to enforce covenants not to compete are tried in equity. Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 324 (Iowa 1966). Accordingly, the courts tend to take a careful look at the hardship that will be imposed on an employee if the covenant is enforced. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376 (Iowa 1983); Baker v. Starkey, 259 Iowa 480, 495, 144 N.W.2d 889, 897 (Iowa 1966). For example, in Iowa Glass, the

Supreme Court examined extensively the hardship the employee would endure, considering issues such as his marital break up, the fact that he wished to stay in Iowa City where his children were located and the fact that despite his sales and management skills, he had been unable to find full time employment in Iowa City in another field. 338 N.W.2d at 383-84.

The court in Iowa Glass considered whether the employee would be effectively denied gainful employment in the given geographic area. Clearly, this is, in itself, a significant factor. In Lamp v. American Prosthetics, Inc., 379 N.W.2d 909 (Iowa 1986), the court found that enforcement of the restriction would effectively deny employment to the employee because the restriction precluded competition within 100 miles of any of the employer's offices. 379 N.W.2d at 910.[8] But see Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1437-38 (N.D. Iowa 1996) and Uncle B's Bakery, Inc. v. O'Rourke, 938 F.Supp. 1450, 1464-65 (N.D. Iowa 1996) (on modification) (preliminary injunction granted, later clarified and modified because of defendant's extreme difficulty in finding work consistent with restrictions).

Another factor considered is what, beyond employment itself, the employee will have to forego if the covenant is enforced. The court will refuse to enforce restrictive covenants where the employee would forfeit duly earned and vested benefits. E.g., Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984); Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972).[9] In Pathology Consultants, the Supreme Court refused to enforce a forfeiture provision in a deferred compensation agreement that provided that if a departing physician left and

---

[8] Note, however, the court in Lamp refused to enforce the restriction to the extent reasonable since the employer had not previously urged partial enforcement.

[9] See also Anderson v. Aspelmeier Law Firm, 461 N.W.2d 598 (Iowa 1990). The Anderson decision did not turn upon the forfeiture analysis of Pathology Consultants or Van Hosen. However, it could have been so analyzed. In that case, a departing partner's partnership interest was contractually reduced because of the departing partner's competition, deemed under the contract to be "detrimental to the partnership". Id. at 599. An alternative analysis that could have been employed by the court would have held such a clause unenforceable as a forfeiture provision. But see Iowa Code of Professional Responsibility D.R. 2-108(A) (attorney covenants not to compete invalid "except as a condition to payment of retirement benefits.")

competed in Waterloo, that physician would forego all future benefits. This was held to be unduly burdensome on the physician and the hardship to the physician would outweigh the pathology laboratory's need for restraint. 343 N W 2d 428 (Iowa 1984)

In considering the rights of the employee, the circumstances of the termination of employment will be considered. However, the fact that the employee has been discharged will not, itself, invalidate the no compete agreement "[U]nder some circumstances termination of the employment by [the employer] would not invalidate the covenant not to compete. . . . On the other hand, discharge by the employer is a factor opposing the grant of an injunction, to be placed in the scales in reaching the decision as to whether the employee should be enjoined." Ma & Pa, Inc. v. Kelley, 342 N.W.2d 500, 502-03 (Iowa 1984) (employment at will, employer "did not terminate the contract without any cause", injunction nevertheless refused and trial court reversed). But see Presto-X-Co. v. Ewing, 442 N.W.2d 85, 86 (Iowa 1989) (employee terminated for driving violation, court reversed district court refusal to grant injunction)[10]; Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1270-71 (N.D. Iowa 1995) (preliminary injunction entered despite termination of employee following his filing of declaratory judgment action).

4. Public policy.

The courts will not enforce covenants not to compete that are found to be against public policy. For example, in both Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972), and Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984), the Iowa Supreme Court declined to enforce the forfeiture provision of pension plan (or deferred compensation plan)

---

[10] In Presto-X, the employer also violated the employment agreement by failing to provide the two week termination notice required by the agreement. 442 N.W.2d at 86. Notwithstanding this breach, the court enforced the no compete agreement against the employee and reversed the trial court ruling denying injunctive relief. Justice Harris dissented on the ground that the employer itself breached the contract. 442 N.W.2d at 91.

Preliminary injunction was also entered in Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1431 (N.D. Iowa 1996), despite the claim that the employer breached moving expense and vacation provisions of the

benefits in substantial part because of public policy considerations. In Pathology Consultants, referring to Van Hosen, the court stated that it had "found as a matter of public policy that infinite forfeiture and termination of all pension rights acquired by an employee through his prior employment cannot be forfeited by the employee merely accepting employment with a competing institution since this would impose an unjust and uncivic penalty on the employee and disproportionately benefit his employer." 343 N.W.2d at 436. The court in Pathology Consultants also invalidated one of the restrictions involved because the "public interest suffers" when a pathology laboratory can dictate to other practicing pathologists the amount of referral work that should be sent from the hospitals that employed them. Id. The court also cited a third public policy reason in support of its decision--"a monopoly on laboratory services is not in the best interests of the public." Id.[11]

There is one clear example of public policy prohibition against no compete agreements. D.R. 2-108 of the Iowa Code of Professional Responsibility specifically prohibits agreements among lawyers to restrict "the right of an attorney to practice law after the termination of a professional relationship." See Anderson v. Aspelmeier Law Firm, 461 N.W.2d 598, 601 (Iowa 1990). Despite reported decisions involving physicians, see Cogley Clinic v. Martini, 253 Iowa 541, 112 N.W.2d 678 (1962), similar considerations could be argued to apply also to the medical field. The American Medical Association's Council on Ethical and Judicial Affairs has officially stated that it "discourages any agreement between physicians which restricts the right of a physician to practice medicine . . . . Such restrictive agreements are not in the public interest." Current Opinions §9.02 (1989). Obviously, however, that statement does not rise to the level of

---

employment agreement. The court noted that the claimed breach "bears no necessary connection" to the issues litigated in the case. Id.

[11] In Curtis 1000, Inc. v. Youngblade, 878 F.Supp. 1224, 1270-71 (N.D. Iowa 1995), Judge Bennett analyzed defendant's discharge in the context of public policy

law. Moreover, in one case, Chandra v. Cardiovascular Associates, (Woodbury Dist. Ct. L.A. No. 98076C, May 4, 1990), the court enforced a covenant not to compete against a partner leaving a physician group, notwithstanding the ethical pronouncement of the professional group.[12]

E

5. Time and place restrictions.

The courts will not enforce a restriction that is unlimited in time or place. In Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971), the Supreme Court applied the principle that covenants not to compete are unreasonably restrictive unless they are tightly limited as to both time and area. Id. at 373-74; see also Pathology Consultants v. Gratton, 343 N.W.2d 428, 434 (Iowa 1984). In Pathology Consultants, rejecting the argument of the former employer, the court held a contractual provision not to constitute a "limited" covenant not to compete, concluding "that failure to incorporate time and area restrictions indicates that an anti-competitive covenant was not intended." 343 N.W.2d at 434.

Determining reasonable time and place restrictions is a factual question under the particular circumstances of the case. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). With respect to restrictions as to time, it is difficult to discern in the cases what kind of record must be developed to support an argument that the time restriction is reasonable. In Ehlers, for example, the court held that a two year restriction was necessary. The reason given was that a "two year limitation would appear adequate to enable the employer to establish a satisfactory relationship with customers previously dealing with plaintiff." 188 N.W.2d at 373.

---

[12] Public concern over the Chandra decision resulted in passage of Senate File 210 in the 1991 Iowa General Assembly by wide margins in each house. That legislation specifically provided that such agreements restricting physicians violate public policy. The legislation, however, was vetoed by the governor, also for public policy reasons. In his veto message, the governor specifically acknowledged the physician shortage in Iowa, especially in rural areas, and expressed the opinion that the legislation would discourage physician recruitment efforts as well as interfere with physicians' "ability to freely contract." Letter of June 5, 1991, Governor Branstad to Secretary of State.

Generally, two years appears to be a period of limitation that will be enforced. See Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 554 (Iowa App. 1988); Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703, 704 (Iowa App. 1990) (no Iowa Supreme Court case enforcing an agreement of greater than five years, "typically" enforcement of restrictions of two or three years); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447 (Iowa App. 1992) (affirming a trial court decision modifying and enforcing a five year no compete agreement for a period of two years). But see Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996) (although five-year time period "is at the very limits of what Iowa courts have found enforceable", for this case it is not "unreasonably restrictive, at least for the purposes of a preliminary injunction.").[13]

With regard to geographic restrictions, the court looks to determine whether restriction is too broad, i.e., does it protect areas only where the employer is doing business? In Ehlers, for example, the court examined a restriction of 150 miles from Waterloo, Iowa, an area in which the employer claimed it was doing business. 188 N.W.2d 373. The court found that there were many population areas within that radius in which the employer had no local customers. Id. Instead, the court limited the restriction to a customer list that had been introduced into evidence. Id.

In Casey's General Stores, Inc. v. Campbell Oil, 441 N.W.2d 758 (Iowa 1989), the court narrowed a geographic limitation contained in a franchise agreement to three miles from any existing franchise store. The court held this was not unduly restrictive because the franchise

---

[13] With respect to the period of limitation, there is Iowa authority that, if the case is tied up in lawsuit and the period of time designated has expired, the injunction issue becomes moot. See Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979); Nitta v. Kuda, 249 Iowa 853, 857, 89 N.W.2d 149, 151 (Iowa 1958). However, in Presto-X-Co. v. Ewing, 442 N.W.2d 85, 90 (Iowa 1989), the court, notwithstanding the approaching expiration of the period of time covered by the covenant, used its "equitable powers", reversed the trial court's refusal to grant injunctive relief and imposed an injunction for a period of "one year from the date of this opinion." Id. at 90.

would profit from such a rule since it applied to all of the company's franchisees. Id. at 159-60. This case, however, must be contrasted to Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986), in which the court refused to enforce a provision that restricted competition within 100 miles of any company offices. The differing results can be explained in two ways. First, the geographic restriction was far broader. Second, the Lamp case involved a former employee. Casey's involved a franchisee.[14] See also Farm Bureau Service Co. v. Kohls, 203 N.W.2d 209, 211 (Iowa 1972) (two county restriction limited to six townships); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447 (Iowa App. 1992) (affirming trial court enforcement of a no compete agreement after limiting area from the states of Iowa and Minnesota to the particular "trade area"). See also Diversified Fastening Systems, Inc. v. Rogge, 786 F. Supp. 1486, 1492, 1494 (N.D. Iowa 1991).[15]

E

6. Necessary consideration to support a no compete agreement.

Employees have sought to void or avoid non-compete agreements entered into after the employment relationship has begun. The Iowa Supreme Court has held that a continuing

---

[14] The Iowa Supreme Court seems to apply less restrictive, though similar, analysis to cases involving the sale of a business or sale of a franchise interest. Baker v. Starkey, 144 N.W.2d 889, 895 (Iowa 1966); Brecher v. Brown, 17 N.W. 2d 377, 379 (Iowa 1945). As justification, the court in Baker stated that "in case of the sale of good will, the restriction adds to the value of what is sold, and the parties are presumably more nearly on a parody inability to negotiate than in negotiation of agreements between employer and employee." 144 N.W.2d at 895. But see Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703, 704 (Iowa App. 1990) (referring generally to restrictive covenants, making no distinction that the case was a sale of business situation). In Casey's, the court appears to have given a more liberal, less restrictive look at the covenants because a franchise agreement was involved, rather than an employment agreement. The issue, however, is not addressed explicitly. See also Kunz v. Bock, 163 N.W.2d 442, 446 (Iowa 1969).

[15] The Diversified Fastening case serves as an example of the court's tailoring the parties' agreement to make it reasonable. There the court imposed a nationwide restriction on one defendant, even though time and space blanks were not filled in by the parties. The other defendant was limited to a prohibition regarding customers with which he had established a business relationship. 786 F. Supp. at 1492, 1494.

In other circumstances, the court may even enforce a no compete agreement where it is not at all clear the defendant agreed. See Uncle B's Bakery, Inc. v. O'Rourke, 920 F. Supp. 1405, 1433 (N.D. Iowa 1996) (preliminary injunction entered with no signed agreement in evidence; defendant testified he was aware of no agreement; court noted that a jury or finder of fact "could go either way on the question [of whether the defendant signed the agreement]."); Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 447-49 (Iowa App. 1992) (injunction affirmed despite fact defendant business partner never signed agreement; defendant did not object to no compete at meeting

employment relationship is sufficient consideration for such an agreement. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W 2d 381 (Iowa 1983). See also Farm Bureau Services Co. v. Kohls, 203 N.W.2d 209 (Iowa 1972); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971). As with termination from employment, however, under Iowa Glass, it is clear that this factor will be considered by the court. "[W]e find no compelling reason to overrule our prior decisions. This is especially true since we determine the covenant is invalid for [other] reasons . . . " 338 N.W 2d at 381

TRADE SECRETS LITIGATION

Lawsuits based upon contractual agreements restricting competitive activities continue to arise. Increasingly, however, either in conjunction with contractual restriction or separate from it, the courts are being asked to restrict competition by former employees based upon fiduciary duty or trade secrets theories. The increase in trade secrets litigation is likely due to a number of factors. First, as noted above, contractual restrictions are not always easily litigated. Second, many former employees are not contractually limited. Third, much of what provides the basis for analysis in contractual no compete cases involves the value of information and training provided to employees, not plain competition. As business increasingly relies upon information and technology (and, possibly, fewer employees have direct customer contact), trade secrets claims become more attractive. Last, with the enactment in 1990 by the Iowa General Assembly of the Uniform Trade Secrets Act, Chapter 550, Iowa Code, some of the uncertainties regarding trade secrets litigation have been lessened.

---

of partners but repeatedly refused to sign; substantial evidence supported finding that, by his conduct, he assented to the agreement)

Under the common law, relief was available for misappropriation or theft of trade secrets. See Kendall/Hunt Publ. Co. v. Rowe, 424 N.W.2d 235, 245-46 (Iowa 1988); Basic Chem., Inc. v. Benson, 251 N.W.2d 220, 226 (Iowa 1977). In 205 Corp. v. Brandow, 517 N.W.2d 548 (Iowa 1994) (en banc), the Iowa Supreme Court considered the effect of the enactment of the Trade Secrets Act. Eschewing reliance upon case law regarding the common law right to protect trade secrets, the 205 Corp. court limited definition of a trade secret under the Iowa Trade Secrets Act to that specifically set forth in the statute, Iowa Code §550.2(4). 517 N.W.2d at 549 [16] But see Diversified Fastening Systems, Inc. v. Rogge, 786 F.Supp. 1486, 1491 (N.D. Iowa 1991) [17] Although the 205 Corp. decision does not restrict the former employee (who was fired) from engaging in competition, the decision is significant in that there existed no contract relative to trade secrets and the case turns upon rights accorded all possessors of trade secrets.

Although the 205 Corp. decision is the first by the Iowa Supreme Court interpreting Iowa Chapter 550, it is not the first time that a court addressed rights of the parties under the statute. In Diversified Fastening, the court analyzed contractual restrictions with some problems [18] and,

---

[16] There is frequently an issue as to whether trade secrets are involved. In Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 648 (Iowa 1995), the court held that the determination whether information constitutes trade secrets under the law is a "mixed question of law and fact." The legal question is whether information is of a type that might be a trade secret. The factual aspect is whether the information has economic value and has been treated as confidential. Id.

Frequently, customer lists serve as the basis of trade secrets claims. With respect to the legal aspect of the equation, the Iowa Supreme Court has noted that a customer list, under certain conditions, can be a trade secret. Basic Chem., Inc. v. Benson, 251 N.W.2d 220, 230 (Iowa 1977). See Lemmon v. Hendrickson, 559 N.W.2d 278, 280 (Iowa 1997). However, the court made clear that it is not prohibited to call upon customers of a former employer recalled from memory. Id. at 280-81 (quoting Restatement (Second) of Agency § 396)

[17] The Diversified Fastening court declined to decide whether a common law trade secrets action was supplanted by Iowa Code Chapter 550 or whether the elements of the Iowa Tort apply equally to an action under Chapter 550. In 205 Corp., however, the Iowa Supreme Court held that the remedies under Chapter 550 are not exclusive and the statute does not preempt a tort cause of action. 517 N.W.2d at 551-52. The court found significant the Iowa General Assembly's decision not to incorporate Section 7 of the uniform statute which "would have specifically displaced all other trade secret recoveries." Id. at 551.

[18] In Diversified Fastening, the time and geographic scope blanks were not filled in and, with respect to one defendant, the company had not executed the agreement. 786 F.Supp. at 1488. See Phone Connection, Inc. v. Harbst, 494 N.W.2d 445, 448 (Iowa App. 1992) (restrictive covenant enforced notwithstanding defendant's refusal to sign the agreement. Essentially, defendant was estopped from claiming restriction did not apply to him). See also Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405, 1433 (N.D. Iowa 1996).

as well, whether or not Chapter 550 would, itself, restrict actions competitive with the former employer's business. In the context of a preliminary injunction, the court held that Chapter 550 did so restrict one of the defendants.

The Diversified Fastening court first held that one defendant, in his employment, had obtained access to plaintiff's trade secrets and had made copies of certain business records, shipment information and detailed information concerning plaintiff's "top 26 sales people, their territories and their sales volumes." 786 F.Supp. at 1488. Although much of the alleged confidential information the court held to be "readily ascertainable", it held other information was not. Id. at 1490, see Iowa Code §550.2(4) (trade secrets are not "generally known" and are not "readily ascertainable by proper means").

The Diversified Fastening court noted that neither a common law trade secrets action nor Chapter 550 applies to "prevent competition with an employer, except to the extent that competition utilizes trade secrets." 786 F.Supp. at 1491. With that said, however, the court went on to hold that "the only rational way to . . . to protect [plaintiff's] rights under Iowa Code Chapter 550, is to prevent defendant Rogge from being employed by [the new employer]." 786 F.Supp. at 1494. As an alternative holding, the court issued a preliminary injunction pursuant to Iowa Code §550.3 preventing one of the defendants from working for his new employer.[19]

The types of cases in which such injunctive relief will be employed under the Trade Secrets Act to prohibit a new employment relationship (where no contractual restrictions exist) are, necessarily, limited. Such rulings, however, are not unprecedented. In Norand Corp. v.

[19] Likewise, in Uncle B's Bakery, the court held the entirety of plaintiff's manufacturing process, "from ingredients through bagging, is sufficiently unique to constitute a trade secret under Iowa law." 920 F.Supp. at 1438. The court went on to hold that the statute or common law may serve as the foundation for a trade secrets injunction. Id. at 1430-31. As an alternative ground, injunction was premised upon the trade secrets claims. "[T]here is a significant danger of inadvertent disclosure . . . of confidential information in the course of [defendant's new] employment . . . ." 920 F Supp at 1435

Parkin, 785 F.Supp. 1353 (N.D. Iowa 1990), Judge Hansen granted a temporary restraining order, notwithstanding the court's "concern that there is no non-competition agreement . . . and no non-disclosure agreement . . . ." 785 F.Supp. at 1355. See Emery Indus., Inc. v. Cottier, 202 U.S.P.Q. (BNA) 829 (S.D. Ohio 1978) (non-disclosure agreement executed but no non-competition agreement; court held injunction prohibiting non-disclosure to competitor would not be enforceable if employee allowed to retain new employment); see also Air Products and Chem., Inc. v. Johnson, 296 Pa. Super. 405, 442 A.2d 114 (1982).[20] Given the right circumstances--involving clear misappropriation of proprietary information and/or a situation in which the new employment is not possible without using the confidential information--Chapter 550 provides an alternative, non-contractual remedy to potentially limit competitive activities

E

CONCLUSION

In nearly all circumstances, litigation seeking to prevent former employees from working for competitors is risky and unpredictable. It is also contentious and, usually, emotion laden. Although there is a wealth of appellate court authority, for each reported decision there are many more trial court rulings. The number of factors that may determine the outcome of such litigation is surprisingly large and results from reported decisions are varied and inconsistent. The most important factor, in practical terms, probably boils down to the trial judge hearing any injunction case.

From the practice standpoint, drafting of restrictive covenants must be cautiously undertaken. The circumstances of the imposition of such restrictions, the individual employee's

---

[20] See also B.F. Goodrich Co. v. Wohlgemuth, 192 N.E.2d 99 (Ohio App. 1963); Tie Systems, Inc. v. Telcom Midwest, Inc., 560 N.E.2d 1080, 1085-86 (Ill. App. 1990); Weedeater, Inc. v. Dowling, 562 S.W.2d 898, 901-02 (Tex. App. 1978); Travenol Laboratories, Inc. v. Turner, 228 S.E.2d 478, 485 (N.C. App. 1976); Thermotics, Inc. v.

employment history with the firm, the circumstances of that employee's departure from the company and a number of other individual facts that will likely be added to the court's equitable balance must be considered. Personalities, necessarily, play an important role and it is foolish for any lawyer practicing in this area to pretend that they do not.

Because of the unpredictability of the area, the desire of employer-clients to rely almost totally upon written agreements must be strongly cautioned against at every stage. A position in court that essentially boils down to "because it says so here" will very likely be unsuccessful. Clients, however, usually think in those terms.

Practitioners should carefully consider restrictions that do not absolutely prohibit competition but impose liquidated damages for certain competition. Such an approach avoids the vagaries attendant to injunction proceedings. That kind of restriction was upheld in Dental East P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988). In certain businesses, such as accounting or the insurance industry, such an approach is commonly employed. See Burton E. Tracy & Co. v. Frink, 520 N.W.2d 316, 317-18 (Iowa App. 1994). By the same token, where a monetary penalty becomes a forfeiture of vested benefits, the forfeiture likely will be struck down as against public policy. See Van Hosen v. Bankers Trust Co., 200 N.W.2d 504 (Iowa 1972); Pathology Consultants v. Gratton, 343 N.W.2d 428 (Iowa 1984). But see Iowa Code of Professional Responsibility D.R. 2-108. Where circumstances are especially aggravated, protection is available under the Iowa Trade Secrets Act.

The clearest threat to the interests of a client (whether the former employer or the former employee) engaged in litigation seeking to limit post-employment competition is a simplistic approach. Finding a case that appears to square with the facts of the given situation only helps to

---

Bat-Jac Tool Co., 541 S.W.2d 255, 260 (Tex. App. 1976); Allis-Chalmers Mfg. Co. v. Continental Aviation and Eng. Corp., 255 F Supp. 645, 654 (E.D. Mich. 1966)

increase the danger. As lawyers, we owe our clients the duty to be cautious under such circumstances.

E

ETHICAL RESPONSIBILITIES AND LEGAL MALPRACTICE

MARICLARE THINNES CULVER
DUNCAN, GREEN, BROWN, LANGENESS & ECKLEY
400 LOCUST STREET, SUITE 380
DES MOINES, IOWA 50309

F

I. Legal Malpractice

A. Standard of Care

1. An attorney is required to exercise "that degree of care, skill, diligence and knowledge ordinarily possessed and exercised by members of the legal profession in good standing in similar communities." Burke v. Roberson, 417 N.W.2d 209, 211 (Iowa 1987).

2. The failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake. Millwright v. Romer, 322 N.W.2d 30, 32 (Iowa 1982); Martinson Mfg. Co., Inc. v Seery, 351 N.W.2d 772, 775 (Iowa 1984).

B. Plaintiff's Burden of Proof

1. Prima Facie Case

a. One which will suffice until contradicted and overcome by other evidence.

b. "A case which has proceeded upon sufficient proof to the stage where it will support a finding if evidence to the contrary is disregarded." Koeller v. Reynolds, 344 N.W.2d 556, 558 (Iowa App. 1983).

2. Elements

a. Existence of an attorney-client relationship giving rise to a duty.

1. Plaintiff must prove that attorney-client relationship existed with respect to specific act or omission upon which malpractice claim is based, not just that relationship existed in general. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (1977).

2. The requirement of privity has only been slightly relaxed; third party/non-client malpractice claims are actionable only if third-party was direct, intended and specifically identifiable beneficiary of a gift or testamentary disposition by the client and lawyer's negligence frustrated client's disposition scheme. Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987); Holsapple v. McGrath, 521 N.W.2d 711, 713-14 (Iowa 1994).

b. The attorney, either by act or omission, violates or breaches the duty.

1. An attorney is not liable for mere error in judgment on previously undecided issues, or for mistaken opinion on a legal issue which has not been ruled on by a court of last resort. Martinson Mfg. Co., Inc. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984).

2. An attorney is not an insurer of a successful trial outcome unless a special contract to that effect is made. Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212, 215 (Iowa App. 1986).

c. Attorney's breach of duty proximately causes injury/damage to plaintiff.

1. To establish proximate causation, plaintiff must prove that "but for" the attorney's alleged negligence, the loss would not have occurred. Ruden v. Jenk, 543 N.W.2d 605, 611 (Iowa 1996).

2. Usually requires proof that a superior result would have been obtained had attorney not been negligent. Shannon v. Hearity, 487 N.W.2d 690, 692 (Iowa App. 1992).

d. The plaintiff sustains actual injury, loss or damage.

1. Proper measure of damages is the loss actually sustained as a proximate result of attorney's negligence. Dessel v. Dessel, 431 N.W.2d 359, 362 (Iowa 1988); Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 526 (Iowa 1983).

2. Where negligence is alleged in prosecution of previous litigation, plaintiff must establish amount of judgment he would have obtained but for the negligence, and that the judgment was collectible, in part or total. Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 525-26 (Iowa 1983).

C. Expert Testimony Regarding Standard of Care and Breach

1. Expert testimony on the reasonableness of the attorney's conduct is usually required unless proof of the negligence is so clear and obvious that the trial court can rule as a matter of law that the lawyer did or did not meet the applicable standard. Benton v. Nelson, 502 N.W.2d 288, 290 (Iowa App. 1993).

2. Expert testimony is not essential when the asserted shortcomings of the lawyer are so plain that they may be recognized or inferred from the common knowledge or experience of a layman. Devine v. Wilson, 373 N.W.2d 155, 157 (Iowa App. 1985).

3. Iowa Code §668.11 sets statutory expert designation deadlines and requirements in cases of professional negligence.

4. Because legal malpractice actions are a "case within a case," it is often necessary to use non standard of care experts to testify as to various matters arising from or relating to the underlying matter.

D. Causes of Action

1. Tort: Generally a plaintiff's cause of action against his or her former attorney is couched in negligence terms: breach of the applicable standard of care.

2. Contract: The same facts giving rise to the negligence claim generally also support a cause of action for breach of contract for legal services. It is not necessary that the contract be express or that a retainer to be paid. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (1977). However, any recovery under one theory may not duplicate the recovery allowed under the other theory.

II. Iowa Code of Professional Responsibility for Lawyers

A. Preliminary Statement

1. "The Canons are statement of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived. The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."

Iowa Code of Professional Responsibility for Lawyers, Preliminary Statement (1997) (Emphasis added).

2. "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. . . . An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied int he Canons and in the objectives reflected in the Ethical Considerations."

Iowa Code of Professional Responsibility for Lawyers, Preliminary Statement (1997). (Emphasis added).

B. Purposes

1. To protect the courts and public from persons unfit to practice law, to vindicate public confidence in the integrity of our system of justice, and to deter other lawyers from committing similar misconduct. Committee on Professional Ethics and Conduct v. Millen, 357 N.W.2d 313, 314-15 (Iowa 1984).

2. The Iowa Code of Professional Responsibility is "a floor, not a ceiling, on professional conduct. Conduct falling below this minimal standard is subject to disciplinary sanctions." Committee on Professional Ethics v. Conzett, 476 N.W.2d 43, 46 (Iowa 1991).

3. A disciplinary proceeding is "basically an inquiry into the fitness of a member of the bar, in the light of his conduct, to continue in the practice of the law." Iowa State Bar Association v. Kraschel, 148 N.W.2d 621, 625 (Iowa 1967).

4. Attorneys are expected to be aware of the Supreme Courts' decisions in disciplinary cases. Committee on Professional Ethics v. Gill, 479 N.W.2d 303, 307 (Iowa 1991).

III. THE EMERGING RELATIONSHIP BETWEEN LEGAL MALPRACTICE AND THE CODE OF PROFESSIONAL RESPONISIBILITY

A. Former view

F

1. The Code of Professional Responsibility "does not provide a basis for a private cause of action for professional negligence against attorney (by adverse party in prior action); a third-party may institute disciplinary proceedings against attorney in appropriate instances." Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978).

2. "Violation of the Code of Professional Ethics is not tantamount to a tortious act, particularly with regard to liability to a non-client . . . . Canon 7 does not create a private cause of action." Bickle v. Mackie, 447 F.Supp 1376, 1383 (N.D. Iowa 1978).

3. Standards of conduct and practice may be evidenced by . . . the Code of Professional Responsibility for Lawyers. Menzel v. Morse, 362 N.W.2d 465, 471 (Iowa 1985).

4. Whether attorney violated the ethical code is not a proper matter for review in action for fraudulent misrepresentation against attorney; however, violation may be relevant to the claim that the attorney had a duty to disclose certain facts. Cornell v. Wunshel, 408 N.W.2d 369, 373 (Iowa 1987).

5. The Iowa Supreme Court concludes that the Preliminary Statement of the Code of Professional Responsibility "sets the standard for an attorney's conduct in any transaction in which his professional judgment may be exercised. Cornell v. Wunshel, 408 N.W.2d 369, 277 (Iowa 1987).

6. Supreme Court affirms the district court's finding in legal malpractice action that attorney's breach of disciplinary rules, in part, formed basis for finding of negligence against the attorney. Dessel v. Dessel, 431 N.W.2d 359, 361 (Iowa 1988).

B. Current View

1. "Although the Iowa Code of Professional Responsibility does not undertake to define standards of civil liability, it constitutes some evidence of negligence." Ruden v. Jenk, 543 N.W.2d 605, 611 (Iowa 1996).

2. Supreme Court approves the use of alleged violations of disciplinary rules in the Code of Professional Responsibility to prove claims in legal malpractice action. Supreme Court Board of Ethics v. D.J.I., 545 N.W.2d 866, 875 (Iowa 1996), citing Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987).

C. Reporting Requirements

1. Under Iowa Code of Professional Responsibility, attorneys have an ethical obligation to report violations of the disciplinary rules.

2. DR 1-103(A) states: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation (emphasis added). (DR 1-102 includes violations of any disciplinary rules; DR 6-101 contains the general prohibition against (1) neglecting a client's legal matter; (2) handling a matter a lawyer knows or should know he or she is not competent to handle; and (3) inadequate preparation to handle a legal matter).

3. Self Reporting: Lawyer disciplined for attempting to limit liability to a client for malpractice; court noted that attorney informed client of expired statute of limitation on client's personal injury claim but attorney did not tell client of possible malpractice claim or advise client to seek independent counsel. Committee on Professional Ethics & Conduct v. Nadler, 467 N.W.2d 250 (Iowa 1991).

D. Coming Full Circle

1. Board of Professional Ethics and Conduct uses issue preclusion to prove its case against attorney who was previously found liable to client for fraud and negligence in a civil malpractice action arising from the same underlying matter. Supreme Court Board of Ethics v. D.J.I., 545 N.W.2d 866 (Iowa 1996).

2. DR 6-102 Limiting Liability to Client: "a lawyer shall not attempt to be exonerated from or limit liability to a client for personal malpractice."

3. Appellant counsel's failure to notify client of decision not to pursue appeal constitutes ineffective assistance of counsel; attorney had duty under DR 2-110(A)(2) to notify client to allow client time to protect his rights and/or obtain other counsel. Lamphere v. State, 348 N.W.2d 212, 216 (Iowa 1984).

4. Attorney must report his own misconduct. Committee on Professional Ethics v. Conzett, 476 N.W.2d 43 (Iowa 1991).

5. A lawyer may be disciplined even if the client suffers no damage; settlement of a malpractice case is not a defense to a disciplinary proceeding; a violation of the Code of Professional Responsibility may result in discipline even though the conduct would not constitute a civil wrong. Committee on Professional Ethics v. Mershon, 316 N.W.2d 895 (Iowa 1982).

6. Violations of ethical consideration alone is sufficient to support disciplinary action. Committee on Professional Ethics and Conduct v. Millen, 357 N.W.2d 313, 314-15 (Iowa 1984).

7. Fact that attorney is released from civil liability is not dispositive to ethical investigation. Iowa State Bar Association v. Kraschel, 148 N.W.2d 621, 627 (Iowa 1967).

8. Attorney's handling of client's personal injury claim by telephone with only one subsequent in person meeting constitutes "serious breach of professional responsibility." Committee on Professional Ethics v. Behnke, 486 N.W.2d 275, 277 (Iowa 1992).

DISCOVERY AND EVIDENTIARY USE OF JOURNALISTIC EVIDENCE: DO LITIGANTS TRULY HAVE A RIGHT TO EVERY PERSON'S EVIDENCE?

G

IOWA DEFENSE COUNSEL SEMINAR

SEPTEMBER, 1997

R. Todd Gaffney
FINLEY, ALT, SMITH, SCHARNBERG,
MAY & CRAIG, P.C.
Fourth Floor, Equitable Building
Des Moines, Iowa 50309
Phone 515/288-0145
Fax 515/288-2724

R. Todd Gaffney
Finley, Alt, Smith, Scharnberg, May & Craig
Fourth Floor, Equitable Building
Des Moines, Iowa 50309

DISCOVERY AND EVIDENTIARY USE OF JOURNALISTIC EVIDENCE: Do Litigants Truly Have a Right to Every Person's Evidence?

G

I. INTRODUCTION

A. Journalistic Evidence in Litigation: In the context of complex litigation, issues related to your client's involvement in an accident may force you to seek discovery of journalistic evidence. The ability of a litigant to obtain such journalistic evidence is governed by various sources of law, from the United States Constitution, state constitutions and state statutes. In this area, a basic understanding of your ability to discover and effectively utilize such materials will clearly enhance your client's defense.

II. DISCOVERY OF JOURNALISTIC EVIDENCE

A. Journalistic evidence is a broad category of materials which includes among other items, published and unpublished:

1. Videotape footage and still photographs of accident scenes;

2. Videotaped interviews of witnesses;

3. Reporter's notes, sketches, diagrams and charts related to the information they have gathered.

B. Hypothetical Facts

Your client is involved in an accident causing serious personal injuries. Several reporters, including a newspaper journalist and a television news crew arrive on the scene shortly after the accident. The reporters and news crew film and photograph the accident scene, as well as interviewing several witnesses. Portions of the videotape made at the scene are broadcast on the evening news. The next morning the local newspaper runs a front-page story including several photographs from the accident. It is clear, however, that extensive portions

of the videotapes and other journalistic evidence is never published or released.

C. In the ensuing litigation, you seek discovery of information from the news crew and reporters that were at the scene of the accident. You serve each of the reporters as well as the television station and newspaper with subpoenas duces tecum, or you informally request production of documents and things from these non-parties.

1. You are likely seeking three separate pieces of evidence:

   a. Testimony of the reporters on the scene of the accident, each reporter's first hand knowledge of the events and aftermath of the accident:
      - this information is probably the least valuable of the three mentioned here, but the easiest to compel, so long as it does not involve any confidential information, which it likely would not.

   b. Portions of the videotape, and copies of photographs that were broadcast and published:
      - depending on what was broadcast and published, these are possibly of great value, they should also be relatively easy to compel, since any privilege which might be asserted was likely waived by broadcasting.

   c. "Out-takes" of the videotapes, non-published photographs and other non-published materials:
      - these tapes and photographs could contain the key to your representation of the client, they will be the most difficult to compel, likely requiring an analysis of the newsperson's privilege.

2. The reporters are apt to comply with the subpoenas and testify as to non-confidential matters of which they have first-hand knowledge. The television station and newspaper may release the broadcast/published and non-broadcast/non-published tapes and photographs, however, it is more likely that they will move to quash the subpoena, at least as to the non-broadcast/non-published items. (See Exhibit 1 which contains a Motion to Compel, Resistance and Reply. These are examples of what may occur if it is necessary to compel the information sought by you.)

D. If the reporters, television station and/or newspaper move to quash the subpoenas, will the court analyze the motion under the **newsperson's privilege**? The court should apply the following two factors in analyzing whether the newsperson's privilege should even be considered.

1. Is the person subpoenaed within the class of persons protected by the newsperson's privilege?

   a. This is usually a clear answer. Professional journalists, publishers, television news directors are the types of persons usually involved in these motions. Courts rarely take time to discuss whether the person fits into either the statutory language or the class protected under constitutional jurisprudence.

   b. If the person fails to meet this requirement, they receive no protection and must comply with the discovery request. Under this circumstance the litigant does have a right to every person's evidence.

   c. A case which may fall outside the scope of the "newsperson's privilege" is when amateur photographers videotape news events, and then submit their tapes to the station which broadcasts portions thereof. The person is arguably outside the class of persons protected. The argument likely to be raised is that the television news director is covered, and the process of collecting the tapes is **newsgathering** under the second prong and is therefore privileged.

   d. There have been several cases in which courts were unwilling to extend newsperson protection to individuals who gathered information for reasons unrelated to dissemination of news and information to the public. See, Wright v.Jeep Corp., 547 F.Supp. 871 (E.D.Mich. 1982) (no privilege for study data of academic researcher); von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987) cert. denied sub nom., Reynolds v. von Bulow by Auersperg, 481 U.S. 1015 (1987) (no privilege for information gathered for personal reasons).

G

2. Was the information obtained through the newsgathering process? If so, the newsperson's privilege may apply.

   a. This issue is also rarely addressed in reported decisions. Tapes and documents subpoenaed are usually the professional work product of people covered by the privilege. As mentioned above, some dispute may arise in the area of collecting amateur home videotapes, portions of which are broadcast. Courts generally would apply the newsperson's privilege analysis if the amateur video tapes were obtained through the newsgathering process.

   b. If the information was gathered by someone covered by the privilege, but done so outside their employment, it may be discoverable. The issue would then become the scope of their employment as a journalist.

III. NEWSPERSON'S PRIVILEGE:

A. Provided a court finds the person and activity covered by the newsperson's privilege, what is the source and scope of the privilege?

   1. Three sources of protection form the basis for the newsperson's privilege:

      a. First Amendment to the United States Constitution - the freedom of the press.

      b. State Constitutions - these usually contain provisions protecting the freedom of the press, which at times are broader than the protection granted under the First Amendment.

      c. State Shield Laws - Statutory press protection; these have been enacted in at least half of the states and they give added protection against discovery of news material.

   2. Protection of the press under the First Amendment to the United States Constitution: Most courts start their analysis of this issue with either the United States Supreme Court case of Branzburg v. Hayes, 408 U.S. 665, 33 L.Ed. 2d 626, 92 S.Ct. 2646 (1972), or the Second Circuit's decision in Garland v. Torre, 259 F.2d 545 (2nd Cir.), cert. denied, 358 U.S. 910 (1958).

a. Garland v. Torre Defamation action against CBS executives for statements attributed to them in newspaper article.

1) Second Circuit recognized that "compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation upon the availability of news."

2) Court refused to grant an absolute privilege and instead called for a balancing of the interest in a free press against the interest in the proper administration of justice.

3) The test set out in Garland, which has often been adopted by subsequent courts, asked whether:

a) the information sought is material and relevant, "going to the heart of the ... claim";

b) the information is sought in good faith; and

c) disclosure "was a necessary step in the due and proper preparation for trial."

b. Branzburg v. Hayes Journalists were subpoenaed to testify before a grand jury as to their personal contacts and communications with confidential sources who were involved in criminal activity.

1) The Supreme Court in a 4-1-4 decision held that reporters have no constitutional privilege under the First Amendment against testifying, at least in the context of a grand jury.

2) The plurality opinion refused to grant even a conditional privilege against testifying. Justice Powell, in his concurrence, found limited protection, but he failed to set forth any test to balance the interests involved. Subsequent courts have often read

G

Powell's opinion together with the dissents to require:

a) compelling or paramount interest to burden the press' First Amendment rights;

b) the request is in good faith; and

c) the process is subject to the supervision of a judge.

See, Marketos v. American Employers Ins. Co., 460 N.W.2d 272, 276 (Mich. App. 1990) (discussing varying interpretations of Branzburg); In re Grand Jury Proceedings, 810 F.2d 580, 583-584 (6th Cir. 1987).

3) Although the starting point of the analysis, the opinions in Garland and Branzburg fail to give clear guidance on the scope of the newsperson's privilege, beyond the holding that no absolute newsperson's privilege under the First Amendment exists.

4) The key of the Branzburg opinion for subsequent litigation, which seeks to compel discovery or testimony of reporters and their employers, was the statement that Congress or the state legislatures may grant broader statutory protection than that of the First Amendment. It was this language that led to the development of many state "Shield Laws".

3. State "Shield Laws" - Background rationale behind shielding journalists.

a. Legislatively established by states to protect the free exercise of the press beyond the protection granted in the First Amendment. The primary objective of these statutes was to protect newspersons' ability to obtain information from confidential sources.

b. In their drafting and interpretation, however, state shield laws since have been expanded to cover most non-published information acquired in the newsgathering process.

c. These statutes typically set out a several part test similar to the one established in Garland. For example, New York's shield law allows discovery if a "clear and specific showing" has been made that the news:

> "(i) is highly material and relevant;
> (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and
> (iii) is not obtainable from any alternative source."

See Exhibit 2, page 2, attached hereto.

G

d. Maryland was the first state to adopt a newsperson shield law in 1896; however, most states adopted their "shield law" legislation after the Branzburg decision in the early 1970s.

e. The following is a list of state shield laws:

1) Alabama Code, section 12-21-142 (1975)

2) Alaska Statutes, section 09.25.150 (1973)

3) Arizona Revised Statutes Annotated, section 12-2237 (Supp. 1979)

4) Arkansas Statutes Annotated, section 16-85-510 (1987)

5) California Evidence Code, section 1070 (West Supp. 1979)

6) Delaware Code Annotated, title 10, sections 4320-4326 (1974)

7) Illinois Statutes, Chapter 735 sections 5/8-901 et seq. (West 1997)

8) Indiana Code, section 34-3-5-1 (1980)

9) Kentucky Revised Statutes Annotated, 421.100 (1970)

10) Louisiana Revised Statutes Annotated, 45:1451-45:1454 (West Supp. 1979)

11) Maryland Courts & Judicial Procedure Code Annotated, section 9-112 (1986)

12) Michigan Compiled Laws, section 767.5a (1979)

13) Minnesota Statutes Annotated, sections 595.021-595.025 (West Supp. 1979)

14) Montana Code Annotated, sections 26-1-902 - 26-1-903 (1979)

15) Nebraska Revised Statutes, sections 20-144 - 20-147 (1977)

16) Nevada Revised Statutes, section 49.275 (1979)

17) New Jersey Revised Statutes Annotated, section 2A:84A-21 (1987)

18) New Mexico Statutes Annotated, section 38-6-7 (Supp. 1980)

19) New York Civil Rights, section 79-h (McKinney 1995)

20) North Dakota Centennial Code, section 31-01-06.2 (1976)

21) Ohio Revised Code Annotated, section 2739.12 (Baldwin 1978)

22) Oklahoma Statutes, title 12 section 2506 (Supp. 1979)

23) Oregon Revised Statutes, sections 44:510 - 44:540 (1979)

24) Pennsylvania Consolidated Statutes, title 28, section 330 (1979)

25) Rhode Island General Laws, sections 9-19.1-1 to 9-19.1-3 (Supp. 1986)

26) Tennessee Code Annotated, section 24-1-208 (1980)

4. Iowa is a state without a shield law:

a. Iowa does not have a state shield law and accordingly, the newsperson's privilege is

analyzed under the First Amendment to the United States Constitution and Iowa's State Constitution.

1) The Iowa Supreme Court in Winegard v. Oxberger, 258 N.W.2d 847 (1977) recognized a "newsperson's privilege". However, the Court concluded the privilege was not absolute or unlimited.

In Winegard a reporter for the Des Moines Register and Tribune refused, on the basis of rights allegedly guaranteed by the First Amendment to the United States Constitution and Article I, section 7, of the Iowa Constitution, to answer questions under oath in a deposition regarding the identity of her sources or conversations she had with her sources.

The Iowa Supreme Court in discussing this issue analyzed the Branzburg and Garland decisions. After lengthy analysis, the Court adopted a three-prong test. The Court stated it would presume the journalist's material to be privileged unless the person seeking discovery is able to show the following:

a) The information is necessary or critical to the cause of the action; it goes to the heart of the claim;

b) That other reasonable means available by which to obtain the information sought has been exhausted; and

c) That it does not appear from the record the action or defense is patently frivolous.

See Winegard at 852.

The Winegard decision made it clear the holding regarding a newsperson's privilege was to be deemed equally applicable to Article I, section 7, of the Iowa Constitution, as well as the First Amendment to the United States Constitution.

2) The Iowa Supreme Court next addressed the newsperson's privilege in Lamberto v. Bown, 326 N.W.2d 305 (1982). Mr. Lamberto was a news reporter who had written a story which appeared in the Des Moines Register. He was subpoenaed for a deposition and asked details of a conversation he had and was also subpoenaed to produce documents. Mr. Lamberto refused, claiming a First Amendment privilege.

G

Pursuant to a motion compelling discovery, the Court entered an order requiring Mr. Lamberto to answer the questions. Contrary to the Court's ruling, Mr. Lamberto again declined to answer the questions and the Court found him in contempt. Mr. Lamberto was sentenced to jail pending his compliance. Mr. Lamberto filed a petition for writ of certari with the Iowa Supreme Court and the writ was sustained. The Iowa Supreme Court in analyzing the writ again recognized the three-prong test set out and adopted by it in Winegard.

In analyzing all of the evidence, the Court concluded it had not been shown that there was a "compelling need for the evidence" as required under the first element of the three-prong test.

The Court stated the "necessity" requirement is met when the need for the evidence is "substantial" or when the evidence "goes to the heart of the litigant's case". Id. at 308.

The Court explained "an individual's constitutional rights cannot be subordinated by a 'remote, shadowy threat' to a countervailing state interest". Id.

The "exhaustion" requirement is the showing that other, less obtrusive means of establishing the facts are unavailable. Id. The purpose of this legal requirement is to avoid using reporters as investigative tools in a "fishing expedition". Id. "Disclosure

from the newsman himself [should be] the end, and not the beginning of the inquiry." Id.

Under Lamberto, the court may order an in camera inspection of the evidence.

3. In Bell v. City of Des Moines, 412 N.W.2d 585 (Iowa 1987), the Iowa Supreme Court was faced with the question of whether or not certain videotaped evidence could be secured from a TV station. Several news reporters from certain TV stations were present and observed a suicide in Des Moines in 1986. In contemplating a suit against the City based on the police officers' handling of the threatened suicide, certain videotaped evidence was subpoenaed for possible use in the civil suit. It was alleged that the videotape represented "the best and most competent evidence in support of [the] claims" against the City, and unless the Court ordered the station to preserve the videotape, it would be destroyed in the normal course of its business.

One TV station agreed to furnish copies of all footage which had been aired on its newscast, but it moved to quash the request as it required production of "raw footage" or videotapes which were retained in its files. It contended that these videotapes were presumptively privileged and that this privilege had not been rebutted.

In analyzing whether or not the "raw footage" should be produced, the Court recognized the "scale has generally tilted toward requiring disclosure of the disputed evidence if the case involves a criminal charge". Id. at 587.

However, because this was a civil case, the Court recognized the test previously set forth by it in Lamberto Id. at 309.

The Court reaffirmed "under this test, a reporter falling within the 'class of persons qualifying for the privilege' is presumptively entitled to its protection.

Once this presumption status is established, the party seeking access to the evidence must show the necessity for it and the unavailability of other sources." Id. at 587.

The Supreme Court did not order disclosure of the videotapes, but rather remanded the case back to District Court because the District Court had not properly applied the Winegard and Lamberto tests.

b. These are significant decisions because they occurred in the civil arena, instead of a criminal context.

IV. USES OF JOURNALISTIC EVIDENCE

A. Pretrial uses of journalistic evidence.

1. Identification of potential witnesses

2. Preparation of expert witnesses, and/or the production of demonstrative exhibits.

   a. Allows experts to see the positions of vehicles in relation to the physical surroundings and each other. This may aid the accident reconstruction expert in ways that simple measurements cannot.

   b. Computer animation or scale model animation

   c. The videotape may show weather conditions and visibility factors that may otherwise be difficult to record beyond the vague recollections of the parties and/or witnesses.

3. Videotapes or photographs taken by a newsperson may be the "best evidence" in accurately showing an accident or accident scene. As one Court has said, such evidence (photographs) are "not subject to the vagaries of the human mind in recalling what a person saw at a point some time past." Grand Forks Herald v. District Court, 322 N.W. 2d 850, 856 (N.D. 1982).

4. The videotape or photographs may contain evidence which either allows you to push for settlement, or it may show you weaknesses in your case making

settlement or an admission of liability a wise move.

B. Evidentiary uses of the material

1. Impeachment - the videotape may contain interviews or unsolicited statements by witnesses, which if inconsistent with their subsequent testimony under oath, may be crucial to undermining their credibility.

2. Admissibility and Hearsay Exceptions

a. The journalistic evidence may be useful for proving issues other than the truth of the statements therein.

b. Excited Utterances - these are likely admissible provided that the person's statements are close in time to the accident while they are still under the effects of the trauma. Federal Rule of Evidence 803(2).

b. Present sense impressions. F.R.Evid. 803(1)

c. Statements against interest. F.R.Evid. 801(d)(1)

d. Admissions by a party. F.R.Evid. 801(d)(2)

e. General reliability under the "catch all" exceptions in Federal Rules of Evidence 803 and 804, and any analogous state rules. The journalistic evidence videotaped or collected by a news crew to be broadcast to the general public is arguably of the type of material which this reliability exception is meant to encompass.

C. Laying the foundation for the admissibility of videotapes or other news related evidence

1. The key to proper foundation is whether there is a witness who can testify the videotape or photograph is a fair, accurate and authentic representation of the event or location.

2. The videotape or photograph must be material, and relevant to an issue in the case. It must be accurate and its probative value must outweigh any prejudice.

3. Under Federal Rule of Evidence 1001(2) a videotape is considered a photograph. Federal Rule of Evidence 1002 requires the original to prove the content of a "photograph". Rule 1003 allows for a duplicate unless an issue is raised on authenticity or if it is not fair to admit the duplicate instead of the original.

4. Questions regarding foundation:

G

a. You may also be required to qualify your foundational witness as to the person's competency to take photography or filming of the video.

b. the witness may have to explain any editing, altering or gaps on the tape.

c. questions will be asked about periods of time or activities which are on the tape and those that are not.

d. chain of custody of the tape.

f. type of equipment and camera.

All of these questions go to the admissibility and the weight to be given to the evidence.

IN THE IOWA DISTRICT COURT FOR JOHNSON COUNTY

JOHN W. WEIHE, Individually and as Administrator of the Estate of JUDITH M. WEIHE, Plaintiff, vs. MARY JANE WALDIE AND FORD MOTOR COMPANY, Defendants.	)	Law No. 55941 MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND THINGS FROM A NON-PARTY

G

COMES NOW the Defendant, Ford Motor Company, and in support of its Motion for an Order to Compel Production of Documents and Things From a Non-Party, states:

1. On November 2, 1995, Defendant, Ford Motor Company, filed per I.R.C.P. 131 a Notice to Take Records Deposition for the production of certain broadcast and nonbroadcast film found at the offices of KCRG Television, Channel 9, Cedar Rapids, Iowa, pertaining to the station's coverage of the July 28, 1993 multi-vehicle accident from which this action arises. (Please see Exhibit A attached hereto.)

2. In conjunction with the Notice of Records Deposition, a District Court Subpoena Duces Tecum was served on Bob Smith, News Director for KCRG Television by the Linn County Sheriff's Department. (Please see Exhibit B attached hereto.)

3. On or about November 20, 1995, KCRG television forwarded a video of the broadcasted news coverage and interviews relating to the station's coverage of the July 28, 1993 multi-vehicle accident at issue. (Please see Exhibit C attached hereto.)

4. On December 5, 1995, Defendant, Ford Motor Company, requested John Bickel, attorney for KCRG television, produce the nonbroadcast film relating to witness interviews and scene coverage. (Please see Exhibit D attached hereto.)

5. On December 8, 1995, Mr. Bickel responded in a letter to Defendant's counsel that the nonbroadcast footage would not be provided. (Please see Exhibit E attached hereto.)

6. Defendant, Ford Motor Company, has made a good faith effort to resolve this discovery dispute.

WHEREFORE, Defendant, Ford Motor Company, respectfully requests the Court for an order granting the Defendant's Motion to Compel KCRG Television, Channel 9, Cedar Rapids, Iowa, to produce any and all nonbroadcast film relating to witness interviews and accident scene coverage of the July 28, 1993 multi-vehicle accident involved in this lawsuit.

R. Todd Gaffney-ISBA#PK0001729
FINLEY, ALT, SMITH, SCHARNBERG,
MAY & CRAIG, P.C.
400 Equitable Building
Des Moines, Iowa 50309
Telephone: (515) 288-0145

John T. Coleman
BAKER & McKENZIE
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601
Telephone: (312) 861-8000

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

IN THE IOWA DISTRICT COURT FOR JOHNSON COUNTY

FILED
95 NOV -2 AM 9:09
EDWARD J. STEINBACH
CLERK OF DISTRICT COURT
JOHNSON COUNTY, IOWA

JOHN W. WEIHE, Individually and as Administrator of the Estate of JUDITH M. WEIHE, Plaintiff, vs. MARY JANE WALDIE AND FORD MOTOR COMPANY, Defendants.	Law No. 55941 NOTICE TO TAKE RECORDS DEPOSITION

G

TO: Bob Smith, News Director, or his designee,
as Custodian of Documents and Films for
KCRG Channel 9
2nd Avenue at 5th Street S.E.
Cedar Rapids, Iowa 52401

You are hereby notified that beginning at 12:30 p.m. on November 20, 1995, at the offices of KCRG, Channel 9, 2nd Avenue at 5th Street S.E., Cedar Rapids, Iowa 52401, the deposition and production of documents will be taken on behalf of Defendant, Ford Motor Company.

It is not anticipated that any sworn testimony will be taken at that time.

The deponent will bring with him to said deposition documents and items set forth in Exhibit A, which is attached hereto.

R. Todd Gaffney-ISBA#PK0001729
FINLEY, ALT, SMITH, SCHARNBERG,
MAY & CRAIG, P.C.
400 Equitable Building
Des Moines, Iowa 50309
Telephone: (515) 288-0145

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on October 27, 1995

By: ☐ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other:

Signature Betty Brem

Exhibit A

DISTRICT COURT SUBPOENA DUCES TECUM

STATE OF IOWA } ss.
Johnson County }

To Bob Smith, News Director, or his designee, as Custodian of Documents and Films for KCRG Channel 9 2nd Avenue at 5th Street S.E. Cedar Rapids, Iowa 52401

YOU ARE COMMANDED to be and appear before the District Court of Iowa, in and for JOHNSON COUNTY, to be held at ~~the Courthouse~~ KCRG Channel 9, 2nd Avenue at 5th Street S.E. in the City of Iowa City, said County and State aforesaid, at 12:30 o'clock P M., on the 20th day of November A.D. 19 95 to testify in the cause now pending and to be tried, wherein John W. Weihe, Plaintiff, and Mary Jane Waldie and Ford Motor Company Defendants, on the part of ~~the~~ Defendant, Ford Motor Company

AND YOU ARE FURTHER COMMANDED to produce and bring with you and have in Court the following described papers, books, records and documents, to-wit See attached Exhibit A.

HEREOF FAIL NOT AT YOUR PERIL.

Witness EDWARD F. STEINBRECH
Clerk of the District Court, in and for Johnson County, and the Seal of said Court hereunto affixed at his office in the city of Iowa City, Iowa, Johnson County, this 26th day of October A.D. 19 95.

EDWARD F. STEINBRECH
Clerk of the District Court.

By Cathy Burkholder

STATE OF IOWA, _____ County. } ss.

This subpoena came into my hands _____ 19 ____, and I certify that I personally served the same as follows:

On _____ { By reading the same to him in this County and delivering him a copy. } _____ 19 ____
On _____ " " " _____ 19 ____
On _____ " " " _____ 19 ____
On _____ " " " _____ 19 ____
On _____ " " " _____ 19 ____
On _____ " " " _____ 19 ____

FEES

Service ---$ _____
Mileage ---$ _____
Copies ---$ _____
Total --$ _____

_____
Sheriff.

By _____
Deputy.

Exhibit B

Any and all records including, but not limited to, photographs, videotape, correspondence, statements, notes, schematics and diagrams relating to an accident occurring July 28, 1993 on Highway 1 near Ivanhoe Bridge, Linn County, Iowa. This request also includes, but is not limited to, any broadcast footage concerning this accident plus any raw nonbroadcast footage. This accident involved drivers, Mary Jane Waldie, Michael Dean Roseberry and Judith Weihe.

The deponent, or his representative, may contact R. Todd Gaffney, 400 Equitable Building, Des Moines, Iowa 50309, (515) 288-0145, prior to November 20, 1995 to make arrangements for the production of the requested/subpoenaed records and videotapes. Reasonable processing costs will be reimbursed only upon prior notification of the amount.

G

Exhibit A

IN THE IOWA DISTRICT COURT FOR JOHNSON COUNTY

JOHN W. WEIHE, Individually and as Administrator of the Estate of JUDITH M. WEIHE,	:	LAW NO. 55941
Plaintiff,	:	
vs.	:	
MARY JANE WALDIE and FORD MOTOR COMPANY,	:	PROFESSIONAL STATEMENT OF ATTORNEY TODD GAFFNEY
Defendants.	:	

COMES NOW attorney Todd Gaffney and states to the Court as follows:

1. I am the attorney of record for Defendant Ford Motor Company.

2. The case at issue involves product liability claims against Ford Motor Company arising out of a motor vehicle accident.

3. The nature of the motor vehicle accident is such that eyewitness testimony is crucial to the defense of this case.

4. Evidence of the damage to the Ford truck involved in this accident, and the location of the vehicles is very important in determining fault, in preparing for trial, and in retaining expert witnesses.

5. I am unaware of any photographic evidence of the damages to the vehicles at the accident scene and their relative locations at the time, other than the video tape possessed by KCRG Television, and which is the subject of a Motion to Compel.

Ex. 1, p. 6

6. KCRG Television has a video tape of the scene of the accident. That video tape likely shows damages to the truck and may show the position of the vehicles at their point of rest. To the best of my knowledge and belief, there is no substantial equivalent available which would depict the vehicle damage and positions.

7. The broadcast portion of the requested video tape contained an interview of two eyewitnesses to the accident. It did not identify these eyewitnesses by name or address. I have not been able to identify them through other means. Co-defendants do not know them. I am unaware of any less obtrusive means to identify the eyewitnesses in the broadcast tape.

8. It is reasonable for me to question whether KCRG Television interviewed additional eyewitnesses on the non-broadcast portion of their video tape. It is important for my defense to identify and locate each and every potential eyewitness to this accident.

9. I am not seeking production of any confidential sources. I am only asking for a video tape and identification of citizens who voluntarily consented to be interviewed by the news media for the purposes of broadcasting these interviews.

R. Todd Gaffney, PKO 001729
FINLEY, ALT, SMITH, SCHARNBERG,
MAY & CRAIG, P.C.
4th Floor, Equitable Building
Des Moines, IA 50309
Telephone: (515) 288-0145

ATTORNEY FOR DEFENDANT
FORD MOTOR COMPANY

IN THE IOWA DISTRICT COURT FOR JOHNSON COUNTY

JOHN W. WEIHE, Individually and as Administrator of the Estate of JUDITH M. WEIHE,	)	Law No. 55941
Plaintiff,	)	KCRG TELEVISION'S RESISTANCE TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND THINGS FROM A NON-PARTY
vs.	)	
MARY JANE WALDIE and FORD MOTOR COMPANY,	)	
Defendants.	)	

KCRG Television resists Defendant Ford Motor Company's (Ford Motor) Motion to Compel Production of Documents and Things From a Non-Party by asserting its Constitutionally protected First Amendment rights, and in support thereof states:

1. KCRG is not a party to this proceeding.

2. Defendant Ford Motor requested from KCRG both broadcast and nonbroadcast footage relating to a motor vehicle accident that gave rise to the above-captioned proceeding. On November 2, 1995, Ford Motor Company filed a Notice to Take Records Deposition with the court and served a Subpoena Duces Tecum on News Director Bob Smith.

3. By agreement of counsel for Ford Motor, KCRG responded to the Subpoena by providing the video footage that was broadcast on KCRG News.

KCRG asserted its First Amendment rights and refused to provide nonbroadcast footage, if any exists.

4. On December 20, 1995, Defendant Ford Motor served KCRG with a Motion to Compel Production of Documents and Things From A Non-Party, in which Ford Motor specifically demanded nonbroadcast video relating to the motor vehicle accident.

G

5. KCRG employs a full-time professional news staff whose function is to gather and disseminate news and information. Bob Smith is the station's News Director.

6. Members of the KCRG News department obtained the relevant nonbroadcast video footage, if any exists, during the process of gathering news.

7. KCRG has a Constitutionally protected right not to disclose nonbroadcast video under the First Amendment to the United States Constitution and article I, section 7 of the Iowa Constitution. See Bell v. City of Des Moines, 412 N.W.2d 585, 587 (Iowa 1987) (reversing a district court's decision to compel production of "raw footage" held by WHO-TV and holding that such material was presumptively privileged).

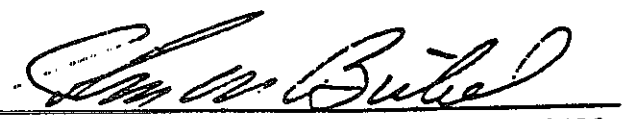
8. Ford Motor failed to assert any basis in it's request for a court order that would violate KCRG's liberties guaranteed by the First Amendment. Ford Motor has failed to make the required showing: (a) that the evidence is necessary or critical to the heart of their claim; and (b) that Ford has exhausted other

reasonable means of obtaining the information. See Winegard v. Oxberger, 258 N.W.2d 847, 852 (Iowa 1977) (articulating the standard for the production of information privileged under the First Amendment).

9. Ford Motor has failed to demonstrate a compelling need for the relevant footage in this lawsuit. Forced disclosure of information privileged under the First Amendment is usually reserved for libel cases and criminal cases. See Lamberto v. Bown, 326 N.W.2d 305, 307 (Iowa 1982). This case is neither.

10. Other than a letter to KCRG requesting the nonbroadcast footage, Ford Motor has made no effort to secure the information from another source, nor has it alleged such efforts were ever made. Additionally, Ford Motor failed to provide with specificity any details of the efforts made, all of which is essential when seeking to violate this non-party's Constitutionally protected First Amendment rights. Instead, Ford Motor apparently seeks to use KCRG as an investigative tool in contravention with established case law. See Lamberto, 236 N.W.2d at 308.

WHEREFORE, KCRG Television requests that the court deny Ford Motor Company's Motion to Compel the Production of non-broadcast video footage relating to the relevant accident.



JOHN M. BICKEL LI0000430
KEVIN J. CASTER LI0014773
for
SHUTTLEWORTH & INGERSOLL, P.C.

Ex. 1, p. 10

IN THE IOWA DISTRICT COURT FOR JOHNSON COUNTY

JOHN W. WEIHE, Individually and as Administrator of the Estate of JUDITH M. WEIHE,	:	LAW NO. 55941
Plaintiff,	:	
vs.	:	
MARY JANE WALDIE and FORD MOTOR COMPANY,	:	REPLY TO KCRG TELEVISION'S RESISTANCE TO MOTION TO COMPEL
Defendants.	:	

G

COMES NOW Defendant Ford Motor Company, and in reply to the Resistance to Motion to Compel Production of Documents and Things From a Non-Party, filed by KCRG Television, states as follows:

1. This Defendant's request does not seek any confidential information. It merely seeks production of video taped interviews, taken voluntarily from eyewitnesses of the motor vehicle accident at issue in this litigation. KCRG does not claim that any persons interviewed requested anonymity. These persons volunteered to be interviewed by the broadcast media with the specific understanding that their interviews may be broadcast on television. There is no issue or question of disclosure of confidential communications to a newsgatherer in violation of the First Amendment.

2. Neither the United States Constitution nor common law provide a testimonial privilege for a news reporter, and newsgatherers may be compelled to reveal information given to them in their professional capacity. See e.g. Branzburg v. Hayes, 408 U.S. 665 (1976). As one legal resource has stated:

~~newsgatherers possess no First~~ Amendment privilege against

divulging their sources of information; they must testify to their knowledge the same as everyone else to whom no privilege is granted." 81 Am. Jur. 2d §547. A qualified privilege may exist in civil cases to protect against the compelled disclosure of the identity of a reporter's confidential sources. Id. at §551. However, that policy is not invoked here, as there has been no claim raised that the video tape being sought contains any confidential sources.

3. Even if this Court concludes that a qualified privilege applies, disclosure should still be compelled because this Defendant can establish a likelihood that the video tape is (1) necessary to its defense and (2) it has exhausted any less obtrusive means likely to obtain the substantial equivalent of the requested information.

4. Even if information is presumptively privileged, the party seeking production:

> May rebut the presumption by showing a likelihood that the evidence is necessary and that it cannot be secured from any less obtrusive source.

Bell v. Des Moines, 412 N.W.2d 585, 588 (Iowa 1987). These two requirements were clearly set out in Lamberto v. Brown, 326 N.W.2d 305 (Iowa 1982). The "necessity" requirement is met when the need for the evidence is "substantial" or when the evidence "goes to the heart of the litigant's case." Id. at 308. The "exhaustion" requirement is the showing that other, less obtrusive means of establishing the facts are unavailable. Id. The purpose of this legal requirement is to avoid using reporters

as investigative tools in a "fishing expedition." Id. "[D]isclosure from the newsman himself [should be] the end, and not the beginning of the inquiry." Id. quoting Carey v. Hume, 492 F.2d 631, 638 (D.C. Cir.), cert denied, 417 U.S. 938 (1974).

5. Defendant Ford Motor Company can meet both of these requirements. The portion of the video tape which was produced contains witness interviews. A female witness and a blond male witness were interviewed, but not identified. Identification of witnesses with relevant knowledge concerning the facts and circumstances giving rise to this litigation meets the "necessity" requirement. Eyewitness testimony is "substantial" evidence. See BLACK'S LAW DICT.,5th Edition at 1280. Further, the video tape shows the damage to the Ford vehicle, and the other vehicle involved in the motor vehicle accident at issue in this litigation. It also shows the vehicles at their point of rest. A video tape showing these damages and positions is highly pertinent to the issues in this case.

6. The second Lamberto requirement has also been met. Ford Motor Company has been unable by other means to identify the fact witnesses interviewed. See professional statement of attorney Todd Gaffney. Co-defendants have not identified these witnesses. If other witnesses were interviewed in the non-broadcast footage, their identity may be crucial to the issues of this litigation. Further, Ford Motor Company is unaware of any other photographs or video tapes showing the damage to the vehicles and their positions at the time of the accident. The truck has since been

repaired, and there is no way to obtain any views of the vehicular damage, as it existed at the accident scene. As the Third Circuit Court of Appeals has acknowledged, non-broadcast video outtakes are "unique bits of evidence that are frozen at a particular place and time," which are unobtainable from any other source, even the witnesses themselves. United States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir.), cert. denied, 449 S.W. 1126 (1980).

7. This request is not a "fishing expedition." It is the end-point of an attempt to locate witnesses who's statements (or portions thereof) were broadcast, but who's identity remains unknown. Further, if only a portion of these witness statements was broadcast, the balance of their statement, their observations of how this accident occurred, etc., are all highly relevant and necessary to the defense of this lawsuit. These statements were taken nearly contemporaneously with the events at issue, when memories were fresh, etc. The non-broadcast footage is Ford Motor Company's only means to identify crucial witnesses, refresh their memories if needed and/or impeach their testimony if at variance with their earlier statements.

8. It is irrelevant that other discovery means are available, if those means are unlikely to prove fruitful. In that event, production of this information is still required. See Winegard v. Oxberger, 258 N.W.2d 847, 853 (Iowa 1977).

9. Ford Motor Company is not aware of any less obtrusive means to obtain this crucial information. Discovery directed to

the parties has not been, and cannot be, a substitute for production of interviews of as-yet anonymous witnesses possessing necessary evidence. As the United States Supreme Court has previously held, even the news reporter must testify, as any other citizen, to observations made as an eye witness. Branzburg, 408 U.S. at ____, 33 L. Ed.2d at 642. This request is less intrusive; Ford Motor Company does not seek a reporter's eyewitness account; but merely seeks information sufficient to identify eyewitnesses who are willing to be interviewed by the broadcast media, and video tape footage of vehicular damages and positions.

G

9. In this instance, the statements of then Circuit Judge Potter Stewart are particularly appropriate:

> Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.
>
> It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. Blair v. United States, 1919, 250 U.S. 273, 279-281, 39 S. Ct. 468, 63 L. Ed. 979; Wilson v. United States, 1911, 221 U.S. 361, 372-373, 31 S. Ct. 538, 55 L. Ed. 771; Blackmer v. United States, 1932, 284 U.S. 421, 438, 52 S. Ct. 252, 76 L. Ed. 375; United States v. Bryan, 1950, 339 U.S. 323, 331, 70 S. Ct. 724, 94 L. Ed. 884. Whether or not the freedom to invoke this judicial

> power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: '[O]ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.' Blackmer v. United States, supra, 284 U.S. at page 438, 52 S. Ct. at page 255.
>
> Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But '[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' Blair v. United States, supra, 250 U.S. at page 281, 39 S. Ct. at page 471.
>
> If an additional First Amendment liberty-the freedom of the press-is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.

Garland v. Torre, 259 F.2d 545, 548-49 (2d Cir. 1958), cert denied, 358 U.S. 910 (1959).

WHEREFORE, Defendant Ford Motor Company asks this Court to hold, as the Iowa Supreme Court did in the Winegard v. Oxberger case, that the requirements of justice are such that disclosure of the requested information must be compelled.

R. Todd Gaffney, PKO 001729
FINLEY, ALT, SMITH, SCHARNBERG,
MAY & CRAIG, P.C.
4th Floor, Equitable Building
Des Moines, Iowa 50309
Telephone: (515) 288-0145

ATTORNEY FOR DEFENDANT
FORD MOTOR COMPANY

G

Original filed.

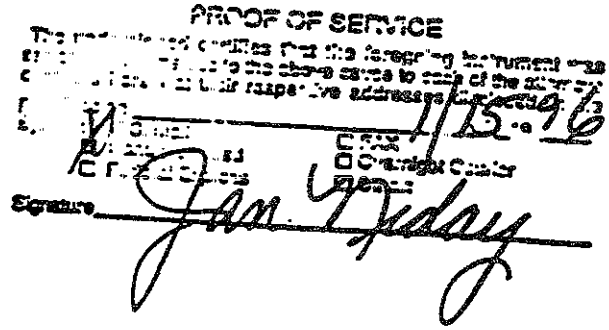
Copy to:

John T. Coleman
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601

Charles T. Traw
Randall B. Willman
222 S. Linn Street
P.O. Box 2447
Iowa City, Iowa 52244-2447

Stephen J. Powell
528 W. 4th Street
P.O. Box 1200
Waterloo, Iowa 50704

John M. Bickel
Kevin Caster
500 Firstar Bank Bldg., P.O. Box 2107
Cedar Rapids, Iowa 52406



NEW YORK's State Shield Law.

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
CIVIL RIGHTS LAW
CHAPTER 6 OF THE CONSOLIDATED LAWS
ARTICLE 7-MISCELLANEOUS RIGHTS AND IMMUNITIES

Current through L.1995, chs. 1 to 3, and 6 to 690.

§ 79-h. Special provisions relating to persons employed by, or connected with, news media

(a) Definitions. As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.

(2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at a United States post-office as second-class matter.

(3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or

criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.

G

(c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under section thirty-one hundred twenty-six of the civil practice law and rules.

(d) Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency.

(e) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.

(f) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

(g) Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section.

CREDIT(S)

1992 Main Volume

(Added L.1970, c. 615, § 1; amended L.1975, c. 316, § 1; L.1981, c. 468, §§ 1 to 3; L.1990, c. 33, §§ 1, 2.)

Ex. 2, p. 2

PROTECTING YOUR CLIENT

WHEN THE CIVIL CASE HAS

CRIMINAL RAMIFICATIONS

H

WILLIAM B. SERANGELI
SMITH, SCHNEIDER, STILES, HUDSON,
SERANGELI, MALLANEY & SHINDLER, P.C.
1000 EQUITABLE BUILDING
604 LOCUST STREET
DES MOINES, IOWA 50309

I. Introduction

Section 622.13 of the Code of Iowa provides that:

> "No witness is excused from answering a question on the mere grounds that the witness would thereby be subject to a civil liability."

With increasing frequency our clients are exposed to multiple contemporaneous or successive investigations involving law enforcement or administrative agencies which rely upon the civil litigation process and its liberal discovery to obtain information adverse to our clients for use in a criminal investigation free of traditional constitutional protections. These "parallel proceedings" when discovered add a new dimension to legal representation and call upon us to protect our clients' vital interests while avoiding charges of obstruction of justice. My purpose here is to highlight some of the legal issues generated when parallel proceedings are discovered and suggest some possible approaches that may be utilized to protect the client.

H

II. Staying the Civil Proceeding

The most often sought remedy is a stay of the civil proceeding until a resolution of the potential criminal matter has occurred. Unfortunately, there is no guaranty a stay will be entered as the grant of that remedy is left to the discretion of the courts.

In United States v. Kordel, 397 U.S. 1, 98 (1970), two company executives along with their employer were convicted of violations of the Federal Food, Drug and Cosmetic Act. 21 U.S.C. § 301 et seq. Prior to the initiation of the criminal prosecution, the government had instituted civil condemnation proceedings and had served interrogatories to obtain evidence for use in that proceeding. Upon learning that a criminal proceeding was contemplated, the corporation sought to stay the condemnation proceedings or extend the response time for answering the discovery until the

criminal action was disposed of on the grounds that the government would improperly obtain evidence for the criminal prosecution by use of the civil discovery proceedings. No claim of Fifth Amendment privilege was made. The trial court denied the motion and the vice president answered the interrogatories. The civil case was settled and the government then brought criminal charges which resulted in convictions for both the vice president answering the interrogatories and another company officer based upon the civil discovery responses which the trial court would not suppress. The United States Court of Appeals for the Sixth Circuit reversed the conviction of the corporate officers on the grounds that the government's use of interrogatories to obtain evidence in the nearly contemporaneous criminal proceeding violated the corporate officer's Fifth Amendment privilege against self-incrimination. United States v. Detroit Vital Foods, Inc., 407 F.2d 570, 575-76 (6th Cir. 1969).

The United States Supreme Court disagreed and reinstated the convictions holding:

1. A corporation has no Fifth Amendment privilege against compulsory self-incrimination; and

2. The public interest of enforcement of federal law outweighed the deferral of the civil proceedings.

The United States Supreme Court also pointed out that there was no evidence that the government had brought a civil action solely to obtain evidence for its criminal prosecution.

In Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1983), the Appeal's Court stated the most compelling reason for a stay:

> "In handling motions for a stay of civil suits until the disposition of a criminal prosecution or related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal

> Rules of Civil Procedure have provided a well stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Id. at 487.

Here, in the Eighth Circuit, the standard for a stay was set forth in Fisher Controls Company, Inc. v. Control Components, Inc., 443 F. Supp. 581 (S.D. Iowa 1977), where in a patent case involving no criminal allegations, Judge Stuart held the court's power to stay has been drawn purposely broad and is discerning. Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the grant or refusal of the stay must be evaluated Among the competing interests are:

H

i) the possible damage which may result from the granting of a stay;

ii) the hardships or inequity which a party may suffer if required to go forward; and

iii) the orderly course of justice measured in terms of simplifying or complicating issues, proof and questions of law which could be expected to result from a stay.

Id. at 581-2.

The Supreme Court of Iowa has developed a rule and procedure for the grant of a stay which as stated in Teleconnect Co. v. Iowa State Commerce Comm'n, 366 N.W.2d 511, 513 (Iowa 1985), slightly expands the federal practice. Under the Iowa standard, there are four factors that bear on the determination to grant a stay. These factors are:

1. The likelihood the movant will prevail on the merits after a full hearing;

2. Whether irreparable damage will be suffered if the stay is denied;

3. Whether the public interest calls for discretion to be exercised to deny the stay; and

4. Would issuance of a stay substantially harm other parties interested in the proceedings.

III. Use of Protective Orders to Limit Discovery

Rule 26(c) of the Federal Rules of Civil Procedure

Rule 123 of the Iowa Rules of Civil Procedure

Rather than attempting to stay the entire civil proceeding where there are parallel civil and criminal proceedings, the focus should be narrowed to avoiding the use of the civil discovery process to obtain information unavailable under the criminal process. To that end, civil discovery may be deferred. White v. Mapco Gas Products, Inc., 116 F.R.D. 498 (E.D. Ark. 1987).

In Nowaczyk v. Matingas, 146 F.R.D. 169 (N.D. Ill. 1988), the defendant's motion for a protective order was granted to prevent the plaintiff from converting the civil case into a vehicle for conducting broad discovery not otherwise available in a criminal investigation.

IV. Evidentiary Privileges

If a stay is not obtained, the next line of defense must involve utilization of evidentiary privileges under Rule 501 of both the Federal and Iowa Rules of Evidence. Copies of both of these Rules are attached to this outline.

A. Privilege Against Self-Incrimination - The Fifth Amendment Claim

Utilization of the claim of Fifth Amendment privilege must be tempered by our rule that the claim of privilege is not a substitute for relevant evidence. Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984).

> By its terms, the Fifth Amendment prohibition against a person being compelled to be a witness against himself is expressly limited to criminal cases. Thus, while this privilege may be invoked in civil or criminal proceedings, the right to exclude evidence because it is testimonial and incriminating is limited to criminal proceedings.

Johnson v. Civil Service Comm'n of the City of Clinton, 352 N.W.2d 252, 256 (Iowa 1984).

The Fifth Amendment to the United States Constitution protects citizens from compelled self-incrimination. Craig Foster Ford, Inc. v. Iowa Dept. of Transportation, 562 N.W.2d 618, 623 (Iowa 1997) (citing, Baxter v. Palmigiano, 425 U.S. 308, 317 (1976)). While in a criminal trial, it would be unconstitutional for a court to instruct a jury that adverse inferences could be drawn from a defendant's silence, Id. (citing, Baxter, 425 U.S. at 317; State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985)), such adverse inferences are not constitutionally off limits in civil cases. Id. (citing, Baxter, 425 U.S. at 318). In a civil case, a trial court may infer from a party's refusal to answer, based on a claim of privilege against self-incrimination, that the answer would be adverse to the party. Id. at 623-24 (citing, Eldridge v. Herman, 291 N.W.2d 319, 322 (Iowa 1980)). Therefore, the repercussion of pleading the Fifth in a civil case is that the court may decide that the answer the witness would have given, if she had not taken the Fifth, would be adverse to that witness. The federal interpretation of the civil use of the Fifth Amendment privilege is in accordance with the Iowa rule. See, Cerro Gordo Charity v. Fireman's Fund A.M. Life Ins., 819 F2d 1471, 1480 (8th Cir. 1987).

As attorneys we are entitled to the due process protections of the United States and Iowa Constitutions. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Hurd, 375 N.W.2d 239, 241 (Iowa 1985). Iowa Supreme Court Rule 118.6 provides, in pertinent part:

> In any disciplinary proceeding or action taken by the Committee of Professional Ethics and Conduct, discovery shall be permitted as provided in R.C.P. 121 to 134 inclusive; 140 and 141; and in 154 to 158. The attorney against whom a complaint has been filed, in addition to the restriction stated in R.C.P. 122(a) shall not be required to answer an interrogatory pursuant to R.C.P. 126; a request for admission

H

> pursuant to R.C.P. 127; a request upon oral examination pursuant to R.C.P. 140; or a question upon interrogatories, pursuant to R.C.P. 150, if the answer would be self-incriminatory.

This Rule provides that an attorney does not have to answer any interrogatory, oral examination question, or admission that is self-incriminatory. However, if an attorney fails to timely assert his Fifth Amendment right, this could be held to be a waiver of the privilege and these above interrogatories, admissions, or oral examination questions could be deemed admitted for lack of response. See, Committee on Professional Ethics and Conduct of the Iowa State Bar Ass's v. Nadler, 445 N.W.2d 358 (Iowa 1989).

In the Nadler case, the Iowa Supreme Court stated that our profession is strengthened by self-discipline and attorneys, though sharing with all citizens the right to be free from self-incrimination, must cooperate with discovery requests even if only to announce the exercise of Fifth Amendment rights. Nadler, 445 N.W.2d at 360. Because of this, attorneys must affirmatively announce they wish to plead the Fifth Amendment by stating this in their responses to discovery requests. If the attorney fails to do this, the discovery requests may be deemed admitted. If the requests are deemed admitted, the Committee can establish the operative facts underlying the attorney's unethical conduct in the matter in the unanswered discovery requests. Id. Thus, if the attorney fails to answer, the court may determine the facts of the case on its own.

B. Spousal Communications. One of the most readily available sources of information in a parallel proceeding is the spouse. Such individuals when faced with the threat of personal criminal involvement often balance their desire for personal freedom against disclosure of information obtained during the marriage. When faced with this evidence, the challenge of a

privileged spousal communication must be made. Unfortunately, the success of such a challenge will vary drastically depending on the forum where the action is pending.

i) The Federal Rule. Under federal practice the spousal communications privilege is recognized, but the old exclusionary rule of Hawkins v. United States, 358 U.S. 74 (1958) has been abandoned. In Trammel v. United States, 445 U.S. 40 (1980), the court upheld the privilege as permissible under Rule 501 of the Federal Rules of Evidence, but found that "reason and experience" no longer justify sweeping a rule as previously found acceptable in Hawkins. The outcome was to permit the petitioner's spouse to testify against him to obtain her grant of immunity and a restriction of the right to assert the privilege to only the witness spouse, not the other marital partner. Id. at 53.

ii) The Iowa Rule. The Iowa Rule is based upon § 622.9 of the Code of Iowa (1997), a copy of which accompanies this outline. In State v. Hastings, 466 N.W.2d 697, 649 (Iowa App. 1990), a criminal conviction was overturned because a spouse was examined regarding spousal communications. In Hastings, the privilege was found to be very broad, "... prohibiting disclosure of any communication without express exceptions" and unlike the federal rule was deemed to be held by the defendant not the testifying spouse.

H

IV. Conclusion

Other potential privileges exist and are codified in § 622.10 of the Code of Iowa (1997) and are recognized under Rule 501 of both the Federal and Iowa Rules of Evidence. To address each one here would require far more time and space than allocated. Parallel proceedings challenge us to preserve and protect the interests of our clients while the courts have a competing interest to assure that access is given to every person's evidence.

H

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C) Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the depo-

sition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for

production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

123. Protective orders. Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

a. That the discovery not be had;

b. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

c. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

d. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

e. That discovery be conducted with no one present except persons designated by the court;

f. That a deposition after being sealed be opened only by order of the court;

g. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

h. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R.C.P. 134 "*a*"(4) apply to the award of expenses incurred in relation to the motion. [Report 1943; amendment 1965; amendment 1970; amendment 1973]

H

ARTICLE V. PRIVILEGES

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

(Pub.L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

ARTICLE V
PRIVILEGES

Rule 501. General rule. Nothing in these rules shall be deemed to modify or supersede existing law relating to the privilege of a witness, person, government, state or political subdivision. [Report 1983]

622.9 Communications between husband and wife.

Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

H

622.10 Communications in professional confidence—exceptions—application to court.

A practicing attorney, counselor, physician, surgeon, physician assistant, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, physician's assistants, mental health professionals, or to the stenographer or confidential clerk of any physicians or surgeons, physician's assistants, or mental health professionals, in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.

H

If an adverse party desires the oral deposition, either discovery or evidentiary, of a physician or surgeon, physician assistant, or mental health professional to which the prohibition would otherwise apply or the stenographer or confidential clerk of a physician or surgeon, physician assistant, or mental health professional or desires to call a physician or surgeon, physician assistant, or mental health professional to which the prohibition would otherwise apply or the stenographer or confidential clerk of a physician or surgeon, physician assistant, or mental health professional as a witness at the trial of the action, the adverse party shall file an application with the court for permission to do so. The court upon hearing, which shall not be ex parte, shall grant permission unless the court finds that the evidence sought does not relate to the condition alleged and shall fix a reasonable fee to be paid to the physician or surgeon, physician assistant, or mental health professional by the party taking the deposition or calling the witness.

For the purposes of this section, *"mental health professional"* means a psychologist licensed under chapter 154B, a registered nurse licensed under chapter 152, a social worker licensed under chapter 154C, a marital and family therapist licensed under chapter 154D, a mental health counselor licensed under chapter 154D, or an individual holding at least a master's degree in a related field as deemed appropriate by the board of behavioral science examiners.

No qualified school guidance counselor, who has met the certification and accreditation standards of the department of education as provided in section 256.11, subsection 10, who obtains information by reason of the counselor's employment as a qualified school guidance counselor shall be allowed, in giving testimony, to disclose any confidential communications properly entrusted to the counselor by a pupil or the pupil's parent or guardian in the counselor's capacity as a qualified school guidance counselor and necessary and proper to enable the counselor to perform the counselor's duties as a qualified school guidance counselor.

PENALTY BENEFITS, INTEREST, ATTORNEY FEES AND LIENS IN WORKERS' COMPENSATION CASES

I

Maureen Roach Tobin
Whitfield & Eddy, PLC
317 Sixth Avenue, Suite 1200
Des Moines, IA 50309-4110
Telephone: (515) 288-6041
FAX: (515) 246-1474

Recently, one commentator wrote,

"No two persons, no matter how wise, how well educated or informed or how well intentioned, will perceive reality in exactly the same way. And, even if their perceptions are totally aligned, the communication of those perceptions will be flawed, sometimes inaccurate, usually biased and almost always ambiguous.

In other words, even honest, honorable and well-meaning people see reality differently, and they communicate imperfectly."

I. Due Dates for weekly benefits -- Robbennolt v. Snap On Tools Corporation, 555 N.W.2d 229 (Iowa 1996)

First payment of weekly benefits are due 11 days after the date of injury. The 11 day grace period is to allow the employer to evaluate and investigate the injury and determine the appropriate compensation rate.

The next payment is due on the day after the last day of the compensation week. That is, if Monday is the first day of the compensation week, payment of weekly benefits is due the following Monday.

A check mailed to the employee is considered paid on the date the check was mailed. A check that is delivered to the employee in person is "made" on the date of delivery. The employer may choose the manner of payment of worker's compensation. Thus, if a payment is mailed to the employer, rather than the employee, and the employer delivers the check to the employee, then the payment is "made" on the date of delivery.

As a matter of proof, employers should keep a record of the mailing dates. Interest shall accrue at the rate of 10% on payments that are made after the due dates. If interest is not paid when accrued, interest on interest accrues thereafter.

II. Penalty Benefits -- Christensen v. Snap-On Tools Corporation, 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-On Tools Corporation, 555 N.W.2d 229 (Iowa 1996); Meyers v. Holiday Express Corporation, 557 N.W.2d 502 (Iowa 1997)

The focus is on whether timely payment of the benefits due was made and if not, whether there was a reasonable excuse for the failure to make timely payment of the amount owed. In the absence of a reasonable basis for a delay, penalty benefits are mandatory. Only the amount of penalty benefits is within the discretion of the commissioner.

The applicability of 86.13 penalty benefits does not turn on the length of the delay, any delay without a reasonable excuse entitles the employee to penalty benefits in some amount.

Underpaid as well as late-paid benefits are subject to penalties; thus, if the rate is not accurate, and the employee has been underpaid, the employee is entitled to penalty benefits. Robbennolt v. Snap-On Tools Corporation, 555 N.W.2d 229 (Iowa 1996)

In determining the amount of the penalty, the commissioner shall consider such factors as:

1) Length of delay;

2) Number of delays;

3) Information available to the employer regarding the employee's injury and wages;

4) Employer's past record of penalties (i.e., the number of prior penalties imposed against the employer)

Avoiding penalties:

If the employer has a reason for the delay and COMMUNICATES THAT REASON TO THE EMPLOYEE contemporaneously with the BEGINNING of the delay, no penalty will be imposed IF the employer has a reasonable or probable cause or excuse for the delay (such as time to investigate the claim, or there is a reasonable basis to contest the claim, i.e., the claim is fairly debatable.) Meyers v. Holiday Express Corporation, 557 N.W.2d 502 (Iowa 1997)

If the employee shows that timely payment of benefits was not made, the BURDEN OF PROOF shifts to the employer to establish:

1) that a reasonable excuse existed for the failure to make timely payment; and

2) that they conveyed the reason to the employee at the beginning of the delay.

III. Payment of Interest pursuant to Section 85.30

Interest at the rate of 10% must be added to a weekly payment if it is not paid when due. If a weekly payment is made after the "due date," interest accrues and should be "added" to the late payment. If it is not added and paid at the time of the late payment, interest may be compounded. Christiansen v. Snap-On Tools Corporation, 554 N.W.2d 254, 262 (Iowa 1996).

That is, when partial payments are made (which do not include interest) they are allocated first toward the interest due. Any payment which exceeds the interest due is applied toward the judgment principal. Subsequent interest is computed on the remaining principal. This is known as the United States Rule.

To compute interest, the period that interest accrues must be known (number of days between the beginning and the end of interest accrual).

A formula to compute interest on a late weekly payment is as follows:

$$\frac{\text{no. of days}}{365} \times \text{weekly rate} \times 10 \text{ percent} = \text{interest due}$$

For example, interest on a payment that is 10 days late, for a claimant with a weekly rate of $250/week, would be computed as follows:

$$\frac{10}{365} \times 250 \times .10 = .68$$

This formula primarily comes into play when there is a series of late payments or underpayments, and interest has not been added to each payment.

At this point, there are a number of unresolved issues regarding late payments, including the following:

Is the carrier subject to penalty benefits under 86.13 for failure to correctly compute and pay a very small amount of interest?

Does a carrier's subrogation interest against a third party include interest paid by the carrier for delayed weekly payments? That is, if a worker's compensation carrier is entitled to enforce its lien on benefits received from a third party, does the lien include the amount of interest paid to the employee?

IV. Attorney Fees

A workers' compensation insurance carrier that is entitled to be indemnified from a third-party recovery must pay the contingent fee claim of the employee's attorney, even if the settlement is less than the workers' compensation lien. Ahlers v. EMCASCO Insurance Co., 548 N.W.2d 892 (Iowa 1996)

Employee's attorney is entitled to 1/3 contingent fee claim from the amount recovered in a third party action, even though carrier had hired own counsel to represent carrier, and counsel for the carrier actively participated at the trial of the third party action. No reduction in the fee is required to compensate for the work performed by the carrier's counsel. Aspelmeier, Fisch, Power v. Allied Group, 556 N.W.2d 805 (Iowa 1996)

Worker's compensation insurer must pay a pro rata share of the attorney's fees; its duty is not diminished by the intervention in the action by the carrier's own attorneys, pursuant to Iowa Code section 668.5. Krapfl v. Farm Bureau Mutual Ins. Co., 548 N.W.2d 877 (Iowa 1996).

Ewing v. Allied Construction Serv. and Allied Group, File No. 928362 (Arb. Dec. June 1996) Claimant recovered damages from the third-party defendant. Claimant's attorney received a one-third contingency fee on claimant's third-party settlement. Defendants compensated claimant's counsel on a one-third contingency fee for the amount claimant's attorney recovered for them from the third-party defendant at the time the third-party case was settled. The fee paid to claimant's attorney was fair and reasonable as provided in Ahlers. The workers' compensation carrier also paid the necessary costs to pursue the third-party action. Neither claimant nor his attorney is entitled to additional monies or fees from the defendants' lien on the third-party settlement, even if the timing of the settlement "saved money" for the carrier.

Marin v. DCS Sanitation, File No. 1009732 (App. Dec. May 14, 1997) As in Ewing, the dispute involved payment of attorney fees for future benefits that would have been paid by the employer and insurance carrier absent the third party recovery. The deputy had allowed attorney fees on future benefits. On appeal, the Industrial Commissioner held that the attorney fees shall not be awarded for future benefits. Citing Shirley v. Pothast, the Commissioner determined that allowing counsel to recover attorney fees for future benefits would amount to a "double recovery for claimant or claimant's attorneys" since "the only amount subject to subrogation is the amount which the claimant is able, figuratively, to put in his or her own pocket."

V. Indemnification/Subrogation Rights

Based upon the number of recent cases in which the indemnity issue has been raised, the Iowa Supreme Court is well aware of the complexities involved in third party litigation, and the incentive that may exist for allocating settlements to the exclusion of the carrier's indemnity rights. The following cases illustrate this point:

The insurer's right of indemnity under section 85.22(1) is against the worker's recovery from a third party. Sourbier v. State, 498 N.W.2d 720, 721 (Iowa 1993); Fisher v. Keller Indus., Inc., 485 N.W.2d 626, 627 (Iowa 1992).

A worker's compensation indemnity claim does not attach to settlement for loss of consortium. Estate of Sylvester v. Cincinnati Insurance Co., 559 N.W.2d 285 (Iowa February 19, 1997)

A settlement structured to simply avoid the workers compensation lien to the detriment of the Carrier without its consent or the approval of the industrial commissioner, was invalid under Iowa Code Section 85.22.Shirley v. Pothast, 508 N.W.2d 712, 713 (Iowa

1993); Mata v. Clarion Farmers Elevator Cooperative, 380 N.W.2d 425, 429 (Iowa 1986) (parties attempt to arrange a method of settlement by which the claims attributed to the third-party recovery would be reduced in favor of increased damages under the loss-of-consortium claim would not be permitted; the settlement could not impair the insurer's right of indemnity);

A workers' compensation insurance carrier that is entitled to be indemnified from a third-party recovery must pay a contingent fee claim of the employee's attorney, even if the settlement is less than the workers' compensation lien. Ahlers v. EMCASCO Insurance Co., 548 N.W.2d 892 (Iowa 1996).

The indemnity rights under Iowa Code section 85.22(1) do not attach to the employee's recovery in a medical negligence action against the physician who treated the employee's injury. Toomey v. Surgical Services, P.C., and United Fire and Casualty Co., 558 N.W.2d 166 (Iowa 1997)

The amount of indemnity to which the insurer was entitled is a question of fact, while the right to indemnity is a question of law; questions of fact are determined by the Industrial Commissioner. Allen v. Allen Water and Wastewater Engineering, Inc., and Kemper Insurance Co., 549 N.W.2d 516 (Iowa 1996).

DEFENDING A GOVERNMENTAL ENTITY

J

Eliza Ovrom
Civil Bureau Chief
Polk County Attorney's Office
111 Court Avenue, Room 340
Des Moines, IA 50309

This outline represents the views of the author only, and does not set forth opinions or positions of the Polk County Attorney's Office.

IOWA MUNICIPAL TORT CLAIMS ACT
CODE CHAPTER 670

Iowa Code Chapter 670 governs tort liability of governmental subdivisions. The law subjects municipalities to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, Iowa Code §§670.2, 670.4 (1997); unless such torts fall within the statutory exemptions in that chapter. State tort claims are governed by Iowa Code Chapter 669; federal tort claims by 28 U.S.C. §2671, et seq.

I. APPLICABILITY

A. Municipality

1. "Municipality" is defined as city, county, township, school district, and any other unit of local government except soil and water conservation districts. §670.1(2).

2. Interpretations:

a. County hospital is a municipality, and county hospital and its ambulance crew employees were covered by Chapter 670. Kulish v. Ellsworth, Iowa S.Ct. No. 106/95-1837, July 23, 1997.

b. Drainage districts are "municipalities" within meaning of Chapter 670. Gard v. Little Sioux Intercounty Drainage Dist., 521 N.W.2d 696 (Iowa 1994)); Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985).

c. Corporation which held public franchise was not a municipality for purposes of a motion to dismiss. Warford v. Des Moines Metropolitan Transit Authority, 381 N.W.2d 622 (Iowa 1986).

d. The attorney general has opined that members of an agency or board established pursuant to Chapter 28E (joint powers agreement) are municipalities within the meaning of Chapter 670. OAG #80-3-9(L) (Mueller to Kenyon); OAG #86-12-2(L) Williams to Schwengels) (South Area Crime Service Agency, a 28E entity is a "municipality" within the meaning of Chapter 670).

B. Officer.

"Officer" includes, but is not limited to, members of the municipality's governing body. Iowa Code §670.1(2).

C. Employee.

Includes a person who performs services for a municipality whether or not the person is compensated, unless the services are performed only as an incident to the person's attendance at a municipality function. §670.2.

D. Acting within the scope of employment or duties.

Trial court found county engineer who tore down a bridge without authority or knowledge of board of supervisors acted outside scope of his duties; Supreme Court remanded so trial court could determine whether county engineer also acted outside scope of employment. Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993).

Vlotho contains a good discussion of the factors courts should look at in determining whether an employee is "acting within the scope of employment." Id., 509 N.W.2d at 354.

J

E. Tort.

"Tort" is defined as every civil wrong which results in wrongful death or injury to person or injury to property; includes actions based on negligence, error or omission; nuisance, breach of duty, or impairment of any right under any constitutional provision, statute or law. §670.1(4).

II. NOTICE AND STATUTE OF LIMITATIONS: SECTION 670.5 IS NOT WHAT IT SEEMS.

Section 670.5 states:

> Every person who claims damages from any municipality or any officer, employee or agent of a municipality for or on account of any wrongful death, loss or injury within the scope of section 670.2 or section 670.8 or under common law shall commence an action therefor within six months, unless said person shall cause to be presented to the governing body of the municipality within sixty days after the alleged wrongful death, loss or injury a written notice stating the time, place, and circumstances thereof and the amount of compensation or other relief demanded. Failure to state time or place or circumstances or the amount of compensation or other relief demanded shall not invalidate the

notice; providing, the claimant shall furnish full information within fifteen days after demand by the municipality. No action therefor shall be maintained unless such notice has been given and unless the action is commenced within two years after such notice. The time for giving such notice shall include a reasonable length of time, not to exceed ninety days, during which the person injured is incapacitated by the injury from giving such notice.

a. The Iowa Supreme Court upheld this notice requirement against an Equal Protection challenge in 1971. Lunday v. Vogelmann, 213 N.W.2d 904 (Iowa 1971).

b. In 1977 the court held the "not to exceed 90 days" language in the last sentence violated an incapacitated plaintiff's Equal Protection rights and should be excised from the statute. Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977).

c. In 1986 the court reversed Lunday, and held that Section 670.5 violated the Equal Protection clause because there was no rational basis to require claimants to file notice within 60 days or a lawsuit in six months against local government bodies. Miller v. Boone County Hospital, 394 N.W.2d 776 (Iowa 1986). Miller stated that "because section [670.5] is unconstitutional, we hold that Iowa Code Chapter 614 is the applicable statute of limitations for all actions arising under Chapter [670]." Id., 394 N.W.2d at 781.

d. However, in 1993 the court held that at least a portion of Section 670.5 was severable from the unconstitutional language, and was still valid. In Clark v. Miller; 503 N.W.2d 422 (Iowa 1993), the court held that if a claimant gives notice of personal injury within 60 days, then the statute of limitations extends to two years after the notice is given.

e. The Iowa courts apply the limitations in Chapter 614 to claims against local governments under Chapter 670. Iowa Coal Mining v. Monroe County, 555 N.W.2d 418 (Iowa 1996) (statute of limitations for a tortious interference with contract claim under Chapter 670 is five years, in accordance with Iowa Code §614.1(4)).

f. The "discovery rule" applies to suits against the state under state tort claims act. Vachon v. State, 514 N.W.2d 442 (Iowa 1994); Callahan v. State, 464 N.W.2d 268 (Iowa 1990).

g. CONCLUSION: Statute of limitations under Chapter 670 is governed by Iowa Code Ch. 614, unless notice of personal injury claim is given under 670.5, in which case statute is extended to two years from date of notice.

III. DEFENSE AND INDEMNITY OF OFFICERS AND EMPLOYEES.

A. Defense.

The municipal government is required to defend all officers and employees from tort claims arising from acts or omissions within the scope of employment or duties. §670.8.

J

B. Indemnity.

The municipal government must also hold harmless and indemnify officers, and employees from tort claims arising from actions or omissions within the scope of employment or duties. §670.8. Enactment of this statute eliminated governments' rights to seek damages from employees for negligent actions occurring within scope of employment of duties. Vlotho v. Hardin County, 509 N.W.2d 350 (Iowa 1993).

Exceptions: 1. Punitive damages awards against officers or employees. (Punitive damages may be awarded only when plaintiff shows actual malice, or willful, wanton or reckless conduct).

Governments may but are not required to pay punitive damages claims. OAG 87-1-7 (Stream). Insurance may be purchased to cover punitive damages awards. §670.8.

2. If officer or employee fails to cooperate in the defense. Id.

IV. IMMUNITIES.

A. Applicability.

Section 670.4 exempts municipalities from certain enumerated claims. Officers and employees are likewise immune from the claims in 670.4, except claims for punitive damages. §670.12. Officers and employees are not liable for punitive damages unless actual malice, or willful, wanton and reckless misconduct is proven. §670.12.

B. Interpretations.

"Recklessness" means proceeding with no care coupled with disregard for consequences. Kulish v. Ellsworth, S.Ct. No. 106/95-1837, Slip Op. July 23, 1997.

C. Specific Immunities.

1. Any claim by an employee of the municipality which is covered by the Iowa workers compensation law. Iowa Code §470.4(1).

2. Any claim in connection with the assessment or collection of taxes. Iowa Code §670.4(2).

a. In Kulish v. Ellsworth, Iowa S.Ct. No. 106/95-1837, Slip Op. July 23, 1997, defendant county officials attempted to assert this exemption. However, because the county had purchased insurance which did not exclude such claims, the court held the immunity was waived under Section 670.7.

b. A county assessor was immune from a tort claim based on negligent misrepresentation of the taxable value of real estate. Caudill v. Shelby County, 519 N.W.2d 423 (Iowa App. 1994).

3. Any claim based upon an act or omission of an officer or employee of the municipality, exercising due care, in the execution of a statute, ordinance, or regulation whether the statute, ordinance or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

a. Exercise of due care.

The first exception within subsection 3 is for officers and employees exercising due care in the execution of a statute or ordinance, whether or not the statute or ordinance is valid.

i. This exception for municipal officers and employees, where they are exercising due care, when read with §670.4 imposing liability for torts where officers and employees are acting within the scope of their employment, is intended to impose tort liability for negligence based upon breach of statutory duty

in some manner as in private sector. Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979).

b. Discretionary Function.

The second exemption in 670.4(3) is the "discretionary function" exemption.

i. Federal Law Persuasive.

This exemption is based on a similarly worded exemption in the state tort claims act (Iowa Code §669.14), and the federal tort claims act (28 U.S.C.A. §2680). Because the language of the acts is so similar, the Iowa Supreme Court looks to decisions of the U. S. Supreme Court in interpreting the discretionary function immunity. See Hansen v. City of Audubon, 378 N.W.2d 903, 906 (Iowa 1985); Keller v. State, 475 N.W.2d 174, 181 (Iowa 1991).

ii. Planning/Operational Distinction.

The original U. S. Supreme Court decision in this area distinguished between planning and operation of actions. Discretionary function immunity protected those discretionary functions made at planning rather than operation level. Dalehite v. U.S., 346 U.S. 15 (1953) (immunizing discretionary functions relating to manufacture and storage of fertilizer made at planning level). The Iowa Supreme Court adopted this planning/operational test in Stanley v. State, 197 N.W.2d 599 (Iowa 1972) (failure to place a construction barrier on roadway was operational). The Iowa Supreme Court has recognized the difficulty in applying this test (Id. at 603), as its decisions reflect:

Seiber v. State, 211 N.W.2d 698 (Iowa 1973) (determination not to erect deer crossing sign was a planning level discretionary function);

Bulter v. State, 336 N.W.2d 416 (Iowa 1983) (decision where to erect freeway guardrail was operational);

Metier v. Cooper Transport Co., Inc., 378 N.W.2d 907 (Iowa 1985) (failure to place deer crossing sign was operational level decision);

Lewis v. State, 256 N.W.2d 181 (Iowa 1977) (decision whether to build highway is discretionary function, but decisions implementing that decision were operational);

Hansen v. City of Audubon, 378 N.W.2d 903, 906 (Iowa 1985) (decision how to build a sewer was operational and not immunized);

Sullivan v. Wickwire, 476 N.W.2d 69 (Iowa 1991) (whether and where to build a state highway was a policy decision, but design and implementation decisions were operational and not immunized under Chapter 669);

Anthony v. State, 374 N.W.2d 662 (Iowa 1985); Sheerin v. State, 434 N.W.2d 633 (Iowa 1989) (state was immune under discretionary function exemption in determining whether to release a prisoner because discretion was exercised in determining whether and under what terms to release a prisoner).

In two cases alleging negligent inspection, the Iowa Supreme Court ruled different ways. See Adam v. State, 380 N.W.2d 716 (Iowa 1986) (inspection of a grain elevator by state was not a discretionary function) and Nordbrock v. State, 395 N.W.2d 872 (Iowa 1986) (inspection of a bank by state was a discretionary function which was immunized). Nordbrook distinguishes Adam based upon differences in the statutory framework of the two statutes.

iii. U. S. v. Gaubert

The U. S. Supreme Court has signalled that it is abandoning the operational/planning distinction. See U.S. v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267 (1991); U.S. v. Varig Airlines, 467 U.S. 797 (1984).

In Gaubert the court looked at whether the government official was exercising discretion, i.e., making decisions with an element of choice, within a broad, generalized statutory and administrative framework. The court said that in addition to the planning level decisions, the actions of governmental agents "involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected". Gaubert, 499 U.S. at 323; 111 S.Ct. at 1274.

iv. Post-Gaubert cases in Iowa.

Since Gaubert was decided, the Iowa Supreme Court has addressed the discretionary function exemption on several occasions. The court has continued to use the planning/operational test set forth in Dalehite. See Sullivan v. Wickwire, 476 N.W.2d 69, 70 (Iowa 1991) (choosing location of highway was exempt planning activity; highway design decisions were operational and not immune from suit). In Hawkeye Bank v. State, 515 N.W.2d 348 (Iowa 1994), the state school for the deaf asserted the discretionary function immunity against a wrongful death claim by the family of a girl who died in a playground accident. The court rejected the defense, stating that the defense does not extend to all government activities involving an element of choice, but to "policy judgments of superior authority that a particular task be done in accordance with the prescribed policy." Neither of these decisions cited U.S. v. Gaubert.

4. Any claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute or where the action based upon such claim has been barred or abated by operation of statute or rule of civil procedure. §670.4(4). See, e.g., Iowa Code §89B.6, exempting political subdivisions for actions taken under Hazardous Chemical Right to Know Act.

5. Any claim for punitive damages. §670.4(5). [This

bars claims against the municipality. Officers and employees may be sued for punitive damages, but plaintiff must prove actual malice, or willful, wanton and reckless misconduct. §670.12.]

6. Any claim for damages caused by a municipality's failure to discover a latent defect in the course of an inspection. §670.4(6).

City held immune from suit arising from fatal fall on staircase of privately owned building. City's only involvement was inspection and issuance of building and occupancy permits. Williams v. Bayers, 452 N.W.2d 624 (Iowa App. 1990).

7. Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a highway, secondary road, or street as defined in section 321.1, subsection 78, that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing highway, secondary road, or street, to new, changed, or altered design standards. In respect to highways and roads, seal-coating, asphalting, patching, resurfacing, ditching, draining, repairing, graveling, rocking, blading, or maintaining an existing highway or road does not constitute reconstruction. This subsection shall not apply to claims based upon gross negligence. §670.4(7). This exemption was added in 1983. 1983 Iowa Acts, Ch. 198, §27.

Reconstruction of a bridge fit within this exemption, even though it increased flood damage to nearby property. Connolly v. Dallas County, 465 N.W.2d 875 (Iowa 1991). It is plaintiff's duty to establish that design was improper under this section; it was not the county's duty to establish the design was proper. Id.

8. Any claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public

improvement or other public facility to new, changed, or altered design standards. This subsection shall not apply to claims based upon gross negligence. This subsection takes effect July 1, 1984 and applies to all cases tried or retried on or after July 1, 1984.

9. Any claim based upon an act or omission by an officer or employee of the municipality or the municipality's governing body, in the granting, suspension, or revocation of a license or permit, where the damage was caused by the person to whom the license or permit was issued, unless the act of the officer or employee constitutes actual malice or a criminal offense. §670.4(9).

10. Any claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, inspection, investigation, or otherwise, and whether the statute, ordinance, or regulation is valid, if the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense. §670.4(10).

11. A claim based upon or arising out of an act or omission in connection with an emergency response including but not limited to acts or omissions in connection with emergency response communications services. §670.4(11).

In Kulish v. Ellsworth the Iowa Supreme Court held a county, a county hospital, and individual emergency response crew members immune from suit under this exemption from a claim from the estate of a car crash victim who was rescued by ambulance. Iowa S.Ct. No. 106/95-1837, Slip Op., July 23, 1997.

12. A claim relating to a swimming pool or spa as defined in section 135I.1 which has been inspected by a municipality or the state in accordance with chapter 135I, or a swimming pool or spa inspection program which has been certified by the state in accordance with that chapter, whether or not owned or operated by a municipality, unless the claim is based upon an act or omission of an officer or employee of the municipality and the act or omission constitutes actual malice or a criminal offense. §670.4(12).

Baker v. City of Ottumwa, 560 N.W.2d 578 (Iowa 1997) held that the "swimming pool" exemption barred a claim against the City of Ottumwa , that lifeguards at a city water park were negligent.

13. A claim based on an act or omission by a county or city pursuant to section 717.2A or chapter 717B relating to either of the following:

a. Rescuing neglected livestock or another animal by a law enforcement officer.

b. Maintaining or disposing of neglected livestock or another animal by a county or city. §670.4(13).

V. INSURANCE.

Local governments are authorized to purchase liability insurance for torts covered under Chapter 670, §670.7. Section 670.7 contains the following language:

> The procurement of this insurance constitutes a waiver of the defense of governmental immunity as to those exceptions listed in section 670.4 to the extent stated in the policy but shall have no further effect on the liability of the municipality beyond the scope of this chapter, but if a municipality adopts a self-insurance program or joins and pays funds into a local government risk pool the action does not constitute a waiver of the defense of governmental immunity as to the exceptions listed in section 670.4.

The Iowa Supreme Court held that an insurance policy which is silent as to the immunities listed in 670.4 does not preserve the immunities. City of West Branch v. Miller, 546 N.W.2d 598 (Iowa 1996). The court stated that because an insurance policy did not exclude the immunity for collection and assessment of taxes, the county had waived the immunity. Miller, 546 N.W.2d at 605-605. In response to the language in 670.4, and the Miller decision, municipalities should include an endorsement to liability insurance policies which preserves the statutory immunities. Sample language is set forth below:

> The Company and the Insured expressly agree and state that the purchase of this policy of insurance by the Insured does not provide coverage for torts specified in Iowa Code §670.4, and that the Insured does not waive any of the defenses of governmental immunity available to the Insured under Iowa Code §670.4 as it now exists and as it may be amended from time to time. The Company and the Insured further expressly agree and state that the insured may, at any time, assert any of the governmental immunity defenses

available to it without affecting the coverage afforded under this policy.

The Company and the Insured further agree that this policy of insurance shall cover only those claims not subject to the defense of governmental immunity under Iowa Code §670.4 as it now exists and may be amended from time to time.

VI. GOVERNMENTAL IMMUNITIES ARE NOT JURISDICTIONAL, BUT ARE DEFENSES ON THE MERITS. IMMUNITIES MUST BE ASSERTED AS AFFIRMATIVE DEFENSES.

Formerly the local government immunities in Section 670.4, and the state government immunities in Chapter 669 were considered jurisdictional and could be raised at any time. See Hyde v. Buckalew, 393 N.W.2d 800, 802 (Iowa 1986).

In recent years the Iowa Supreme Court has changed its position on this issue. In Moyer v. City of Des Moines, 505 N.W.2d 191 (Iowa 1993), the court held that the local government immunities in Section 670.4 are not jurisdictional, but are "substantive rules of law affecting the municipal corporation's liability on the merits." Id., 505 N.W.2d at 193. In Hawkeye Bank v. State, 515 N.W.2d 348 (Iowa 1994) the court held that the immunities in the state tort claims act were not jurisdictional, but defenses on the merits.

Practice Tip: Because the immunities are not jurisdictional, they may not be raised at any time. The immunities should therefore be pled as affirmative defenses. Additionally, because they are not jurisdictional, when governmental immunities are raised in a motion to dismiss, courts will only look at the allegations in the complaint read in the light most favorable to plaintiff. Moyer, 505 N.W.2d at 193. Therefore, unless a complaint is unambiguous, summary judgment motions will ordinarily be the vehicle to raise governmental immunity defenses.

VII. TERMS OF SETTLEMENTS ARE PUBLIC RECORDS.

Documents of public bodies are public records, unless they fall within an exception to the Public Records Law, Iowa Code Ch. 22. Iowa Code §22.7. Terms of settlements or other dispositions of claims against governmental bodies, if made by an insurance company, must be filed with the governmental body and are public records. Iowa Code §22.13.

TORT CLAIMS ACT IMMUNITIES

Local Government	State	Federal
670	669	28 USC 2680
1. Worker's Compensation	1. Discretionary Function	a. Discretionary Function
2. Tax Assessment/collection	2. Tax Assessment/Collection Detention of Merchandise	b. Postal Matters
3. Discretionary Function	3. Quarantine	c. Tax Assessment /Collection Detention of Merchandise
4. Immune-Other Statutes	4. Assault/Battery	d. Admiralty Realty
5. Punitive Damages	5. Worker's Compensation	e. Administering Trading with the Enemy Act
6. Inspection Defect	6. Inmate Working	f. Quarantine
7. Highway Design	7. National Guard	g. Repealed
8. Pub. Imp. Design	8. Highway Design	h. Assault/battery
9. Licensee Damage	9. Pub. Imp. Design	i. Fiscal Operations
10. Third Party Damage	10. 89B Enforcement (HAZMAT)	j. Military combat
11. Emergency Response	11. Financial Regulation	k. Foreign Country
12. Swimming Pools	12. Care Review Committee	l. TVA
13. Neglected Livestock	13. Swimming Pools	m. Panama Canal
		n. Fed. Land Bank

Appellate Practice Suggestions

September 25, 1997

Prepared for
1997 Iowa Defense Counsel Annual Meeting & Seminar

by
Marsha K. Ternus
Iowa Supreme Court

I. Briefs.

A. Rule 4: Scope of Review.

Review in equity cases shall be de novo. In all other cases the appellate courts shall constitute courts for correction of errors at law, and findings of fact in jury-waived cases shall have the effect of a special verdict.

Comments:

1. Correctly state the scope of review. Even when the parties agree on the scope of review, the court will not be bound by the parties' apparent agreement if the standard of review is different from what the parties think it is

2. Even in appeals of equity cases where our review is de novo, it is critical that error be specifically identified on appeal *Hyler v Garner*, 548 N.W.2d 864, 870 (Iowa 1996) "The appeal of an equity case does not entitle an appellant to a *trial* de novo, only *review* of identified error de novo." *Id*

B. Rule 14: Briefs.

(a)(3): Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.

Comments:

1. Issues must be identified with specificity *See Hyler*, 548 N.W.2d at 870 (a broad, all-encompassing claim that the trial court's findings are not supported by substantial evidence or by the law is insufficient to preserve any issue for review); *Smith v State*, 542 N.W.2d 567, 570 (Iowa 1996) (statement that court's order violated plaintiff's "religious rights," without more specific identification of right and without supporting legal authority, does not preserve issue for review).

2. Statement of issue must be accompanied by supporting legal authority and/or discussion of issue. *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 689 (Iowa 1994) (random mention of issue, without elaboration or supporting authority, is insufficient to raise issue for Supreme Court's consideration).

3. The waiver provision of rule 14(a)(3) is discretionary. *See* Iowa R. App. P. 14(a)(3) (failure to argue or to cite authority "*may* be deemed a

waiver") (emphasis added). When a party fails to respond to an issue raised by the appellant, the Supreme Court will consider whether the nonresponding party's position clearly has merit and whether that party's failure to cite authority or argue the issue has hindered court's review or consideration of issue. *State v. Crone*, 545 N.W.2d 267, 271 n.1 (Iowa 1996).

4. Issues raised for the first time in a reply brief will not be considered by the Supreme Court *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) Nor may a new issue be presented in an untimely amendment to a brief. *Mueller v. St. Ansgar State Bank*, 465 N.W.2d 659, 660 (Iowa 1991).

5 Issues raised only in an amicus brief are not properly presented for review *Mueller*, 465 N.W.2d at 660.

(a)(4): All portions of the statement [of the case] shall be supported by appropriate references to the record or the appendix.

Comments:

1. When discussing facts please cite to where the fact appears in the record or appendix. If the court must search for verification of a fact relied upon in the brief, you run the risk the court will not be able to find support for your factual assertion. In that event, the court will not accept your statement of fact as true.

2. Slanting the situation in your favor by leaving out key facts, or by creating facts that do not exist or that contradict the record is wrong; we will review the entire record. When the court discovers that a party has not been totally honest in stating the facts, that party's credibility is seriously undermined.

(a)(5): Each division of the argument shall begin with a discussion, citing relevant authority, concerning the scope or standard of appellate review and shall state how the issue was preserved for review, with references to the places in the record where the issue was raised and decided.

Comments:

1. Failure to cite to the record to support factual statements permits appellate court to ignore party's contentions. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 342 (Iowa 1991); *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 174 (Iowa 1990)

2. Citing *relevant* authority has many connotations. First, do not cite cases for propositions for which they do not stand. It is important to *read* relevant cases thoroughly before citing them for a proposition; don't merely read the digest head notes. Second, if a case is overturned, note that fact; it is relevant. Similarly, if using an overturned case for an idea, point out it has been overturned and argue why the case before the court is distinguishable or how the overruling decision was wrong.

3. Do not cite cases from other jurisdictions to support an argument without first analyzing Iowa jurisprudence. The court first researches Iowa precedent before turning to other jurisdictions. Therefore, if Iowa case law clearly opposes an argument upon which a party relies, the court will discover that fact. A party's failure to alert the court to Iowa authority undermines the lawyer's and party's credibility and does not advance the client's cause.

4. When citing a dictionary for a term's definition, do not simply pick the one meaning supporting your client's viewpoint if the term is susceptible to many common meanings. Tell the court both the most common definition and the one you wish to apply, if different, and then argue why the court should apply your definition.

5. Proofread briefs carefully. Errors draw the reader's attention away from the substance of your argument.

6. When setting forth the preservation of error, cite to the relevant pages in the record. Again, failure to do so enhances the risk the court will not locate support for this proposition.

7. Do not gloss over error preservation problems in the hope your opponent will not recognize them. Even where the appellee does not challenge the appellant's preservation of error, the court will still examine the record to verify error preservation. We are not bound by the parties' agreement that error has been preserved! If you see a problem, discuss it; otherwise, the court will discover the problem and resolve it without your input. You may be surprised when the substantive issue you raise in your appellant's brief is not addressed by the court because error was not preserved, even though your opponent did not argue lack of error preservation.

8. Check citations before filing the brief to be sure they are accurate. If your citations are unreliable, a judge may assume your research is also unreliable.

(c): Reply Brief

Comment: This rule provides an opportunity to point out mistakes in your opponent's brief. Such highlighting is important. Also, respond to the other side's arguments. You may think of responsive arguments that never enter the court's thinking. Do not simply rehash the arguments made in your initial brief.

General Comments on Briefs:

1. There should be **no** substantive changes in the final brief as compared to the proof brief. *See* Iowa R. App. P. 13(b).

2. Briefs cannot be confidential. *See* Iowa R. App. P. 33.

3. Arabic numbering shall begin with the statement of the issues presented for review. *See* Iowa R. App. P. 14(h).

4. Notice of Additional Authority: If a decision in another case is filed after briefing is completed and relates to an issue in your appeal, file a notice of additional authority citing the case and identifying the issue on appeal to which it is relevant. Do not argue the applicability of the new authority. (no rule)

C. Rule 15: Appendix to Briefs.

(a): Appellant shall prepare and file an appendix to the briefs which shall contain:

> (2) any relevant portions of the pleadings, transcript, instructions, findings, conclusions, and opinion. . . . The fact that parts of the record are not included in the appendix shall not prevent the parties or the courts from relying on such parts.

Comments:

1. When creating an appendix do not use testimony out of context. If you cite testimony in the brief, in the appendix add any surrounding testimony that is relevant to understanding the context in which the statement was made. Again, any attempt to put an unfair spin on a witness's testimony will only lessen your credibility with the court.

2. Make it clear when arranging portions of the transcript in the appendix who is testifying, who is examining or cross-examining, and—most important—where there are breaks in the testimony.

3. Do not overload the appendix with irrelevant material.

4. Do not include trial court briefs in the appendix unless absolutely necessary to show error preservation, i.e. that an issue was raised or an argument was made in the district court. In that case include **only** the essential portions of the brief. *See* Iowa R. App. P. 15(a).

5. Iowa Rule of Appellate Procedure 15(a) requires inclusion of relevant docket entries in the appendix. **Do not** merely photocopy and insert the district court docket papers; rather, type a list of **relevant** docket entries.

6. Make sure the appendix is properly numbered. *See* Iowa R. App. P. 15(d) ("The pages of the appendix shall be consecutively numbered."). Number the appendix in such a way that the appendix numbering is not confused with the original page numbers of the documents included in the appendix.

D. Rule 16: Form of Briefs, Appendix, and Other Papers.

(a): Double spaced, averaging no more than ten characters per inch; each line no more than 60 characters on average; margins on bound side not less than 1 1/8 inches.

Comments:

1. Do not attempt to bypass the page limit by expanding margins and decreasing type size. It is noticeable and it detracts from your credibility before the court.

2. When preparing a table of contents use specific descriptions. For example, say "Exhibit 1: copy of 1989 contract," not merely "Exhibit 1." Similarly, say "Instruction 10: comparative fault," not merely "Instruction 10." An inadequate and unhelpful table of contents is one of the most frustrating (for the court) mistakes made by attorneys.

3. Do not use distracting typeface. For example, do not print the parties names in bold type or capital letters throughout the brief and do not print the brief in all capital letters.

4. When including highlighted documents in the appendix, be sure that the highlighted portions of the document are readable.

(c): "[I]f either party shall cause matters to be unnecessarily included in the appendix the appropriate appellate court may impose the cost of producing such parts on that party."

Comment: The fact that the party including unnecessary materials in the appendix was successful on appeal does prevent application of this rule *Dowell v. Wagler*, 509 N W 2d 134, 138 (Iowa App. 1993).

II. Rule 21: Oral Argument.

Comments:

1. It is always helpful to members of the court to begin your argument by identifying yourself and the party you represent.

2. Oral argument is the time to convince the court to decide an issue in your favor. The best approach to achieve this goal is to address the pivotal issues. Don't ignore controversial or close arguments thinking the court is unaware of them. If an argument is so unconvincing that you cannot bring yourself to talk about it, abandon it. Your candor will enhance your credibility

3. If Iowa case law exists and is relevant to an issue discuss it; do not rely solely on cases from other states. On the other hand, if Iowa case law gives inadequate guidance, supplement your discussion of Iowa law with a discussion of how the courts of other states have addressed the issue.

4. Do not waste your argument time on useless facts. Merely discuss the facts which are necessary to decide the issue argued. When obviously irrelevant facts are discussed in oral argument, the court may sense that the attorney is trying to appeal to the court's sympathies. This strategy will backfire

5 Respond to important arguments made by the opposition. If you ignore them or dismiss them cursorily, you lose a chance to raise an argument the court might use to decide your way. The best tactic is to distinguish the prior argument, or explain how that reasoning does not apply to your case

6. When responding to a judge's questions give a response after the question is completed; do not interrupt the judge. Also answer the question; do not avoid it. If you do not know an answer, say so. Dodging a question is apparent to the court

7. Do not point out clients who are in attendance; we are a court of law, not a jury or the legislature.

8 Be careful in using exhibits at oral argument. To be useful, the exhibit should either be reduced in size and copied for each member of the panel as a handout, or the exhibit should be sufficiently enlarged that it can easily be read at a distance.

Many of these comments also apply to writing a brief.

III. Rule 22: Motions.

[A]n application for an order or other relief . . shall be made by serving a motion on all other parties to the appeal and filing it with the clerk of the Supreme Court.

Comments:

1. The court will not consider a motion that has not been served upon the other party. Even when the issue raised in the motion requires a prompt ruling, it is still necessary that the opposing party be notified of the motion and served with a copy. The clerk will generally request a copy of the motion be immediately hand-delivered or faxed to the opposing party in these circumstances.

2. The motion must be accompanied by the order challenged by the moving party and any other portions of the record necessary for the Supreme Court's consideration of the issues.

3. Do not wait until the last minute to file a motion requesting a stay of a trial court order or a trial.

4 If there is an upcoming trial date or some other event which would require an order immediately, indicate that fact in the motion.

5. Include in the motion any legal authority that supports your request for relief.

IV. Rule 27: Petition for Rehearing.

[A] petition for rehearing may be filed within fourteen days after the filing of an opinion by the supreme court . .

Comments:

1. All justices have read each opinion filed by the court and have had an opportunity to discuss the proposed opinion and offer suggestions before it is filed. Consequently, do not file a petition for rehearing under the illusion that it will attract the attention of a justice who was not on the panel that decided the case and who was unaware of the panel's decision.

2. Do not rehash the same arguments made in your brief; all members of the court have already considered and rejected those arguments. You must articulate how the particular manner in which the court has decided the case creates an unworkable or illogical situation.

3. A motion for rehearing is often used as a means to have minor corrections made in an opinion. For example, if factual statements are incorrect, one of the parties may file a petition for rehearing pointing out the inaccuracy and explaining why it is important to make the correction. (For example, factual statements made in an opinion may have collateral consequences in other proceedings or transactions.) Although the petition will usually be denied, the corrections will generally be made.

V. Rule 12: Docketing Appeal.

Comments:

1. Requests to waive the docket fee or the filing fee must be accompanied by the district court order which finds your client indigent and appoints counsel.

2. When filing an application for interlocutory appeal, application for discretionary review, or petition for writ of certiorari, file a request to waive the filing fee with the application or petition.

3. Do not docket the case if the transcript has not been completed. Instead, file a motion to extend the time for docketing the appeal, explaining that the transcript is not ready and attaching supporting correspondence with the court reporter. Serve the motion on the delinquent court reporter and show on the motion that a copy has been sent to the reporter.

VI. Combined Certificate and Supplemental Combined Certificate.

(b): If appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, 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 describe the parts of the proceedings ordered transcribed and state the issues appellant intends to present on appeal, by using the combined certificate . . .

Comment: Appellant must either (a) order the entire transcript, (b) order portions of the proceedings transcribed and provide a statement of the issues in the combined certificate, or (c) indicate if a statement of the evidence will be prepared because the proceedings were not reported or the transcript is not available.

(b): If appellee deems a transcript of other parts of the proceedings to be necessary, appellee shall, within ten days after the service of the combined certificate, serve on all other parties and the reporter, and file with the clerk of district court a designation of additional parts to be included.

Comment: Appellees must inspect combined certificates when they are filed to determine if additional parts need to be transcribed. Do not wait until the proof brief and designation of parts are filed to raise any objections

SUMMARY JUDGEMENTS
OR
SHOOTING YOURSELF IN THE FOOT

BY MICHAEL J. COYLE

In Iowa you will find yourself under either I.R.Civ.P. 56 or F.R.Civ.P. 237. In Iowa, the plaintiff can move anytime after the appearance day or an adverse party's filing of a motion for summary judgment. In the Federal Court, the plaintiff can move anytime after twenty days from starting the action. The defendants are treated identically the same under both rules. There's a pitfall in Iowa which does not exist in the federal rule, in Iowa one must file more than forty-five days before trial. Rule 237 specifically provides for a post-trial motion under I.R.Civ.P. 179(b) in the event summary judgment disposes of the entire case. The federal rule is silent in this regard.

Each rule specifically empowers the Court to enter judgment for reasonable expenses, including attorneys' fees, and to also find an offending attorney guilty of contempt if there is a determination that an affidavit filed as part of the motion or resistance was in bad faith.

Iowa alone requires a statement of facts to be filed with the motion for summary judgment. The statement of facts must be annotated referring to the various pleadings, interrogatories or what have you which one claims are the basis for the fact. And perhaps little noticed, Iowa also requires a memorandum of authorities which support the movant's contentions.

We've come a long way from the Eighth Circuit decision that controlled in the

early '80's. Basically, there were no summary judgments as a result. Much of the judiciary today bears the imprint of that thinking. But motions for summary judgment are alive and well and being used repeatedly throughout the jurisdictions of northeast and eastern Iowa.

It is possible the U.S. Supreme Court had a hand in this increasing acceptance of summary judgment motions by deciding three cases in 1986 involving these motions. Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

I.R.Civ.P. 237(c) just plain says a motion for summary judgment should be granted when there is no genuine issue of material fact and the movant happens to be entitled to judgment as a matter of law. A fine summary of the Supreme Court's view of this rule and how it operates is found in Tasco, Inc. v. Winkel, 281 N.W.2d 280 (Iowa 1979), at page 282:

> "[2, 3] Under rule 237, Rules of Civil Procedure, summary judgments are granted when there is no genuine issue as to any material fact. The matters come up on affidavits, pleadings, answers to interrogatories, admissions on file, and affidavits. Rule 237(c), R.Civ.P. The court may, as it did here, permit oral testimony to supplement the record. Rule 237(e), R.Civ.P.
>
> "[4-6] The trial court (and this court on review) must look at the whole record in the light most favorable to the one against whom the motion is made. The moving party has the burden to show the absence of a fact issue. Even if

> the facts are undisputed, summary judgment is not appropriate if reasonable minds may draw different inferences from them. *Drainage District No. 119 v. City of Spencer*, 268 N.W.2d 493, 499-500 (Iowa 1978); *Sand Seed Service, Inc. v. Poeckes*, 249 N.W.2d 663, 664-65 (Iowa 1977); *Daboll v. Hoden*, 222 N.W.2d 727, 731-33 (Iowa 1974)."

Summed up by Matherly v. Hanson, 359 N.W.2d 450 (Iowa 1984), the Supreme Court has explained that it will examine the record in the light most favorable to the party opposing the motion to see if the moving party met its burden.

If the ruling on the motion for summary judgment disposes of the case and one must appeal, be guided by Anita Valley, Inc. v. Bingley, 279 N.W.2d 37 (Iowa 1979). Anita Valley, Inc. tells us that the Supreme Court will require the movant to show no genuine issue of material fact exists and entitlement to judgment as a matter of law.

For technicians reading the rule to allow only "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," and who argue that a request for admissions not responded to cannot be used in summary judgment, see Double D Land and Cattle Co. v. Brown, 541 N.W.2d 547 (Iowa App. 1995).

As soon as you read the rule to require filing of a motion in Iowa prior to 45 days before trial, you must consider the case of Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995), which dealt with the recognition that a Trial Court has discretion to consider an untimely motion and late filing of a motion would not require reversal.

Not infrequently do those resisting motions for summary judgment show up unarmed with affidavits, pleading or anything else. Both the Iowa and federal rule would make it clear that you simply cannot do this, and if you fail to respond summary judgment can be entered against you "... if appropriate." "If appropriate" would be a topic of separate discussion and we'll not go down that road today. But if one is unprepared, a motion to continue the hearing would be most appropriate, Moser v. Thorp Sales Corp., 312 N.W.2d 881, appeal after removal 334 N.W.2d 715 (Iowa 1981). And it must be the law that if a resisting party cannot provide an affidavit that counters the motion, he may file an affidavit that says he cannot, giving the reasons, and seek either an order from the Court refusing the motion or granting a continuance. After all, that's what rule 237(f) says. With some trepidation counsel might try a professional statement which for many purposes and intents is tantamount to sworn testimony but the rule does specify affidavits.

There was a major piece of litigation that wound up in the U.S. Supreme Court which may be of significant help to the practitioner confronted with a motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317 (1986), dealt with a kamikaze motion early in the lawsuit. None other than Chief Justice Rehnquist wrote the opinion which contains a thorough discussion of what might be a premature motion. In Celotex the motion came more than a year after the suit was on file and discovery had taken place. One can read Justice Rehnquist's words to speak favorably

toward a motion to continue to allow an opportunity for necessary discovery.

Iowa has authority for the Trial Courts having discretion to decide whether or not there's been enough time for discovery so that one can resist a motion. See Moser v. Thorp Sales Corp., 312 N.W.2d 881 (Iowa 1981), appeal after remand 334 N.W.2d 715. See as well Midthun v. Pasternak, 420 N.W.2d 465 (Iowa 1988).

Some good thoughts about what really happens when one resists a motion for summary judgment come out of Banks v. City of Ames, 369 N.W.2d 451 (Iowa 1985). On appeal somebody complained that the opponent had not answered interrogatories prior to the motion for summary judgment and that was hardly a fair situation. The poor overworked and underpaid municipality did not answer the interrogatories but filed a motion for summary judgment, it was granted, however the opponent made no effort to continue and presumably must not have filed an affidavit saying they couldn't file an affidavit in resistance pursuant to rule 237(f). The opponent failed to preserve an appealable issue.

Neoco, Inc. v. Christenson, 312 N.W.2d 559 (Iowa 1981), dealt with the resister trying to file something with the Court after hearing on a motion for summary judgment, there was no reason advanced for the tardy filing and the Trial Court would not consider what was filed. The Trial Court was upheld.

We learn from Shaw v. Soo Line Railroad Co., 463 N.W.2d 51 (Iowa 1990), where a defendants' motion for summary judgment was sustained, at page 53:

> "Although appellees have the burden of proving that no material fact is in dispute, this does not relieve appellants' burden to make a showing sufficient to establish the existence of an element essential to their case. Appellants' burden of proof must be considered in determining whether appellants have met their burden of resisting appellees' motion for summary judgment. If the evidence before the court requires a directed verdict for the appellees, a motion for summary judgment should be sustained. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (applying Federal Rule of Civil Procedure 56). Because Iowa Rule of Civil Procedure 237 is patterned after Federal Rule of Civil Procedure 56, we find federal cases interpreting rule 56 persuasive in our interpretation of the Iowa rule. *Brody v. Ruby*, 267 N.W.2d 902, 904 (Iowa 1978)."

You can make pretty limited attacks in motions for summary judgment. For instance, whether § 321.358 dealing with a vehicle parked within 50 feet of the nearest railroad crossing exhibiting a proper light when the vehicle is parked on private property. Shaw v. Soo Line Railroad Co., supra. The answer is that the statute is inapplicable to private property based on the authority of § 321.228, Code of Iowa.

Unfortunately, omitted from the jurisprudence of the State of Iowa is what was really being discussed immediately prior to this double fatality resulting from a car/train collision. The estates and grieving widows of the two passengers sought just damages in the suit. But the surviving driver did remember that as they drove down a county road toward the railroad tracks that his two passengers were talking between them about one having moved out of his house, left his wife and set up an apartment very recently. And had it not been for the train the destination was a wet T-shirt

contest in a tavern in a small Iowa town. Why should the owner of two semi trailers who parked them in a creamery parking lot bear any liability if in fact there was an obstruction of visibility, however strained, for the train on the intersecting track?

For brevity and to avoid a lot of dictating, the Motion, supporting Statement and Memorandum of Authorities filed on behalf of defendant Mikes Lines, Inc. is attached.

Again, for brevity and to avoid a lot of dictating, attached is the Joint Motion for Summary Judgment in Campbell v. Penn-Daniels, et al, and Joint Statement of Facts omitting only the various exhibits identified. The Trial Court held that Penn-Daniels was right, its insurance policy covered injuries within its store and landlord Muscatine's insurance policy covered injuries outside the store. This case is on appeal. But it does demonstrate that joint motion for summary judgment could be appropriate.

Once again, for brevity and to avoid a lot of dictating, attached is the Motion for Summary Judgment of Fidelity Guaranty Insurance Co. and USF&G Insurance Company which was sustained and is now on appeal. At Clarke College in Dubuque a sprinkler system was damaged and flooded the gymnasium floor in a brand new facility, the owner's insurance policy replaced the floor at considerable expense and sought contribution toward its payment from the liability policies of all the various contractors and subs.

While the rules on summary judgment specifically refer to a decision only on the issue of liability, such a motion can be made on single issues less than a total

adjudication of the liability aspects of the case. Lamantia v. Sojka, 298 N.W.2d 245 (Iowa 1980), is authority for the concept of partial summary judgment. Rather than bring a witness to Court, it might be practical to incorporate that witness's testimony in an affidavit, file a summary judgment and ask for an adjudication on the issues covered by the affidavit. With a recalcitrant opponent, foundation for a document might be ably handled this way and save the witness time and expense of traveling to trial.

Specific and narrow issues are very much appropriate subjects of motions for summary judgment. Consider presenting the factual basis of a car having been sold so that the record owner is no longer liable and appropriately dismissed from the pending lawsuit based on § 321.493, Code of Iowa. Consider parental responsibility for the actions of children under § 631.16 and removing a noncustodial parent from a lawsuit, or limiting the liability to one act as opposed to multiple acts.

Section 613.18, Code of Iowa, gives terrific protection to retailers and the like from the theories of products liability and breach of implied warranty for merchantability. Developing through discovery and affidavits that one is in fact a retailer and not an assembler, that the manufacturer is subject to jurisdiction and those kinds of issues are particularly appropriate for summary judgment.

Insurance coverage issues almost cry out for summary judgment at times. Whether one might be using an auto without the reasonable belief that he's entitled to do so can be put into the form of a summary judgment after deposition and the

testimony has come out that the owner was in the car but screaming that the driver should stop and let her out. Questions of the identity of named defendants can be beautiful fodder for the summary judgment cannon, suing one individual because he's one of those from the Quad Cities who always hangs with the same group is more likely than not begging for summary judgment.

And I close with an editorial, a simple statement of fiction not based on fact or experience. There might be some Judge who just is not going to give a summary judgment and it makes little difference what the facts are, who the lawyers might be, or whether we have rules that allow motions for summary judgment. But the file will be well set up for the later presentation of a motion for directed verdict on the very same grounds and for the very same reasons set out in a disallowed motion for summary judgment. After all, you can't be so unlucky as to get the same Judge both times. And there are even some who think that a motion for summary judgment is worthwhile if it merely forces the opponent to take its best shot back and extricate the light from under the bushel.

IN THE IOWA DISTRICT COURT FOR CLAYTON COUNTY

JOHN SHAW, Administrator of the Estate of WILLIAM J. SHAW, Deceased; LAURIE A. WILLIS, Administrator of the Estate of DEAN DENNIS WILLIS a/k/a DEAN D. WILLIS, Deceased,	)	
Plaintiffs,	)	
vs.	)	LAW NO. C3144-1187
SOO LINE RAILROAD CO.; JOSEPH C. SPINOSO; SWISS VALLEY FARMS CO., INC. f/k/a MISSISSIPPI VALLEY MILK PRODUCERS ASSOC.; and MIKE'S LINES, INC.,	)	MOTION FOR SUMMARY JUDGMENT OF DEFENDANT MIKES LINES INC.
Defendants.	)	

COMES NOW Defendant Mikes Lines Inc. and moves the Court to enter Summary Judgment in its favor and against Plaintiffs for the reasons and upon the grounds hereinafter set forth:

Plaintiffs' Petition at Law shows upon its face that all of Plaintiffs' claims against Defendant Mikes Lines Inc. are based upon allegations that the vision of persons traveling upon County Road 2090S was obscured by vehicles allegedly owned by Mikes Lines Inc. and parked on land owned by Defendant Swiss Valley Farms Co. and specifically that Mikes Lines Inc. was negligent for:

(1) Allowing the vehicles to be parked within fifty feet of a railroad crossing in violation of Iowa Code § 321.358(8) (1985, as amended);

(2) Failing to use reasonable care to keep their vehicles in such a condition as to not create defects or obstructions in an adjacent street or highway in violation of their common law duty to do so; and

(3) Allowing trucks to be parked and parking said trucks in such a manner as to create a hazardous and dangerous situation to motorists using the adjacent roadway, when said Defendant knew or should have known of the proximity of the railroad track and the unsignalized crossing.

As a matter of law Plaintiffs cannot recover upon any of the above claims for the following reasons:

(1) Iowa Code § 321.358(8) (1985, as amended) is a statutory rule of the road which does not apply to vehicles on private premises pursuant to Iowa Code § 321.228 (1985, as amended).

(2) Defendant Mikes Lines Inc. had no statutory or common-law duty to park its vehicles in a way which would allow motorists on County Road 2090S an unobstructed view of the railroad crossing.

WHEREFORE, Defendant Mikes Lines Inc. prays the Court to enter Summary Judgment in its favor and against Plaintiffs, dismissing Plaintiffs' Petition at Plaintiffs' costs.

STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO I.R.C.P. 237(h)

COMES NOW Defendant Mikes Lines Inc., pursuant to Iowa Rule of Civil Procedure 237(h) and submits the following statement of material facts as to which there is no genuine issue for trial:

1. On or about May 26, 1986, William J. Shaw and Dean D. Willis were passengers in an automobile operated by Duane H. Gray in a northerly direction on Clayton County Road 2090S which collided with a train owned and operated by Soo Line Railroad Co., resulting in the deaths of William J. Shaw and Dean D. Willis. (Petition, Division I, paragraphs 4, 5 and 6; Petition, Division III, paragraphs 2 and 3.)

2. John Shaw and Laurie A. Willis are the administrators of the estates of William J. Shaw and Dean D. Willis, respectively. (Petition, Division I, paragraph 1; Petition, Division III, paragraph 1.)

3. Plaintiffs allege that the line of vision of persons traveling upon County Road 2090S was obscured by a building and vehicles parked parallel to the roadway and perpendicular to the railway. (Petition, Division I, paragraph 8.)

4. Plaintiffs allege that at the time of the accident there were three semi trailers owned by Mikes Lines Inc. parked on land owned by Swiss Valley Farms Co., Inc. adjacent to a creamery also owned by Swiss Valley Farms Co., Inc. (Petition, Division I, paragraphs 5 and 6.)

5. Plaintiffs allege that Mikes Lines Inc. was negligent for the following reasons:

a) In allowing the vehicles to be parked within fifty feet of a railroad crossing in violation of Iowa Code § 321.358(8) (1985, as amended).

b) In failing to use reasonable care to keep its vehicles in such a condition as to not create defects or obstructions in an adjacent street or highway in violation of its common law duty to do so.

c) In allowing trucks to be parked and parking said trucks in such a manner as to create a hazardous and dangerous situation to motorists using the adjacent roadway, when said Defendant knew or should have known of the proximity of the railroad track and the unsignalized crossing.

(Petition, Division II, paragraph 9.)

6. The semi trailer parked closest to County Road 2090S was forty-four feet east of the east concrete edge of the pavement. (Affidavit of Robert Hoffert.)

7. The pavement of County Road 2090S is twenty-two feet wide. (Affidavit of Robert Hoffert; Affidavit of Jerry Weber.)

8. The County right-of-way extends fifty feet from the center of the pavement of County Road 2090S to the east, in the area adjacent to the creamery owned by Swiss Valley Farms Co., Inc. (Affidavit of Jerry Weber.)

AFFIDAVIT

STATE OF IOWA)
) ss:
CLAYTON COUNTY)

I, the undersigned, Robert Hoffert, being first duly sworn on oath, depose and state as follows:

1. I am an officer in the Iowa State Patrol and conducted a technical investigation at the scene of the vehicle/train collision which occurred on or about May 25, 1986, at Luana, Iowa, between a train owned by Soo Line Railroad and a vehicle owned and operated by Duane H. Gray.

2. In connection with the preparation of my Investigating Officer's Report, I measured the distance from the east concrete edge of the pavement of County Road 2090S to the westernmost side of a semi trailer parked parallel to the road and in the Swiss Valley Creamery Parking lot. The distance from the east concrete edge of the pavement to the west side of the trailer parked closest to the road was 44 feet.

3. I also measured the width of the pavement. The width of the pavement was 22 feet.

4. At the time I made the above measurements, the trailer was parked in the same position it was parked when I arrived at the scene of the accident.

Further Affiant Sayeth Not.

ROBERT HOFFERT

Subscribed and sworn to before me by the said Robert Hoffert this 15th day of May, A.D. 1989.

Notary Public in and for the
State of Iowa

GREGG L OWENS
MY COMMISSION EXPIRES
9-21-91

AFFIDAVIT

STATE OF IOWA)
) ss:
CLAYTON COUNTY)

I, the undersigned, being first duly sworn on oath, depose and state as follows:

1. I am the County Engineer for Clayton County, Iowa.

2. I have examined Exhibit "A" attached to this affidavit. Exhibit "A" is a portion of the Plan and Profile of the proposed improvement on the secondary road system, project number L-455. Exhibit "A" is a diagram of County Road 2090S.

3. As shown by Exhibit "A", sheet number 4, the county right-of-way extends 50 feet from the center of the roadway to the east

4. As shown by Exhibit "A", sheet number 2, the width of the pavement is 22 feet.

5. The above measurements apply to the area of the roadway adjacent to the Swiss Valley Creamery.

6. The portion of the Plan and Profile attached to this affidavit as Exhibit "A" is a document possessed by Clayton County, Iowa, and produced by the office of the County Engineer.

Further Affiant Sayeth Not.

Jerry J. Weber

Subscribed and sworn to before me by the said this 15th day of May, A.D. 1989.

Notary Public in and for the State of Iowa

GREGG L. OWENS
MY COMMISSION EXPIRES
9-29-91

IN THE IOWA DISTRICT COURT FOR CLAYTON COUNTY

JOHN SHAW, Administrator of the Estate of WILLIAM J. SHAW, Deceased; LAURIE A. WILLIS, Administrator of the Estate of DEAN DENNIS WILLIS a/k/a DEAN D. WILLIS, Deceased, Plaintiffs, vs. SOO LINE RAILROAD CO.; JOSEPH C. SPINOSO; SWISS VALLEY FARMS CO., INC. f/k/a MISSISSIPPI VALLEY MILK PRODUCERS ASSOC.; and MIKE'S LINES, INC., Defendants.	LAW NO. C3144-1187 MEMORANDUM OF AUTHORITIES

A prerequisite to establishing a claim of negligence is the existence of a duty. Bain v. Gillespie, 357 N.W.2d 47, 49 (Iowa App. 1984). The question of whether a duty arises out of the parties' relationship is always a matter of law for the Court. Soike v. Evan Matthews and Co., 302 N.W.2d 841, 842 (Iowa 1984).

Summary judgment is appropriate where there is no material fact at issue and the moving party is entitled to judgment as a matter of law. Iowa R.C.P. 237(c). The moving party has the burden of proving that no material fact is in dispute. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984). However, this does not relieve the Plaintiffs' burden to make a showing sufficient to establish the existence of an element essential to their case. The burden of proof of the Plaintiffs must be considered in

determining whether Plaintiffs have met their burden of resisting Defendant's motion for summary judgment and if the evidence before the Court would require a directed verdict for the Defendant, a motion for summary judgment should be sustained. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986) (applying Federal Rule of Civil Procedure 56).

Iowa Rule of Civil Procedure 237 is for all practical purposes the same as Federal Rule of Civil Procedure 56 and federal cases interpreting the federal rule are persuasive in interpreting the Iowa rule. Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978). A party resisting a motion for summary judgment may not rest upon the mere allegations of his pleading but must set forth by affidavits or otherwise specific facts showing there is a genuine issue. Schulte v. Mauer, 219 N.W.2d 496, 500 (1974).

Plaintiffs in the present case allege that semi trailers owned by Defendant Mikes Lines Inc. (Mikes Lines), which were parked on land owned by Defendant Swiss Valley Farms Co. (Swiss Valley), obstructed Duane Gray's view of the railway line and therefore constituted a proximate cause of the collision between the vehicle operated by Duane Gray and the train owned and operated by Defendant Soo Line Railroad Co. (Soo Line), in which Plaintiffs were killed. Assuming arguendo that the semi trailers were owned by Mikes Lines and constituted an actual obstruction to view, Mikes Lines owed no legal duty to Plaintiffs to park

the semi trailers in a way which would allow an unobstructed view of the railroad crossing. The authorities set forth below fully support the position of Mikes Lines that no statutory or common-law duty was owed to Plaintiffs by Mikes Lines on the night of the accident in question.

IOWA CODE § 321.358(8) IS A STATUTORY RULE OF THE ROAD WHICH DOES NOT APPLY TO VEHICLES PARKED ON PRIVATE PREMISES.

Plaintiffs allege that Mikes Lines was negligent in allowing the vehicles to be parked within fifty feet of the railroad crossing in violation of Iowa Code § 321.358(8). Iowa Code § 321.358 (1985, as amended) provides, in relevant part, that:

> No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic-control device, in any of the following places:
>
> * * *
>
> 8. Within fifty feet of the nearest rail of a railroad crossing, except when parked parallel with such rail and not exhibiting a red light.

Again, assuming for the purposes of this motion that the semi trailers were parked within fifty feet of the railroad crossing, Iowa Code § 321.358(8) is a rule of the road which does not apply to vehicles parked on private premises.

The undisputed facts in the present case, as established by Affidavits, are that the County right-of-way extends fifty feet east from the center of the pavement of County Road 2090S and that the pavement is twenty-two feet wide. The semi trailer parked closest to the road was forty-four feet east of the east concrete edge of the road. Because the County right-of-way extends only thirty-nine feet east of the concrete edge of the road, the trailer was at least five feet outside the County right-of-way. Therefore, it is clear that the semi trailers were on private property at the time of the accident.

Iowa Code § 321.228 (1985, as amended) specifically provides:

> The provisions of this chapter relating to the operation of motor vehicles refer exclusively to the operation of vehicles upon highways except:
>
> 1. Where a different place is specifically referred to in a given section.
>
> 2. The provisions of sections 321.261 to 321.274 and sections 321.277 and 321.280 shall apply upon highways and elsewhere throughout the state.

Because § 321.358(8) does not specifically refer to a different place, and because § 321.358(8) is not one of the enumerated exceptions to § 321.228, § 321.358(8) has no application to the undisputed facts of the present case. See also, Anderson v. Wilcox, 189 N.W.2d 541, 544 (Iowa 1971). (Chapter 321 does not

20 S.E.2d at 304 (citations omitted). See also, Alabama Great Southern Railroad Co. v. Johnston, 199 So.2d 840, 844 (Ala. 1967); Midland Valley R.Co. v. Pettie, 162 P.2d 543, 546 (Okl. 1945); Cowles v. New York, N.H. & H.R. Co., 80 Conn. 48, 66 A. 1020 (1907).

The rule cited above applies equally to buildings and structures located on the railroad right of way whether owned by the railroad or private landowners. Midland Valley R.Co. v. Pettie, supra, and cases cited therein. In Bottorf v. Spence, 183 N.E.2d 1 (Ill.App. 4 Dist. 1962), the plaintiff sued a landowner, claiming that box cars standing on defendant's property obstructed the view of the railroad crossing resulting in a collision between plaintiff's vehicle and an oncoming train. The Court, affirming the trial court's entry of summary judgment in favor of the defendant-landowner, concluded:

> It is elementary that a complaint must contain facts sufficient to establish a duty on part of the defendant in a cause before we can conclude that a cause of action had been stated . . . On the facts before us it was apparent, as a matter of law, that defendant Spence was not subject to liability to plaintiff for an accident resulting from the simple fact that railroad cars were on his property and obstructed the view of plaintiff who was driving along a state highway . . . The mere placing of cars on a side track so that they obstructed the view of trains approaching an intersection with a highway does not constitute negligence even on the part of the railroad.

183 N.E. 2d at 2 (citations omitted).

The Iowa Supreme Court has considered the issue of whether obstructions to view located on private property and off the traveled portion of a roadway will support a cause of action for negligence. In Fritz v. Parkison, 397 N.W.2d 714 (Iowa 1986), the plaintiff alleged that trees, brush, and shrubs growing on the land of a third-party defendant constituted a sight distance obstruction which was a proximate cause of the accident in which plaintiff was injured. The Court held:

> . . . we have at various times imposed liability against individuals responsible for allowing a highway to become obstructed or hazardous . . . In each of these cases, the traveled way actually was obstructed and in several of them the hazard presented was sudden and unexpected.
>
> By contrast, in this case, Norton's trees did not physically obstruct or in any way intrude upon the traveled portion of the road. Rather, the trees were located off the right-of-way. They neither directly impeded travel nor constituted any kind of latent condition . . . While Norton's trees may have required drivers to proceed with some additional degree of caution, the trees could not reasonably have been expected to pose any significant threat to motorists operating their vehicles in a reasonably prudent manner, and clearly could not be characterized as an unexpected occurrence like a falling limb or a gaggle of geese. It is equally plain the primary responsibility for insuring reasonably safe highways is not imposed on abutting property owners.

397 N.W.2d at 715-16 (citations omitted). The Court affirmed the summary judgment entered by the district court.

Other Courts have upheld the entry of judgment as a matter of law where the negligence claimed is the obstruction of view to

motorists by conditions occurring on abutting property. Pyne v. Witmer, 512 N.E.2d 993, 996-97 (Ill.App. 2 Dist. 1987) (obstruction must be on traveled portion of the road); Evans v. Southern Holding Corp., 391 So.2d 231, 232-33 (Fla. 3d DCA 1980), pet. for review denied, 399 So.2d 1142 (Fla. 1981) (where obstruction does not protrude onto roadway landowner has no duty to maintain his property so that a motorist's view of intersecting traffic is not obstructed).

The duty of Mikes Lines is no greater than the duty owed by a railroad or a private landowner. The decisions of the Iowa Supreme Court make it clear that Mikes Lines owed no duty to Plaintiffs to park its vehicles in such a way to provide Plaintiffs an unobstructed view of the railway. Because the issue of duty is a matter of law for the court and not an issue for the trier of fact, summary judgment is appropriate in the present case and Plaintiffs' Petition should be dismissed.

Respectfully submitted,

FUERSTE, CAREW, COYLE,
JUERGENS & SUDMEIER, P.C.
200 Security Building
Dubuque, Iowa 52001

IN THE IOWA DISTRICT COURT
MUSCATINE COUNTY

CLIFFSTINA CAMPBELL, et al, Plaintiffs, vs PENN-DANIELS INCORPORATED, a Delaware Corporation, d/b/a JACK'S DISCOUNT, INC., an Iowa Corporation; and MUSCATINE PLAZA LIMITED PARTNERSHIP, an Iowa Limited Partnership, Defendants.	LAW NO. C 7624-494

JOINT MOTION FOR SUMMARY JUDGMENT

1 Cross Claimant Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., and Cross Claim Defendant Muscatine Plaza Limited Partnership ask the Court to answer whether Penn-Daniels is entitled to indemnity from Muscatine Plaza Limited Partnership in the amount of $23,928.00 plus attorney fees and costs or whether Muscatine Plaza Limited Partnership is entitled to indemnity from Penn-Daniels in the amount of $1,000.00 plus attorney fees and costs.

2. The injury underlying this Cross Claim happened to a Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., customer, Cliffstina Campbell, while on property owned by Muscatine Plaza Limited Partnership. More specifically the exact

location is shown by photo, diagram and deposition transcript attached to the Joint Statement of Facts.

3. It is the contention of Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., that the Lease, paragraph 1, PREMISES, describes the leased premises to constitute " ... a building of approximately 80,640 square feet (hereinafter the 'Premises') ..." and the continued control by Muscatine Plaza Limited Partnership over the sidewalk and parking lot is found in the Lease, paragraph 1, PREMISES, C:

> "Landlord hereby grants unto Tenant, during the entire term of this Lease, a non-exclusive right and easement for itself, its agents, employees and customers, to use in common with the agents, employees and customers of Landlord and other tenants in the Shopping Center, the automobile parking areas, driveways, footways, and all facilities intended for use in common by the foregoing upon and appurtenant to the Shopping Center (the 'Common Areas'), for the purposes of ingress and egress on foot and by motor vehicles, for parking motor vehicles, for loading and unloading merchandise and for the display of merchandise (provided, however, that any such displays shall be of a temporary nature, and shall be confined to the sidewalks adjacent to the building in which the occupant of the Shopping Center, including Tenant, so displaying merchandise shall be conducting its business ..."

4. It is the contention of Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., that Lease, paragraph 12, LIABILITY INSURANCE, requires additional insured status for Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., and that status did exist. The policy provides in SECTION I - COVERAGES:

> "b. 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to

liability for damages:

(1) Assumed in a contract or agreement that is an 'insured contract,' provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement; ..."

"6. 'Insured contract' means:

a. A lease of premises;"

5. Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., contends the exclusion contained in paragraph 4 of this Motion is inapplicable because the policy of Muscatine Plaza Limited Partnership states:

"6. 'Insured contract' means:

a. A lease of premises;"

Since it is the Lease of the premises that required the insurance coverage that made Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., an additional insured and it was the Lease that made Muscatine Plaza Limited Partnership responsible for its own sidewalks and that afforded Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., insurance coverage for any claim made against it for injuries happening on those sidewalks.

6. It is the contention of Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., that it was an additional insured under Muscatine Plaza Limited Partnership's liability policy and that policy provided a defense to Penn-Daniels Incorporated, d/b/a

Jack's Discount, Inc., in the lawsuit brought by Cliffstina Campbell. See Exhibit H, Joint Statement of Facts. Said policy states in Exhibit J attached to the Joint Statement of Facts:

> "*** We will have the right and duty to defend any 'suit' seeking those damages. ***"

"SECTION I - COVERAGES

"COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

"1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend any 'suit' seeking those damages. We may at our discretion investigate any 'occurrence' and settle any claim or 'suit' that may result. But:

* * *

b. This insurance applies to 'bodily injury' and 'property damage' only if:

(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory;' and

(2) The 'bodily injury' or 'property damage' occurs during the policy period.

* * *

"2. Exclusions.

This insurance does not apply to:

* * *

b. 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability

in a contract or agreement. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an 'insured contract,' provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement; . . "

"6. 'Insured contract' means:

a. A lease of premises;"

7. Muscatine Plaza Limited Partnership (hereinafter MPLP), property owner/lessee and Cross Claim Defendant in this matter, agrees with lessor and Cross Claimant Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc , that there exists no genuine issue as to any material fact in the Cross Claim and, furthermore, that this matter may be resolved by the Court as a matter of law under Iowa Rule of Civil Procedure 237.

8. MPLP contends the undisputed, material facts set forth in the joint statement of undisputed facts establishes MPLP is entitled to judgment as a matter of law on Penn-Daniels' Cross Claim, in which it seeks a judgment against MPLP in an amount of $23,928.00 plus attorney fees and costs.

9. MPLP contends the contractual relationship between MPLP and Penn-Daniels is one of lessee (Landlord) and lessor (Tenant), respectively. The sole legal and contractual relationship between the parties rests in the lease agreement (46 pages plus exhibits) and addendum thereto. (See Exhibit A).

10. MPLP contends under the lease agreement, lessors, including Penn-Daniels, are granted a non-exclusive right and easement to use the footways and other common areas for displaying merchandise See Exh. A., para. 1(C). The lease agreement describes in detail the limitations associated with a lessor, such as Penn-Daniels, displaying merchandise on the footway bordering its inside store premises:

> "[Merchandise can be displayed] . . provided, however, that any such displays shall be of a temporary nature, and shall be confined to the sidewalks adjacent to the building in which the occupant of the Shopping Center, including Tenant, so displaying merchandise shall be conducting its business . . ." Exh. A, para. 1(C) (emphasis added)

11 MPLP contends that in a situation in which a lessor, such as Penn-Daniels, chooses to extend its business outside of its doors and into a common area, such as a footway, pursuant to the terms of the lease agreement, such lessor is assuming temporary control over that portion of the common area and the lessee relinquishes control for the temporary period of time that the lessor voluntarily chooses to conduct business in a common area on or about its premises.

12. MPLP contends, that in such a situation, the lessee's and not the lessor's liability insurance policy, that is required to be maintained under the lease agreement, would provide coverage for accidents occurring in such an area under the dominion and control of the lessor. At the time of the accident, Penn-Daniels carried liability insurance on its premises at the Shopping Center in Muscatine, Iowa. (See Exhibit P.)

13. MPLP contends the lease agreement requires both the lessor (Tenant)

and lessee (Landlord) maintain liability insurance for their respective premises. The agreement provides the following liability insurance clause, which states in part:

> "Tenant shall procure and pay the premium for liability insurance in the amount of Three Million Dollars ($3,000,000.00) per occurrence to protect Tenant and Landlord against liability for injuries to persons and damage to property in, on or about the [Jack's Discount, Inc.] Premises and arising from Tenant's operations therein. Landlord shall be named as an additional insured on any such insurance policy
>
> "Landlord shall procure and pay the premium for liability insurance in the amount of Three Million Dollars ($3,000,000.00) per occurrence to protect Tenant and Landlord against liability for injuries to persons and damage to property in, on or about the Common Area or the other areas of the Shopping Center. Tenant shall be named as an additional insured on any such insurance policy." Exh. A, para. 12 (emphasis added).

14. In defense of the Cross Claim, MPLP contends that in order for its liability insurance policy to be implicated, see Exh. A, para. 12, second paragraph, the accident must have occurred in a common area as defined in the lease agreement, see Exh. A, para. 31.

15. MPLP contends the accident at issue occurred not on a "common area," but rather at an area "on or about the [Jack's Discount, Inc.] Premises," as contemplated by the first paragraph of the liability insurance clause of the lease agreement. (See Exh. A, para. 12).

16. MPLP contends Cliffstina Campbell's deposition testimony shows that she fell on or about the Premises of Jack's Discount, Inc., and not in a common area. She testified "Jack's had flowers on the curb" and she was shopping for the flowers at

the time of the accident. (See Exh. E, at page 4.) She further testified that the shelves Jack's used to house the flowers on display on or about their premises were aligned "even with the curb." And as she came around the curb while looking at Jack's flowers on display, that is when she fell.

17. Therefore, MPLP contends Cliffstina was standing on or about the premises of Jack's Discount and in an area under the exclusive control of Jack's, not in an area under the control of MPLP, at the time of her accident.

18. MPLP contends that because Cliffstina's accident occurred in an area on or about the premises of Jack's Discount, Inc., and not in a common area under the sole control of MPLP, liability insurance coverage could only be obtained to cover damages stemming from the accident through Penn-Daniels' liability insurance contract.

19. Therefore, the Court should find as a matter of law that MPLP did not breach its obligations under the lease agreement as alleged by Penn-Daniels and, furthermore, its liability insurer was not obligated to defend Penn-Daniels in the since-settled, underlying lawsuit by Cliffstina Campbell against Penn-Daniels and MPLP.

WHEREFORE, Cross Claimant, Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., asks that the Court enter judgment against Cross Claim Defendant, Muscatine Plaza Limited Partnership for the entire amount of attorneys' fees and costs incurred by Cross Claimant in defense of the action brought by Cliffstina Campbell and for indemnity for all amounts paid by Cross Claimant to settle that litigation, plus

interest as provided by law and the costs of this action.

WHEREFORE, Cross Claim Defendant, Muscatine Plaza Limited Partnership, respectfully requests the Court enter judgment against Cross Claimant, Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc., for the entire amount of attorney fees and costs incurred by Cross Claim Defendant in defense of the action brought by Cliffstina Campbell and for indemnity for all amounts paid by Cross Claim Defendant to settle that litigation, plus interest as provided by law and the costs of this action.

FUERSTE, CAREW, COYLE, JUERGENS & SUDMEIER, P.C.

By _____
Michael J. Coyle 00000836
200 Security Building
151 West 8th Street
Dubuque, Iowa 52001-6832
(319) 556-4011

Attorneys for PENN-DANIELS INCORPORATED d/b/a JACK'S DISCOUNT, INC.

BETTY, NEUMAN & McMAHON, L.L.P.

By _____
Craig A. Levien SC0003129
600 Union Arcade Building
111 E. Third Street
Davenport, Iowa 52801
(319) 326-4491

Attorneys for MUSCATINE PLAZA LIMITED PARTNERSHIP

IN THE IOWA DISTRICT COURT
MUSCATINE COUNTY

CLIFFSTINA CAMPBELL, et al, Plaintiffs, vs. PENN-DANIELS INCORPORATED, a Delaware Corporation, d/b/a JACK'S DISCOUNT, INC., an Iowa Corporation; and MUSCATINE PLAZA LIMITED PARTNERSHIP, an Iowa Limited Partnership, Defendants.	LAW NO C 7624-494

JOINT STATEMENT OF FACTS

1. April 17, 1992, Cliffstina Campbell was injured in Muscatine, Iowa, on property owned by Muscatine Plaza Limited Partnership and while located in front of a store leased by Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc , from Muscatine Plaza Limited Partnership

2. Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc , paid consideration in exchange for a RELEASE, attached and marked Exhibit B, which was a fair and reasonable sum to pay and justly due and owing for the said injury, further Cliffstina Campbell's lawsuit filed in Muscatine County against said landlord and tenant was dismissed with prejudice.

3. Muscatine Plaza Limited Partnership paid consideration in exchange for a RELEASE, attached and marked Exhibit C.

4. Attached, marked Exhibit E, is Cliffstina Campbell's deposition testimony about where the injury happened.

5. Exhibit F attached is the pending Cross Claim which includes the Lease under which Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc , seeks indemnity.

6. Exhibit G attached is the Answer to Cross Claim.

7. Exhibit H attached is a certificate showing Penn-Daniels Inc. was an additional insured under the liability policy issued to Muscatine Plaza Limited Partnership.

8. Exhibit I is a schedule of covered locations, a part of the liability policy issued to Muscatine Plaza Limited Partnership showing the Muscatine, Iowa, store is insured.

9. Exhibit J is a part of the liability policy issued to Muscatine Plaza Limited Partnership.

10. Photographs are attached showing the general location, these are marked Exhibits L, M and N. Exhibit O attached is a diagram drawn during the deposition of Cliffstina Campbell. The X on the diagram and the photo was placed there by Cliffstina Campbell to show where she fell.

11. Exhibit P is the declarations page of Penn-Daniels' commercial liability

policy that was in effect, pursuant to the lease agreement, at the time of the accident on April 17, 1992.

12. Exhibit Q is a copy of a statement of attorney fees and costs incurred by Muscatine Plaza Limited Partnership as a result of defending Penn-Daniels' Cross Claim. The fees and costs are fair, necessary and reasonable.

13. Exhibit R is a copy of a statement of attorney fees and costs incurred by Penn-Daniels Incorporated, d/b/a Jack's Discount, Inc. The fees and costs are fair, necessary and reasonable.

FUERSTE, CAREW, COYLE, JUERGENS & SUDMEIER, P.C.

By _____
Michael J. Coyle 0000001036
200 Security Building
151 West 8th Street
Dubuque, Iowa 52001-6832
(319) 556-4011

Attorneys for PENN-DANIELS INCORPORATED d/b/a JACK'S DISCOUNT, INC.

BETTY, NEUMAN & McMAHON, L.L.P.

By _____
Craig A. Levien SC0003129
600 Union Arcade Building
111 E. Third Street
Davenport, Iowa 52801
(319) 326-4491

Attorneys for MUSCATINE PLAZA LIMITED PARTNERSHIP

IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

PREFERRED RISK GROUP,

Plaintiff,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, et al.,

Defendants.

LAW NO. LACV 50424

MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants, Fidelity Guaranty Insurance Co. and USF&G Insurance Company (collectively "USF&G"), and move for entry of summary judgment dismissing Plaintiff Preferred Risk Group's ("Preferred's") claim against USF&G. In support of this motion, USF&G states:

1. Preferred's Petition alleges a claim for contribution arising out of its payment of a property insurance claim by Clarke College under an insurance policy issued to Clarke College by Preferred.

2. Iowa law requires common liability before there may be a contribution claim.

3. As a matter of law, Preferred did not discharge any obligation owed in whole or in part by USF&G.

4. Upon the facts not in material dispute USF&G is entitled to judgment in its favor as a matter of law dismissing Preferred's contribution claim.

IN THE IOWA DISTRICT COURT
DUBUQUE COUNTY

PREFERRED RISK GROUP, Plaintiff, vs. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, et al., Defendants.	LAW NO. LACV 50424

STATEMENT OF MATERIAL FACTS
NOT IN GENUINE DISPUTE -
USF&G'S MOTION FOR SUMMARY JUDGMENT

1. Preferred insured Clarke College. No provision of the Preferred policy indicates that Swanson Gentleman Hart, Inc. (Swanson) is an additional insured. [Preferred Policy]

2. Preferred admits that it paid only Clarke College and only for Clarke College's damage and loss. [Petition, Par. 11]

3. USF&G insured Swanson. The only property insurance coverage provided therein relevant to the Clarke College project was "Installation Coverage." No provision thereof insured Clarke College. [USF&G policy]

4. Preferred has admitted that it has no subrogation claim and is not bringing any direct action against any defendant insurer. [Preferred's January 18, 1996 Brief in Support of Resistance to Motions to Dismiss, pp. 4-5]

EFFECTIVE USE OF VIDEO DEPOSITIONS

Guy R. Cook

Grefe & Sidney, P.L.C.
2222 Grand Avenue
Des Moines, Iowa 50312

EFFECTIVE USE OF VIDEO TECHNOLOGY IN LITIGATION

Guy R. Cook

INTRODUCTION

We are living in an increasingly visual world. Newspaper readership is down. More and more people gather their news and other information from TV. Computerization and high technology surround our daily lives and continue to increase. The average American home is said to have a TV in use seven hours per day. This article will address how video technology can be effectively used in litigation.

Videotape technology has clearly undergone a striking growth in just the last few years. The videotape recorder, which was once a cumbersome apparatus used to create instant but poor quality recordings, is now a ubiquitous device at every school play, soccer match, and family gathering. The improvement of videotape technology and the widespread acceptance of videotape as a means of recording creates a new opportunity for the use of videotape in litigation, both in discovery and at trial.

LITIGATION IN A VISUAL WORLD

Many effective ways exist for recording and presenting evidence. Each approach has its benefit and specific strength. Many experts recognize, however, that a key to persuasion is to "think visual" and to present information in a visually educational way. Studies indicate that 75 percent of what we learn is through our eyes. We are five times as likely to remember something we **see**

and hear than something we merely hear. It has been said that people are twice as likely to be persuaded by arguments which are buttressed with visual aides, such as charts or drawings. A videotape provides an even more powerful medium for persuasion.

Jurists today are a product of the television age; they are accustomed to video. Many have been exposed to court TV, CNN, and other court-focused television programs, as well as the high profile television trials such as the O. J. Simpson case. With these factors in mind, creative counsel can use videotape to improve persuasion and communication, to reveal an opponent's intentional and inadvertent misrepresentations, and to capture the interest and attention of jurors who ultimately will be called upon to decide a case.

New technology allows the deposition, recorded on videotape or transferred to laser disc, to be searched for inconsistent testimony in the same manner as the computerized transcript is searched. The showing on television of an inconsistent answer has much more impact on the jury than a mere reading of the transcript. Combining a witnesses poor appearance on TV with the substantive inconsistencies can make for devastating impeachment.

RECORDING DEPOSITIONS

Over the past decade or so, a body of law has developed establishing guidelines for the use of videotape during litigation and discovery. Under Iowa Rule of Civil Procedure 140(b)(4), the deposition may be recorded by other than stenographic means:

> "The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may

include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at that party's own expense. **Leave of court is not required to record testimony by nonstenographic means if the deposition is also to be recorded stenographically."**

The Federal Rules of Civil Procedure were not, until recently, as liberal. Under previous Rule 30, videotaped depositions required consent of the party to be examined or leave of court. Amended Rule 30(b)(2) provides that any deposition may be taken by videotape, subject only to notice to all counsel. The examined party can object and obtain a court order barring use of the videotape for good cause, but absent a court order, the video camera can roll.

THE VALUE OF VIDEOTAPED DEPOSITIONS

Not only does a videotaped deposition recognize and play to the visual world we live in, but videotape can be valuable to record nuances in the opposing party's demeanor, manner of speech, facial expressions, and body position that otherwise would be lost in a stenographic transcript of the deposition. Long delays between questions and answers, periods when the opposing party looks confused or looks to counsel for guidance, and periods of anger or surprise, are recorded as they occur.

An opposing party who is surprised or taken off guard by a series of questions at a deposition recorded only by a stenographer has the opportunity to confer with counsel following the deposition and present a more composed or polished demeanor at the time of trial. The video camera, however, captures the opposing party's true reactions and responses to unforeseen questions, and preserves

them in their entirety for the jurors' evaluations. In addition to preserving the nuances and expressions, the recording will show the precise nature of all aspects of the opposing party's testimony. Video testimony is undoubtedly also more interesting than transcript testimony which is read in court.

Following the deposition, counsel, clients, and others may review and analyze the videotape to find weaknesses, such as non-verbal clues indicating uncertainty during the testimony.

A video recording of a deposition can also preserve facts and circumstances, other than testimony, which otherwise could be subject to misrepresentation at trial. Videotaping a deposition can be useful to deal with the "surprise disability". This is certainly not an uncommon circumstance. We are all can think of a case where an allegedly injured party exhibits no disability nor signs of discomfort sitting for extended hours during the course of a deposition; but by at trial, has developed a limp, signs of discomfort, or other outward manifestations of pain. Additionally, there are many cases where a party presents themselves in a particular dress or hair style at a deposition and at trial suddenly has been cleaned up or dressed down depending on how the presentation will enhance the party's case. A video recording of all aspects of the witness's behavior can act to discourages such tactics.

Video depositions can also be useful in controlling the obstreperous witness or adversary. Videotape of the witness and/or counsel can act to inhibit unruly adversaries from carrying on their full act. With the camera angle set wide enough to capture

counsel and the witness, the presence of a visual record may itself prevent counsel from cuing the witness with hand signals, nods, or speaking objections; it may also prevent questioning counsel from attempting to annoy, embarrass, or harass the deponent. Videotaping the deposition eliminates the opportunity for counsel to behave one way in a deposition and another way at trial. Even if the videotape does not act to inhibit the unruly adversary, it provides a record to be played to the judge, or even better for the jury.

RECORDING ACTIVITIES, REENACTMENTS, AND DEMONSTRATIONS

One of the best uses of video technology is to record a party's demonstration of how the incident occurred, the obviousness of the risk involved, or the actual operation and use of an allegedly defective product.

Court opinions seem to encourage the use of videotape technology whenever it would increase the jurors' understanding of the events by providing further clarity or description. See, e.g., Carson v. Burlington Northern, Inc., 52 FRD 492 (D. Neb. 1991) (plaintiff lost part of his hand when a steel press in a blacksmith's shop came down upon it; the court allowed a video for the purposes of showing the manner in which the plaintiff approached and operated the machine immediately prior to and at the time of the alleged accident); Brown v. Bridges, 320 So.2d 874 (Fla. App. Ct. 1976) (the court allowed a video to demonstrate karate maneuver used by plaintiff prior to accident); Rozumalski v. General Motors, 109 FRD 664 (W.Dist. N.Y. 1989) (plaintiff required to demonstrate on tape the manner in which he was wearing a seatbelt prior to the

time of an accident). A recent case from California discusses at some length the question of whether a witness in a deposition can be required to reenact an accident. In the case of Grayson v. Emerson Electric, 49 Cal. App. 4th 931, 56 Cal. Rptr. 2d 897 (1996), the plaintiff filed a product liability suit arising from injuries from the use of a radial saw. At plaintiff's videotaped deposition, defense counsel asked the plaintiff to diagram the accident and reenact at using the saw. Plaintiff's counsel refused to permit the activity. Defense counsel respond with a motion to either bar any non-verbal evidence at trial or to compel the requested activities. The trial court denied the motion to either bar the non-verbal evidence at trial or to compel the requested activities.

The appellate court reversed. It held it proper to request reenactments or diagrams, and if plaintiff refused to comply, the trial court could consider barring reenactments at trial. The court reasoned that reenactments are proper because the rules provide that videotaped depositions shall proceed "as permitted at trial" and that reenactment would be permitted at trial.

One of the implications of the Grayson decision is that if the plaintiff refuses to reenact an accident, the trial court may preclude a reenactment at trial absent some extenuating circumstances. Another implication is if a motion to bar non-verbal testimony is granted, the plaintiff may be precluded from using computerized examinations or even having counsel sketch on an easel.

A demonstration or reenactment captured on videotape is undoubtedly more valuable than any verbal description which could possibly be recorded by ordinary stenographic means. Videotape can obtain precise and accurate representations of the critical aspects of the plaintiff's claims and defenses.

A videotape of the scene of the accident, the obviousness of the risk, or other excerpts relating to the circumstances of the case can also be used effectively in the examination of a witness at a videotaped deposition. Videotape technology allows one to videotape, for example, the obviousness of plaintiff's condition and then play that videotape at the videotape examination of the witness. Previously obtained videotape can be used as any other exhibit at the videotaped deposition and then seamlessly inserted into the videotaped testimony. This can be particularly useful in facilitating the concepts of "primacy" and "recency". By blending the videotaped testimony of the witness with the videotaped exhibit, counsel can strongly influence and underline a juror's perception of the evidence.

PROCEDURES FOR VIDEOTAPING

As discussed previously in this outline, leave of court is not required to record testimony by nonstenographic means if the deposition is also recorded stenographically under the Iowa Rules of Civil Procedure. Under the Federal Rules of Civil Procedure, the party taking the deposition must state in the notice the method by which the testimony is to be recorded. Unless the court orders otherwise, it may be recorded by sound, sound and visual, or stenographic means. Any party may arrange for a transcription to

be made from the recording of a deposition taken by nonstenographic means. Fed. R. Civ. P. 30(b)(2). It would seem to be a good practice, however, to have a stenographer simultaneously record the deposition, as well as a videographer. Use of the stenographic recording as well as the videotape serves as a backup to the possible loss of the deposition testimony on tape and to permit review of the testimony without having to watch the videotape. Additionally, a number of new software programs exist whereby the transcript can be electronically tied to the videotape counter for precise location of the testimony.

It is also a good practice to have an independent video operator. Since a typical stenographer cannot be a party, an employee of a party, or the attorney for a party, those operating the videotape should also have the same neutrality or independence. It is suggested that the camera operator should identify himself, state the date and time the taping commenced, the location and persons present, as well as the time at any time the camera is turned off. Use of a time code on the videotape is essential to ensure accuracy of the timing and to prevent any claim that the tape has been edited by unauthorized persons.

Where counsel is submitting a witness or party to an adverse deposition there are additional considerations. One should be comfortable that the backdrop behind the witness is not distracting or prejudicial. One may wish to consider a royal blue backdrop of the type seen at news conferences. Such backdrops are inexpensive or can be supplied by the videographer.

Some additional tips are as follows:

1. Position the camera behind the examiner and have it shoot over his shoulder. This saves the witness from the dilemma of whether to look at the examiner or the camera. Turning to look at the camera is unnatural and difficult and may convey a bad impression to the jury. If you are taking the videotaped deposition, you may wish to consider positioning the camera differently.

2. Encourage your witness to answer the questions as quickly as possible. Dead air can be the kiss of death in a videotaped deposition. Delays in answering the question can cause the witness to appear to be evasive or lack credibility.

3. Make sure the chair the witness is sitting in is not moveable or encourages the witness to slump. A slouchy witness or one that is spinning in the chair obviously creates a poor visual image and may suggest to the jury that the witness is nervous, caving in, or has been defeated.

The federal rules and Iowa rules do not detail the specific manner in which the videotaped deposition must be staged. If you are taking the deposition, you may wish to use only one camera and subject the witness to the scrutiny and pressure of the camera. You, as the questioner, can relax, review notes, and confer with colleagues without the unending stress of being on camera continuously.

Where your witness is being deposed by an adverse party, however, the use of two camera may be advisable with one on the questioner and one on the witness to be recorded. The two

simultaneous images can be incorporated later into a split screen video. This technique avoids the prejudice naturally inherent when the witness's answers are being preserved on video, but the attorney asking the questions is not seen on film. It is important to note, however, that some states' rules of procedure require that the video camera only be focused on the witness being questioned.

Finally, in considering the procedures and methods to be used, remember that litigation in a trial is still about the interaction between people. Counsel should concentrate on developing jury rapport before using any videotaped testimony or demonstrations. One must ensure that the jury trusts the messenger in order to trust what is being shown. The trusted advocate will never look slick with videotape technology. Presentation tools do not replace the sincere advocate, they enhance the advocate's ability to convey the critical facts or theme of the case.

LET'S GO TO THE VIDEOTAPE

I have collected a number of excerpts from videotaped depositions to demonstrate and exemplify the persuasive nature of videotape in discovery and litigation.

CONCLUSION

Videotape technology offers a more effective way to record and present testimony and other evidence. The video screen plays to the natural bias we all have to the visual world and television age. A picture is truly worth a thousand words, and a moving picture is worth even more. Litigation has become increasingly sophisticated and one should be alert to the advantages to be gained through the use of video technology. Video technology can

be used to enhance evidence gathering and provide demonstrations when verbal descriptions may be woefully inadequate. There is no doubt that video is a powerful tool. Remember, however, that videotape can be turned against you by certain witnesses in a way that a cold transcript cannot. Thus, one should carefully and creatively consider when and under what circumstances to make use of video technology.

ETHICAL RESPONSIBILITIES OF THE ATTORNEY IN DEALING WITH AN UNCOOPERATIVE CLIENT

John D. Stonebraker
McDONALD, STONEBRAKER & CEPICAN, P.C.
3432 Jersey Ridge Road
PO Box #2746
Davenport, IA 52809

I. Who is the Client?

A. The insured?

The Michigan Court of Appeals says yes, Atlanta International Insurance Company v. Bell, et al., 448 NW2d 804 (1989). In this case, Atlanta International Insurance sued Bell and his law partners for malpractice in defending litigation on behalf of its insured, Security Services. Defendants moved for summary judgment, claiming that its client was solely the insured, and not the insurer, and that therefore, no duty existed from the law firm to the insurer. In granting summary judgment, the Court said:

> "Accordingly, to the extent that a 'contract' does exist in this case, it exists between defendants and the insured client, Security Services. At most, it can be said that plaintiff was acting as the agent of its insured client, Security Services, in arranging representation by defendants of the insured client and guaranteeing payment for those services..... Indeed, no such contract [between the carrier and the attorneys] can exist as it would be ethically improper for defendants to have contractually bound itself (sic) to plaintiff when defendant's duty and loyalty was owed to the insured client. MRPC 5.4(c). Moreover, even if such a contract between plaintiff and defendants were to actually exist, it would be unenforceable as violative of public policy since it would impermissably interfere with the attorney-client relationship between defendants and the insured client."

B. The insurer?

Conceptually, it is easy and tempting to answer this question in the affirmative. The insurer retains the right to control the litigation by policy language substantially similar to the following:

> "We will defend or settle any suit or claim for damages payable under this policy as we deem proper."

As the insurer retains the rights and discretions to control the litigation, the attorney becomes the instrument of that power, to the exclusion of the insured, in the typical case where there is no excess exposure.

C. Both the insurer and the insured?

The majority view is that there is a tri-partite relationship between the insured, the insurer and the attorney:

> "The attorney has two clients whose primary overlapping and common interest is the speedy and successful resolution of the claim and litigation. Conceptually, each member of the trio, attorney, client-insured and client-insurer has corresponding rights and obligations founded largely on contract, and as to the attorney, by the Rules of Professional Conduct as well. The three parties may be viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim or litigation against the insured, American Mutual Liability Insurance Company v. Superior Court for Sacramento County, 113 Cal. Rptr. 561, 571 (Cal. App., 1974)."

Iowa conforms to the majority view, Henke v. Iowa Home Mutual Casualty Co., 249 Iowa, 614, 87 NW2d 920 (198).

II. Cooperation Clause

A. Typical Cooperation Agreement

> Each person claiming any coverage under this policy must:
>
> a) Promptly notify us of the time, place and details of accidents, including names and addresses of injured persons and witnesses;
> b) Promptly transmit all suit papers received to us; and
> c) Assist us in any claims or suits.

The Cooperation Clause has been held to be a valid means of advancing and protecting the interests of the insurer, and a means of preventing, or at least discouraging collusion between the insured and the plaintiff.

B. Classes of uncooperative clients:

1) Busy professional

2) Apathetic

3) Nomad

III. Ethical Dilemma is - what happens when the insured to whom you owe undivided loyalty, breaches or threatens to breach his contractual obligation to cooperate with your other client, the insurer?

In another context, the Iowa Supreme Court has held that a fiduciary duty arises between an insurer and an insured with respect to coverage issues when the insurer is required to defend a lawsuit, North Iowa State Bank v. Allied Mutual Insurance Company, 471 NW2d 824, 829 (Iowa 1991). Therefore, the attorney, as the extension of the insurer, owes a duty of trust and confidence to the insured, Parsons v. Continental National American Group, 550 P. 2d 94, 99 (Ariz. 1976). Mallen and Smith, Legal Malpractice, West Publishing Company (1989) p. 369.

A. Categories of cooperation disputes

1) Failure to report claim

2) Failure to forward suit papers

3) Failure to provide statement

4) Failure to sign answers to interrogatories

5) Failure to attend deposition

6) Failure to attend trial

B. Other problems

1) Insured's desire to enter plea, see Farm and City Insurance Company v. Hassel, 197 NW2d 360 (1972)

2) Insured's desire to reject settlement proposal, see ABA Standing Committee on Ethics and Professional Responsibility formal opinion 96-406 (August 2, 1996).

3) Confidential and privileged communications:

(a) A lawyer retained by an insurer to represent an employer and employee who learns from the employee-client that the employee may not be entitled to coverage may not disclose the pertinent facts to the employer or the insurer without the employee-client's consent after full disclosure of the consequences of the revelation, ABA Standing Committee on Ethics and Professional Responsibility informal opinion 1476 (August 11, 1981).

(b) Where the lawyer hired by the insurance company receives information from the insured that may result in a finding by the trier of fact that there is no coverage, the lawyer may not disclose such information to the insurer. The lawyer must withdraw his appearance, and the insurer will not be permitted to control, or even to participate in, the defense. At that point, the insurer's duty to defend is a continuing one, and is satisfied by reimbursement of the insured for the attorney's fees charged by the attorney of the insured's choosing, Illinois League Risk Management Assn. v. Terry Seibert, 223 Ill. App. 3D 864, 585 NE2d 1130 (1992).

IV. An ounce of prevention is worth a pound of cure:

1) Introductory letter [Attachment A]

2) Set up an office conference as early as possible

3) Visit the accident scene with the insured

4) Send informational copies of pleadings and correspondence with explanations if necessary

5) Send proposed interrogatory answers with a stamped self-addressed mailer with extra postage

6) Offer to speak to the insured's employer to facilitate work absences [Attachment B]

V. What if none of this works?

A) Reasonable diligence standard has been adopted by the Iowa Supreme Court, American Guarantee and Liability Insurance Company v. Chandler Manufacturing Company, et al., 467 NW2d 226 (Iowa 1991). [Attachment C]

B) Is there prejudice to the defense when fault is admitted?

ATTACHMENT "A"

(DATE)

Dear Joe:

I have been asked to defend your interests along with those of *(NAME OF INSURANCE COMPANY)* in an action which is now pending in _____ County District Court. Our representation is at no cost to you. *(OPPOSITION)* claims injuries arising from an automobile accident which occurred on or about *(DATE)* at *(PLACE OF ACCIDENT)*.

I have filed an answer generally denying the claims of fault and damages set forth in the lawsuit. I have served a series of written questions called "interrogatories" and a Request for Production of Documents. Responses should be on file within about 45 days. Information and materials provided by the plaintiff and her lawyers will assist us in evaluating her claims and preparing for trial or settlement.

From time to time, it will be necessary for you to cooperate with my office in preparing answers to interrogatories sent to us by the other side, in giving your deposition, responding to a request for production of documents and by attending the trial if the case cannot be settled for a reasonable amount. Cases like this typically last about 18 months from the time that we receive the assignment until the trial date. Please allow about ___ days for trial attendance.

In the meantime, please do not discuss this case with anyone except your personal attorney or me. If anyone attempts to discuss the case with you or attempts to take your statement, please refer that individual to me.

If you would like to discuss this case in detail or if you have any questions, please either contact me by telephone or advise my secretary, Sherry, that you would like an appointment. She will be happy to schedule an appointment for a mutually convenient time.

I will probably be able to give you at least two weeks' notice before your direct participation is necessary. Under normal circumstances, I will also be able to give you several months' notice before the trial occurs. Please keep me advised of any change of address or telephone number that might occur during the period of our representation.

Part of our duty is to keep you advised of all material developments. If you have any questions or comments at any time, please feel welcome to call me.

Very truly yours,

McDONALD, STONEBRAKER & CEPICAN, PC

John D. Stonebraker

JDS/sn

ATTACHMENT "B"

Dear _____:

We have scheduled your deposition here in our offices at 10:00 a.m. on Monday, December 1, 1997.

Basically, a deposition is a question and answer session on the record with a court reporter present who takes down the testimony given under oath. Depositions are important for at least two reasons. First, they give an opportunity for the lawyers to evaluate the "demeanor," that is, the appearance that a witness will make before a jury. Second, the testimony given should be substantially the same as the testimony which is introduced at the time of trial. As you can see, a deposition is a very important part in the preparation of a case for trial.

I would like to meet with you beginning at 8:00 a.m. on December 1 in order to prepare you for your testimony. If a subpoena is necessary for your employer, please let me know as soon as possible. Usually showing a copy of this letter to an employer is sufficient to excuse you from work. However, if you feel it would be helpful, I will be happy to speak with your immediate supervisor to explain the importance of this event.

Please call to confirm your availability. I will be happy to answer any questions you might have. If I am unavailable, please speak with my secretary, Sherry.

I will wait to hear from you, and thank you for your continuing cooperation.

Very truly yours,

McDONALD, STONEBRAKER & CEPICAN, PC

John D. Stonebraker

JDS/sn

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, A New York Corporation, Appellant,

v

CHANDLER MANUFACTURING CO., INC. and Louis Liska, Defendants,

and

Maxwell City, Inc., d/b/a Craft Industries and Illinois Industrial Tool, Appellees.

No. 90-147.

Supreme Court of Iowa.

March 20, 1991.

Insurer brought declaratory judgment action seeking to void duty to indemnify insured after third party secured judgment against insured in separate products liability action. The District Court, Webster County, Louie F. Beisser, J., held for insured, and insurer appealed. The Supreme Court, Schultz, J., held that insurer could not avoid its obligation under liability policy, where evidence supported finding that insurer failed to exercise reasonable diligence in obtaining insured's cooperation in defending action.

Affirmed

1. Insurance ⇐594.3(2)

Judgment creditor is required to stand in position of debtor when seeking coverage under debtor's liability policy.

2. Insurance ⇐646

Party claiming coverage in dispute over breach of condition precedent to insurer's liability generally has burden of proving compliance with condition, which may be met by showing that it has substantially complied with condition precedent, that failure to comply was excused or waived, or that failure to comply was not prejudicial to insurer.

3. Insurance ⇐646

Insured's substantial breach of condition precedent to insurer's liability, which is not excused or waived, must be presumed prejudicial to insurer.

4. Insurance ⇐514.21(1)

In dispute regarding breach of conditions precedent to insurer's liability to judgment creditor, insurer had burden of going forward with evidence of insured's alleged noncooperation; insurer had possession of files on transactions with insured and, thus, possessed firsthand knowledge of lack of cooperation by insured.

5. Insurance ⇐514.21(3)

Insurer met burden of proof of showing noncooperation of insured in light of evidence that insured's president failed to answer numerous letters, failed to return interrogatories, called insurer's lawyer once, and did not appear at trial.

6. Insurance ⇐514.17

Cooperation clause in liability policy applies to conduct of insured in proceedings subsequent to notice of loss, claim, or suit, and prior to determination of insurer's liability.

7. Insurance ⇐514.17

Purpose of cooperation clause in liability policy is to protect insurer and prevent collusion between insureds and injured parties.

8. Insurance ⇐514.17

Insurer's and insured's obligations under cooperation clause of liability policy are reciprocal; insured must cooperate with insurer and insurer must use reasonable diligence in obtaining insured's cooperation.

9. Insurance ⇐514.17, 514.21(1)

Issue of insurer's use of reasonable diligence in attempting to induce cooperation from insured is element of determination of whether insured has breached cooperation clause, but does not shift or change burden of proof on prejudice from insured's failure to cooperate.

10. Insurance ⇐514.21(3)

Evidence supported trial court's finding that liability insurer failed to use reasonable diligence in seeking insured's cooperation in defending products liability lawsuit by third party, so insurer could not

ing placement of the burden of proof in a case in which breach of a cooperation clause was claimed. *Western Mut. Ins. Co. v. Baldwin*, 258 Iowa 460, 472, 137 N.W.2d 918, 925 (1965).

[4] We have varied these established rules regarding placement of the burden of proof when an action against an insurer is commenced by a judgment creditor of the insured, rather than by the insured itself. *Haynes*, 199 N.W.2d at 85–86. We relied upon the principle that "the burden of proving a factual issue . . . should rest upon the party who has possession of facts or information lacking to the other." *Id.* (citations omitted). We concluded that since the insurer maintained files on its transactions with the insured, it possessed firsthand knowledge of any lack of cooperation on the part of its insured. *Id.* at 85. We further held that the judgment creditor did not have the burden of going forth with the evidence concerning compliance with the cooperation clause. *Id.* at 86. We also noted that our holding in *Haynes* did not alter the rule announced in *Henschel* requiring the party claiming coverage to prove the insured's compliance and cooperation with policy terms. *Id.*

The facts of this case and *Haynes* are similar. Maxwell is a judgment creditor of the insured, Chandler. Therefore, we conclude that the insurer, American, had the burden of going forward with the evidence on the issue of Chandler's noncooperation.

[5] In our de novo review, we find that American met the burden of proving the noncooperation of its insured Chandler. We now turn to issues concerning the insurer's use of reasonable diligence under the cooperation clause.

B. *Reasonable diligence.* The trial court concluded that the cooperation clause of the insurance policy required both the insured's cooperation and the insurer's use of reasonable diligence in obtaining that cooperation. However, neither the court nor Maxwell cited any Iowa case law in support of this reasonable diligence requirement. Instead, it relied on authority from other jurisdictions in imposing a reasonable diligence requirement on American. *Lappo v. Thompson*, 87 Ill.App.3d 253, 42 Ill.Dec. 531, 409 N.E.2d 26 (1980); *Rieschl v. Travelers Ins. Co.*, 313 N.W.2d 615 (Minn.1981).

In its appellate briefs, American does not seriously challenge the trial court's requirement that an insurer exercise reasonable diligence in obtaining the cooperation of its insured. Rather, American simply contends that it in fact met this requirement and such a requirement should not change the presumption of prejudice to the insurer under Iowa law. Nevertheless, we must first determine whether a reasonable diligence requirement should be imposed on insurers under Iowa law.

[6, 7] We first examine a cooperation clause of an insurance policy. A cooperation clause applies to conduct of the insured in the proceedings subsequent to the notice of the loss, claim or suit and prior to a determination of an insurer's liability. 8 J. Appleman & J. Appleman, *Insurance Law & Practice* § 4771, at 211–12 (1981). The purpose of a cooperation clause is to protect insurers and prevent collusion between insureds and injured parties. *Id.* at 213. The question of cooperation under a policy's cooperation clause involves not only the good faith of the insured but also the good faith of the insurer. *Id.* at 221.

[8] The majority rule appears to be that the insurer's and insured's obligations under a cooperation clause are reciprocal; the insured must cooperate with the insurer and the insurer must use reasonable diligence in obtaining the insured's cooperation. *Id.* at 221 n. 13; M. Rhodes, 14 *Couch on Insurance 2d* § 51:119, at 624–25 (rev. ed. 1982); 44 Am.Jur.2d *Insurance* § 1438, at 385–86 (1982); *see also* Annotation, *Liability Insurance: Failure or Refusal of Insured to Attend Trial or to Testify as Breach of Cooperation Clause*, 9 A.L.R.4th 218 § 5 (1981); *see, e.g., Lappo v. Thompson*, 87 Ill.App.3d 253, 254–55, 42 Ill.Dec. 531, 533, 409 N.E.2d 26, 28 (1980); *Smithers v. Mettert*, 513 N.E.2d 660, 662 (Ind.Ct.App.1987); *Allen v. Atlantic Nat'l Ins. Co.*, 350 Mass. 181, 183, 214 N.E.2d 28, 29–30 (1966); *Rieschl v. Travelers Ins. Co.*,

313 N.W.2d 615, 617 (Minn.1981); *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168, 225 N.E.2d 503, 508, 278 N.Y.S.2d 793, 800 (1967); *Bailey v. Universal Underwriters Ins. Co.*, 258 Or. 201, 474 P.2d 746, 757 (1970); *Peterson v. Western Casualty & Sur. Co.*, 19 Utah 2d 26, 30–31, 425 P.2d 769, 771–72 (1967). We believe that the stated majority rule is sound and should be adopted by this court. The rule basically requires the insured and insurer to act diligently when a liability claim arises.

[9] We find no merit in American's claim that the reasonable diligence requirement places the burden of proving prejudice on the insured. The insurer does not receive the benefit of a favorable presumption of prejudice until it is established that the insured breached the cooperation clause. The insurer's use of reasonable diligence is simply an element in the determination of whether the insured has breached the cooperation clause. The adoption of this rule adds an element of proof in determining whether the cooperation clause has been breached; it does not shift or change the burden of proof on prejudice.

Consequently, we hold that an insurer cannot avoid its obligation on a policy because of an insured's breach of a cooperation clause unless it exercises reasonable diligence in securing the insured's cooperation. The trial court correctly arrived at this same conclusion.

[10] II. *Proof of reasonable diligence.* In our de novo review, we agree with the trial court's finding that American failed to use reasonable diligence in seeking Chandler's cooperation in defending the products liability lawsuit. American's claims office in Kansas City merely corresponded with George Chandler concerning the lawsuit. American suggested that George cooperate with its lawyer in Ft. Dodge, Iowa, even though it knew that George was a resident of Evanston, Illinois. It did not utilize its claims office and personnel in an area near Evanston to personally contact George. After a careful review of American's correspondence and its actions and inferences therefrom, we find that American was more concerned with making a paper trail to document George's noncooperation than in securing his cooperation in defending the lawsuit. Although George Chandler was accessible, American never took his personal statement, his deposition, or attempted to secure his presence at trial. The trial court correctly concluded that American's conduct fell short of reasonable diligence.

III. *Summary.* We hold that the insurer, American, cannot avoid its obligation under the policy because it failed to exercise reasonable diligence in obtaining Chandler's cooperation. Therefore, we affirm the trial court's denial of American's declaratory judgment petition.

AFFIRMED.

Ron MONSON, Appellant,

v.

IOWA CIVIL RIGHTS COMMISSION; Inga Bumbary-Langston, as Director of the Iowa Civil Rights Commission; and Martin Marietta Aggregates, Inc., Appellees.

No. 90–72.

Supreme Court of Iowa.

March 20, 1991.

Employee who was terminated after he missed extended periods of work to care for his terminally ill child sought relief from Civil Rights Commission, alleging his termination was product of vicarious disability discrimination. The Commission rejected employee's claim, and he petitioned for judicial review. The District Court, Cerro Gordo County, Paul W. Riffel, J., dismissed the action on jurisdictional grounds, and employee appealed. The Su-

ing placement of the burden of proof in a case in which breach of a cooperation clause was claimed. *Western Mut. Ins. Co. v. Baldwin*, 258 Iowa 460, 472, 137 N.W.2d 918, 925 (1965).

[4] We have varied these established rules regarding placement of the burden of proof when an action against an insurer is commenced by a judgment creditor of the insured, rather than by the insured itself. *Haynes*, 199 N.W.2d at 85–86. We relied upon the principle that "the burden of proving a factual issue . . . should rest upon the party who has possession of facts or information lacking to the other." *Id.* (citations omitted). We concluded that since the insurer maintained files on its transactions with the insured, it possessed firsthand knowledge of any lack of cooperation on the part of its insured. *Id.* at 85. We further held that the judgment creditor did not have the burden of going forth with the evidence concerning compliance with the cooperation clause. *Id.* at 86. We also noted that our holding in *Haynes* did not alter the rule announced in *Henschel* requiring the party claiming coverage to prove the insured's compliance and cooperation with policy terms. *Id.*

The facts of this case and *Haynes* are similar. Maxwell is a judgment creditor of the insured, Chandler. Therefore, we conclude that the insurer, American, had the burden of going forward with the evidence on the issue of Chandler's noncooperation.

[5] In our de novo review, we find that American met the burden of proving the noncooperation of its insured Chandler. We now turn to issues concerning the insurer's use of reasonable diligence under the cooperation clause.

B. *Reasonable diligence.* The trial court concluded that the cooperation clause of the insurance policy required both the insured's cooperation and the insurer's use of reasonable diligence in obtaining that cooperation. However, neither the court nor Maxwell cited any Iowa case law in support of this reasonable diligence requirement. Instead, it relied on authority from other jurisdictions in imposing a reasonable diligence requirement on American. *Lappo v. Thompson*, 87 Ill.App.3d 253, 42 Ill.Dec. 531, 409 N.E.2d 26 (1980); *Rieschl v. Travelers Ins. Co.*, 313 N.W.2d 615 (Minn.1981).

In its appellate briefs, American does not seriously challenge the trial court's requirement that an insurer exercise reasonable diligence in obtaining the cooperation of its insured. Rather, American simply contends that it in fact met this requirement and such a requirement should not change the presumption of prejudice to the insurer under Iowa law. Nevertheless, we must first determine whether a reasonable diligence requirement should be imposed on insurers under Iowa law.

[6, 7] We first examine a cooperation clause of an insurance policy. A cooperation clause applies to conduct of the insured in the proceedings subsequent to the notice of the loss, claim or suit and prior to a determination of an insurer's liability. 8 J. Appleman & J. Appleman, *Insurance Law & Practice* § 4771, at 211–12 (1981). The purpose of a cooperation clause is to protect insurers and prevent collusion between insureds and injured parties. *Id.* at 213. The question of cooperation under a policy's cooperation clause involves not only the good faith of the insured but also the good faith of the insurer. *Id.* at 221.

[8] The majority rule appears to be that the insurer's and insured's obligations under a cooperation clause are reciprocal; the insured must cooperate with the insurer and the insurer must use reasonable diligence in obtaining the insured's cooperation. *Id.* at 221 n. 13; M. Rhodes, 14 *Couch on Insurance 2d* § 51:119, at 624–25 (rev. ed. 1982); 44 Am.Jur.2d *Insurance* § 1438, at 385–86 (1982); *see also* Annotation, *Liability Insurance: Failure or Refusal of Insured to Attend Trial or to Testify as Breach of Cooperation Clause*, 9 A.L.R.4th 218 § 5 (1981); *see, e.g., Lappo v. Thompson*, 87 Ill.App.3d 253, 254–55, 42 Ill.Dec. 531, 533, 409 N.E.2d 26, 28 (1980); *Smithers v. Mettert*, 513 N.E.2d 660, 662 (Ind.Ct.App.1987); *Allen v. Atlantic Nat'l Ins. Co.*, 350 Mass. 181, 183, 214 N.E.2d 28, 29–30 (1966); *Rieschl v. Travelers Ins. Co.*,

313 N.W.2d 615, 617 (Minn 1981); *Thrasher v United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168, 225 N.E.2d 503, 508, 278 N.Y.S.2d 793, 800 (1967); *Bailey v. Universal Underwriters Ins. Co.*, 258 Or. 201, 474 P.2d 746, 757 (1970); *Peterson v. Western Casualty & Sur. Co.*, 19 Utah 2d 26, 30–31, 425 P.2d 769, 771–72 (1967). We believe that the stated majority rule is sound and should be adopted by this court. The rule basically requires the insured and insurer to act diligently when a liability claim arises.

[9] We find no merit in American's claim that the reasonable diligence requirement places the burden of proving prejudice on the insured. The insurer does not receive the benefit of a favorable presumption of prejudice until it is established that the insured breached the cooperation clause. The insurer's use of reasonable diligence is simply an element in the determination of whether the insured has breached the cooperation clause. The adoption of this rule adds an element of proof in determining whether the cooperation clause has been breached; it does not shift or change the burden of proof on prejudice.

Consequently, we hold that an insurer cannot avoid its obligation on a policy because of an insured's breach of a cooperation clause unless it exercises reasonable diligence in securing the insured's cooperation. The trial court correctly arrived at this same conclusion.

[10] II. *Proof of reasonable diligence.* In our de novo review, we agree with the trial court's finding that American failed to use reasonable diligence in seeking Chandler's cooperation in defending the products liability lawsuit. American's claims office in Kansas City merely corresponded with George Chandler concerning the lawsuit. American suggested that George cooperate with its lawyer in Ft. Dodge, Iowa, even though it knew that George was a resident of Evanston, Illinois. It did not utilize its claims office and personnel in an area near Evanston to personally contact George. After a careful review of American's correspondence and its actions and inferences therefrom, we find that American was more concerned with making a paper trail to document George's noncooperation than in securing his cooperation in defending the lawsuit. Although George Chandler was accessible, American never took his personal statement, his deposition, or attempted to secure his presence at trial. The trial court correctly concluded that American's conduct fell short of reasonable diligence.

III. *Summary.* We hold that the insurer, American, cannot avoid its obligation under the policy because it failed to exercise reasonable diligence in obtaining Chandler's cooperation. Therefore, we affirm the trial court's denial of American's declaratory judgment petition.

AFFIRMED.

Ron MONSON, Appellant,

v.

IOWA CIVIL RIGHTS COMMISSION; Inga Bumbary-Langston, as Director of the Iowa Civil Rights Commission; and Martin Marietta Aggregates, Inc., Appellees.

No. 90–72.

Supreme Court of Iowa.

March 20, 1991.

Employee who was terminated after he missed extended periods of work to care for his terminally ill child sought relief from Civil Rights Commission, alleging his termination was product of vicarious disability discrimination. The Commission rejected employee's claim, and he petitioned for judicial review. The District Court, Cerro Gordo County, Paul W. Riffel, J., dismissed the action on jurisdictional grounds, and employee appealed. The Su-

PROTECTING YOUR "MIDDLEMAN" CLIENT

IN PRODUCT LIABILITY CASES

W. Curtis Hewett

Smith Peterson Law Firm

Council Bluffs, Iowa

I. DEFINITIONS.

A. "Protect" here means to use effectively when possible under the evidence the provisions of Iowa Code §613.18, "Limitation on products liability of nonmanufacturers," as well as the common law of products liability. This entails attempting to develop the evidence necessary to employ the shield which §613.18 may be, as well as attempting to develop the evidence to exculpate your "nonmanufacturer" if possible on those products liability theories of recovery as to which §613.18 provides no defense, to-wit:

1. Warranty of Fitness for a Particular Purpose, express or implied.

2. Negligence.

B. A "Middleman" for our purposes is defined in §613.18 as "A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product ***." §613.18(1)

C. For purposes of § 613.18, "Products liability cases" are "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." §613.18(1)(a) (Emphasis added).

1. This is merely another way of saying that by its express terms §613.18 is not applicable to and provides no defense against claims premised on theories of express or implied warranties of fitness for a particular purpose, or negligence.

II. SUBSTANCE OF §613.18. Your "middleman" 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." §613.18(1)(a)

1. If your middleman is in the suit in the first instance, these are obviously not the allegations of the Petition.

B. "Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for 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." §613.18(1)(b)

1. Once the alleged manufacturer of the injury-causing product has answered, Requests for Admissions directed to the manufacturer should obtain the admission necessary for the establishment as a matter of law of your client's §613.18(1)(b) defense to plaintiff's claims premised on strict liability in tort and/or implied warranty of merchantability.

2. If the co-defendant manufacturer does not concede the jurisdiction of the court or demonstrates it has been judicially declared insolvent, you are thrown back on the provisions of §613.18(1)(a). You may still prevail with a motion for summary judgment - in the unlikely event your plaintiff admits his claims are "based solely from an alleged defect in the original design or manufacture of the product." As indicated above, this is unlikely to happen in any case in which plaintiff's attorney has thought enough about his or her case to allege negligence on the part of your "middleman."

C. § 613.18(2) provides:

> "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 this state and has not been judicially declared insolvent."

1. Retailer here not quite within the definition of "middleman" because of assembly of product.

2. No statutory language requiring that the "defect in the original design or manufacture of the product" be the sole cause of the accident. A distinction without a practical difference?

3. Of use if Plaintiff's experts are not imaginative enough to create an issue of fact as to the existence of a causal relationship between something done or something not done by your retailer during the assembly process and the injury-producing event.

III. WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

A. Depending on the nature of the product and the purchaser involved, this theory of recovery may be an afterthought, or the centerpiece of plaintiff's case against your middleman. In either event, the defense of such a claim is essentially no different for your middleman than for the co-defendant manufacturer.

1. An implied warranty that goods are fit for a particular purpose arises if, at the time of contracting, the seller has reason to know of a particular purpose for which the goods are purchased and that the buyer is relying on the seller's skill or judgment to select suitable goods. Iowa Code §554.2315.

a. "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question." *Jacobson* v. *Benson Motors, Inc.*, 216 N.W.2d 396, 403 (Iowa 1974)(intended use of vehicle for drag racing was not part of the bargain at the time of sale).

b. The seller's knowledge of the particular purpose for which the product is purchased must exist at the time of the sale. *Id.*

c. Reliance by the buyer on the expertise of the seller in selecting a suitable product is essential to the creation of such a warranty, *ERTL Co.* v. *Lang Plastics Co.*, 158 N.W.2d 93 (Iowa 1968), although reliance may be inferred from the circumstances surrounding the transaction. *Peters* v *Lyons*, 168 N.W.2d 759 (Iowa 1969).

2. Is the alleged warranty express or implied, written or oral? What was the supposed "particular purpose" to which the product was to be put? How is the seller alleged to have known of the "particular" purpose to which the product was to be put by the purchaser? How is the seller alleged to have known the purchaser was relying on the seller to select a suitable product?

a. Rather than engaging in "paper discovery" on these questions, I prefer to depose plaintiff first on the subject and only if necessary follow-up with Interrogatories and/or Request for Production.

b. All the usual rules apply to the plaintiff's deposition on this point. Ask open-ended questions about each of the purchaser's communications with the seller, written or oral, and what was discussed on each occasion or exchange of correspondence, giving the witness multiple opportunities to "volunteer" testimony supportive of the elements of this claim before "closing the door" with the "That's all you remember of any communications with the seller before closing, correct?" question, rather than asking "How did my client know you had this particular purpose in mind for the product?" and "How did my client know you were relying on him/it to select a product appropriate for your intended uses?"

Obviously, if the plaintiff/purchaser responds to such open-ended questions with answers suggesting potential liability of your "middleman" on this basis, you follow-up with questions as pointed as necessary to discover the

complete details of plaintiff's evidence on each of the elements of the claim.

IV. NEGLIGENCE.

"Two roads diverged in a wood, and I - I took the one less traveled by, And that has made all the difference."
Robert Frost, "The Road Not Taken."

A. Did your "middleman" perform any service on, make any repair, modification, or alteration to the product or any of its component systems, or did your client merely purchase a product, new or used, from a "assembler, designer or manufacturer" and sell it to plaintiff/purchaser?

This may make all the difference in the outcome of the case *vis a vis* your middleman.

1 If your middleman client has serviced, repaired, modified or altered the product, there is always the chance that something negligently done or not done in the process may have caused the injurious accident. This evidence presents essentially the same likely factual obstacle to the application of the statute as does "assembly" of the product.

The fact that repair, modification or alteration of the product was conducted by your "nonmanufacturer" is grist for plaintiff's experts' mills, and may well mean you will be confronted with specific allegations of allegedly negligent acts or failures to act by your client in the course of the repairs, etc., or failure to warn plaintiff of the potential effect of such acts or failure to act. Experience shows that any attempted "repair" of a manufactured product, especially when the purchaser's complaints have been difficult of solution and/or long-standing, may well entail some modification of the product.

If this scenario develops, your defense and decision whether to try or settle the case are essentially the same as in any other negligence case. You obtain plaintiff's experts' reports and depositions, have their opinions and the basis therefore analyzed by experts of your choosing, and decide whether in light of all the evidence the case is one to try or settle.

2. If your "middleman" did not service, repair, modify or alter the product in any manner before selling it, did not have actual knowledge of and was not in possession of information from which a reasonable person would infer the existence of the alleged defect(s), there is an excellent argument to be made that under Iowa law your middleman is not liable as a matter of law.

In other words, if plaintiff's sole allegation of negligence against your "nonmanufacturer" is a "failure to inspect the product and to warn plaintiff" of alleged inherent defects in the design, manufacture or assembly of the product, you may be in a position to move for summary judgment successfully. The question is whether a middleman as defined herein has a legal duty to inspect a product designed, manufactured and assembled by others so as to discover latent defects in the design, manufacture or assembly of the product. The existence of a legal duty is always a question of law for the court. *Soike* v. *Evan Matthews and Co.*, 302 N.W.2d 841 (Iowa 1981); *Lunde* v. *Winnebago Industries, Inc.*, 299 N.W.2d 473 (Iowa 1980); *Sweeny v. Pease*, 294 N.W.2d 819 (Iowa 19__).

a. Split of authority amongst the various state courts. *See, e.g.*, 6 A.L.R. 2d 12, §10 (1966).

b. Restatement of Torts, 2d, §402:

> "A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character of condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it."

c. In *Spaur* v. *Owens-Corning Fiberglass* Corp., 510 N.W.2d 854 (Iowa 1994), the Iowa Supreme Court held that the sellers or installers of asbestos-containing insulation products had no duty to inspect those allegedly defective products or to warn purchasers of the allegedly dangerous properties of those products. Quoting from *Henkel* v. *R and*

S Bottling Co., 323 N.W.2d 185, 188 (Iowa 1982), and §402 of the Restatement, 2d, the Court stated:

> " *** for a jury question to be engendered on the issue of whether a warning is required, there must be substantial evidence that the supplier in all probability knew, or had reason to know, the product was dangerous or that there was a likelihood of danger.
>
> A seller of goods likewise has no duty to inspect or test a product for danger 'who neither knows nor has reason to know that it is likely to be, dangerous' ***." *Id.*, at 864.

d. There may not appear at first blush to be any advantage to the defendant in the language "either knows or has reason to know" given the usage of the term elsewhere in the law. However, if the Iowa Supreme Court adopts the definition of the term in Comment "c" to §402 of the Restatement of Torts, 2d, from which it quoted in *Spaur*, the law is more favorable to the defendant "middleman":

> "For the meaning of 'reason to know' see sec. 12(1) and 401, Comment a. the dangerous character or condition of the chattel, in the circumstances stated in this §, is not a fact which the seller 'should know' as those words are defined in sec. 12(2)."

Comment "c", § 402, Restatement of Torts, 2d.

§ 12(1), Restatement of Torts, 2d, states as follows:

> "The words 'reason to know' are used throughout the Restatement of this Subject to denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his

conduct upon the assumption that such fact exists."

Comment "i" to §401 of the Restatement, 2d, states:

> "The fact that the defect could have been discovered by the seller, or that a reasonable man would have discovered it, is not enough to impose liability under the rule stated in this §. The important question is what he did know, and what would a reasonable man conclude from that knowledge."

e. Decisions from other jurisdictions:

(1) *Gorath* v. *Rockwell Intern., Inc.*, 441 N.W.2d 126 (Minn. App. 1989).

(2) *Rahn* v. *Gerdts*, 119 Ill. App.3d 781, 455 N.E.2d 807 (1983).

(3) *Simon* v. *Ford Motor Co.*, 256 So.2d 725 (La. Ct. App. 1971).

(4) *Spillers* v. *Montgomery Ward & Company, Inc.*, 294 So.2d 803 (La. 1974).

B. On the assumption that the law is as it appears to be stated in *Spaur*, the obvious strategy in discovery is to establish, if possible, that your defendant did not have actual knowledge of the defects alleged by plaintiff, and did not possess information from which a "reasonable" person in his or her position would have inferred the existence of the alleged defect(s).

1. Find out from your client, and particularly its "line employees", the people who actually laid eyes and/or hands on the product in the process of acquiring, stocking and selling the product, whether or not any work of any nature was performed on the product before its sale to plaintiff, and, if so, precisely what was done: repair, modification, etc. If the product was altered in any respect by your middleman, you may need to immediately find a expert/consultant

to advise as to whether that alteration could possibly have caused the accident, and anticipate defending specifications of negligence relating to that modification

a. Request Production by plaintiff early on of any and all documents they claim to have been generated by your middleman. Do those documents appear to reflect any repair or modification?

b. In reviewing any documents in the possession of your middleman responsive to plaintiff's Request for Production, keep an eye out for any clue that service, repair or modification may have been performed by your client, and follow up on the details with your client.

2. If no evidence develops of any repair or modification of the product by your middleman, try in depositions to obtain admissions from plaintiff's experts that there was no commonly available source of information from which your middleman "in all probability knew, or had reason to know, the product was dangerous or that there was a likelihood of danger." *Spaur, supra*, 323 N.W.2d at 188.

Of course, amongst your opening questions for Plaintiff's liability expert, is: "Are you aware of any evidence indicating that (client) at the time it had this (product) in its care, custody and control knew of the existence of any of the design defects which you have opined existed in this (product)?" The other "exploratory" question is: "Are you aware of any information, any knowledge that (client) had which should have made him/her/it suspect that these design defects existed?"

Depending on the case, you might want to ask these questions of your client or a consultant rather than waiting until Plaintiff's experts depositions, but you still want the admissions.

a. There have not been Publicized in the popular press any "recalls", air-worthiness directives, or the like, concerning the product at the insistence of regulatory agencies based on the alleged defect(s).

If there have been, how believable is that your seller of the product "had no reason to know of the danger?"

b. There have not been articles published in trade journals or other "industry-published intelligence" (to which your middleman subscribes, if any) concerning the alleged defect(s).

c. There is no evidence your middleman has been privy to Service Bulletins, Service Manuals, or other literature issued to its authorized dealers by the designer, manufacturer, or assembler of the product, concerning the existence of the alleged defect(s).

> "Is there any objective evidence on which to base a conclusion that (middleman) was in fact privy to the service instructions that you referred to a moment ago issued by (manufacturer) concerning (the alleged defect)?"
>
> If your middleman is not an "authorized" dealer for the manufacturer, or if the goods were used at the time of sale by your client, seek admissions from Plaintiff's experts that your client would not, to their knowledge at least, have been on the distribution list for such information.

d. In general, seek to have Plaintiff's experts confirm they cannot testify your middleman knew or had reason to know of the existence of the alleged defect(s) to which they have opined, or discover the extent of their claims in this regard.

e. If possible, seek to have Plaintiff's experts confirm your middleman's anticipated or deposition testimony that, prior to your middleman's acquisition and sale of the product in question, the designer, manufacturer and/or assembler had a reputation for producing safe and reliable products.

Some manufacturers still occasionally emphasize the "safety" of their products in their advertising. Such fact would seem to have some minimal relevance to the question whether or not your middleman "had reason to know" of the existence of the alleged defect(s).

3. Obviously, all of the foregoing discussions of admissions it is desirable to obtain from Plaintiff's experts is premised on the assumption that your client and its employees are prepared to testify they were had no actual knowledge of the alleged defects nor any information on the basis of which to suspect the existence of the alleged defects.

V. GENERAL.

A. Discover as early as possible, informally if possible, formally if necessary, whether or not your co-defendant manufacturer, or other co-defendant, will be claiming Plaintiff's alleged injuries were caused or contributed to "by any act or failure to act" on the part of your middleman, and if so, all the details.

Preferable to accomplish this informally if possible just in case the manufacturer may assert a theory of causation which hasn't yet occurred to Plaintiff's experts, but you must find out early whether you are fighting a war on only one or more than one front.

B. Keep as low a profile as Plaintiff and your co-defendants will allow you to: when dinosaurs are stomping about it's not a good thing to call attention to yourself

Sometimes, if you're fortunate, Plaintiff will be required to concentrate on proving the liability of the manufacturer to the point of overlooking the elements of the case against your middleman.

C. In addition to the usual Interrogatories to Plaintiff early on, consider the following:

> "List each specification of negligence, each alleged breach of duty, and every other theory of liability on the part of this defendant that you contend will be supported by sufficient evidence to warrant its submission to a jury."
>
> "List the name, address and telephone number of each person with knowledge, or who is claimed to have knowledge, relevant to each and every specification of negligence, each alleged breach of duty, and every other theory of liability as against this defendant which you identify in answer to the immediately preceding Interrogatory."
>
> "State what act or acts or failure to act are being relied upon in connection with your allegation in paragraph __, Count __ of your Petition herein that this defendant was "negligent in the design, manufacture, and marketing and warning concerning the subject (product)."
>
> "State the name, address and telephone number of each and every person who has or is claimed to have knowledge of any alleged act or failure to act on the part of this defendant referred to in your answer to the immediately preceding Interrogatory."
>
> "Do you claim that plaintiff's alleged injuries and damages arise from an alleged defect in the original design, manufacture or assembly of the (product) referred to in your Petition herein?"
>
> "Do you claim that plaintiff's alleged injuries and damages arise from or were contributed to by any cause, condition, circumstance, act or failure to act on the part of any person or entity other than the original designer, manufacturer and assembler of the (product) referred to in your Petition herein?"

"If your answer to the immediately preceding Interrogatory is in the affirmative, identify each such cause, condition, circumstance, act or failure to act on the part of any person or entity which you claim caused or contributed to Plaintiff's alleged injuries or damages, and state the name, address and telephone number of each person who has or is claimed to have knowledge of any fact relevant to each such alleged cause, condition, circumstance, act or failure to act."

IN THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY

* * * * * * * * * * * * * * * *

LAURA E CARO,	*	NO. 67153
Plaintiff,	*	
v	*	AFFIDAVIT
SAAB CARS U S A., INC ; SAAB-SCANIA AB, ACURA OF OMAHA, PRECISION MOTORCARS, INC ; WOLFSON CAR LEASING COMPANY, INC.; BRYON BROOKS and DOES 1 THROUGH 100, INCLUSIVE,	*	
Defendants.	*	

* * * * * * * * * * * * * * * *

STATE OF IOWA)
)ss
COUNTY OF POTTAWATTAMIE)

I am the owner of Wolfson's Car Leasing Company, Inc (hereinafter "Wolfson's"), one of the defendants in this case. I have personal knowledge of each and all of the facts set out in this Affidavit, and will testify to the same in the event this case is tried with Wolfson's as a defendant

Sometime before February 16, 1992, Wolfson's purchased the 1986 Saab 900 Turbo involved in this case from Widman Motors. The car was at the time Wolfson's purchased it "used", and the odometer showed that the vehicle had been driven more than 90,000 miles.

Wolfson's did not design, manufacture or assemble the 1986 Saab 900 Turbo involved in this case, nor any of its component systems

Before the purchase of the particular 1986 Saab 900 Turbo involved in this case, I was familiar in a general sense with Saab automobiles. I had previously purchased and sold other Saab automobiles with good experience. At the time Wolfson's purchased the particular 1986 Saab 900 Turbo involved in this case, Wolfson's had several other used Saab automobiles in its inventory and for sale to the public. Before Wolfson's purchase of the particular 1986 Saab 900 Turbo I was familiar with Saab's reputation as a manufacturer of high quality, reliable motor vehicles. I was also aware of the fact that Saab emphasized the safety of the design of their vehicles in their advertising and publicity.

Before the purchase by Wolfson's of the particular 1986 Saab Turbo involved in this case, Wolfson's had sold other used Saab automobiles It had never come to the attention of Wolfson's that there was any claim that any Saab automobile had been defectively designed, manufactured, assembled or marketed

Before purchasing the particular 1986 Saab 900 Turbo involved in this case, I drove the car. I observed the overall condition of the vehicle, which appeared to me to be excellent In driving the automobile, I observed nothing about it which gave me any concern for the condition of the car, or for my safety or that of others. The mechanical systems of the automobile, including the brake system and steering

appeared to me to perform satisfactorily. I was not aware of any damage to or repair of the structure of the body of the car.

The 1986 Saab 900 Turbo involved in this case did not to me appear to require any repairs nor any maintenance at the time of its purchase by Wolfson's, nor at any time while it was in the inventory of Wolfson's. For that reason, Wolfson's did not perform any repairs, or maintenance on the car, and did not alter or modify its condition. Specifically, Wolfson's did not in any manner service, repair, alter or modify the brake system, cruise control mechanism, seat belt systems or body structure of the car.

Following its purchase by Wolfson's, the 1986 Saab 900 Turbo involved in this case was placed in the inventory of Wolfson's, on the lot with the other used cars constituting the inventory of Wolfson's, clearly identified as a "Saab". I spoke personally with Laura Caro and Byron Brooks concerning their purchase from Wolfson's of the 1986 Saab 900 Turbo involved in this case. Neither Laura Caro nor Byron Brooks inquired of me nor any other employee of Wolfson's concerning the mechanical condition of the car, nor concerning its history nor whether it had previously been involved in any accidents or repaired in any manner. Both Laura Caro and Byron Brooks test drove the 1986 Saab involved in this case before purchasing it and declared they found it satisfactory. Caro and Brooks told Wolfson's they had the car examined by an independent automotive diagnostic center and that no problems had been identified.

Neither Laura Caro nor Byron Brooks expressed to me nor any other employee of Wolfson's any particular or unusual purpose for which they were interested in purchasing an automobile, nor that they intended to put to any particular or unusual use any vehicle they might purchase.

FURTHER AFFIANT SAYETH NOT.

Harry Wolfson
HARRY WOLFSON

STATE OF Nebraska)
)ss.
COUNTY OF Douglas)

On this 12 day of July, 1996, before me, a Notary Public in and for said state, personally appeared Harry Wolfson, to me known to be the person named in and who executed the foregoing instrument, and acknowledged that he executed the same as his voluntary act and deed.

GENERAL NOTARY State of Nebraska
R.E. STROUD
My Comm. Exp. June 20, 1997

Re Stroud
NOTARY PUBLIC IN AND FOR SAID STATE

IN THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY

* * * * * * * * * * * * * * * *

LAURA E. CARO,	*	NO 67153
Plaintiff,	*	
v.	*	STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED
SAAB CARS U S A., INC., SAAB-SCANIA AB; ACURA OF OMAHA, PRECISION MOTORCARS, INC.; WOLFSON CAR LEASING COMPANY, INC.; BRYON BROOKS and DOES 1 THROUGH 100, INCLUSIVE,	*	
Defendants.	*	

* * * * * * * * * * * * * * * *

1 On February 20, 1992, Plaintiff, Laura Caro, and Defendant, Byron Brooks, purchased from Defendant, Wolfson Car Leasing Company, a used 1986 Saab 900 Turbo in which Plaintiff alleges she was a passenger at the time of an accident on June 15, 1992, as a result of which Plaintiff alleges she was injured. (Deposition of Laura Caro, p. 39, l. 7 through p. 40, l. 2; p. 114, l. 19 through p. 117, l. 9, p. 125, ll. 4 through 14, see Exhibit A; Deposition of Byron Brooks, p. 50, l. 24 through p. 53, l. 15; p. 147, l. 2 through p. 148, l. 18, Exhibit B).

2 The 1986 Saab 900 Turbo purchased by Plaintiff and Defendant, Brooks was designed, manufactured, assembled and marketed as a new car by Defendants, Saab-Scania, AB and Saab Cars U S A., Inc. (Petition, paragraph 5;

EXHIBIT B

Answer of Defendant Saab Cars U S A , Inc , paragraph 5, Answer of Defendant Saab-Scania AB, paragraph 5)

3 The 1986 Saab 900 Turbo involved in this case was not designed, manufactured or assembled by Defendant, Wolfson Car Leasing Company. (Petition, paragraph 5; Answer of Wolfson, paragraph 5; Affidavit of Harry Wolfson, Exhibit C)

4. The 1986 Saab 900 Turbo involved in this case was not serviced, maintained, repaired, altered or modified from its condition as designed, manufactured and assembled by Defendant, Saab-Scania AB, in any manner by Defendant, Wolfson Car Leasing Company. (Affidavit of Harry Wolfson, Exhibit C).

5. Prior to Wolfson's purchase and sale to Plaintiff of the 1986 Saab 900 Turbo involved in this case, Saab-Scania AB and Saab Cars U S.A., Inc., emphasized the safety of the design and manufacture of the model 900 in its advertising and publicity concerning the model 900. (Deposition of Tony Landh, p. 38, l. 22 through p. 39, l 12; p. 102, l. 15 through p 103, l. 8; p. 196, ll 10 through 19, Exhibit D)

6. Prior to Wolfson's purchase and sale to Plaintiff of the 1986 Saab 900 Turbo involved in this case, Saab-Scania AB nor Saab Cars U S A., Inc., had issued a recall notice concerning any of the alleged defects in the design, manufacture, assembly or marketing of the Model 900 Turbo because of any of the alleged defects opined to by Plaintiff's expert witnesses in this case (Deposition of Ingemar Soderlund, p 52, l. 25 through p. 53, l. 2, Exhibit E).

7 Prior to the purchase by Wolfson's and sale to Plaintiff of the 1986 Saab 900 Turbo involved in this case, Saab-Scania AB nor Saab Cars U S A , Inc , had warned purchasers of Saab 900s of any of the alleged defects opined to by Plaintiff's experts in this case. (Deposition of Ingemar Soderlund, p 53, ll 3 through 5, Exhibit E; Saab's Response to Paragraph 30 of Plaintiff's Demand for Production of Documents and Things [Set No 2], Exhibit F; Saab's Response to paragraph 5 of Plaintiff's Amended Demand for Production of Documents and Things, Exhibit G)

8. Prior to the purchase by Wolfson's and sale to Plaintiff of the 1986 Saab 900 Turbo involved in this case, Wolfson Car Leasing Company had no knowledge nor notice of the existence of any of the alleged defects in the design, manufacture or assembly of the car opined to by Plaintiff's expert witnesses in this case (Affidavit of Harry Wolfson, Exhibit C).

9 Plaintiff's expert witnesses in this case have opined that there were at the time of the purchase of the 1986 Saab 900 Turbo defects inherent in the design of the braking system and in the Electronic Control Module of the cruise control system of the car (Plaintiff's Answer to Interrogatory No. 16 from Saab Cars U.S.A , Inc, Exhibit H, Plaintiff's Answers to Wolfson's Interrogatories No. 8 and 13, Exhibit I and J).

10. Plaintiff's expert witnesses in this case have not opined that any alleged defect in the 1986 Saab 900 Turbo involved in this case and which was a

cause in whole or in part of the accident or Plaintiff's injuries was created by Wolfson's (Id)

11 At the time of the purchase by Plaintiff and Defendant, Brooks, of the 1986 Saab 900 Turbo neither Plaintiff nor Defendant Brooks expressed to Wolfson's any particular purpose for which they desired to purchase an automobile, and neither of them relied on Wolfson's to select an automobile suitable for any particular purpose. (Affidavit of Harry Wolfson, Exhibit C; Deposition of Laura Caro, p. 39, l 7 through p. 40, l. 2; p. 114, l. 19 through p. 117, l. 9; p. 125, ll 4 through 14, Exhibit A; p 29, l. 9 through p. 30, l. 3; p. 34, l. 7 through p 35, l. 24, Exhibit K; Deposition of Byron Brooks, p 50, l. 24 through p. 53, l. 15; p 147, l 2 through p. 148, l 18; p 54, ll. 7 through 19, Exhibit B; p. 47, l. 16 through p 48, l. 2, Exhibit L)

Respectfully submitted,

W. CURTIS HEWETT, #P01002353
SMITH PETERSON LAW FIRM
35 Main Place, P.O. Box 249
Council Bluffs, IA 51502
Telephone: (712) 328-1833
ATTORNEYS FOR DEFENDANT
WOLFSON CAR LEASING COMPANY, INC

cc: Ronald J. Palagi
1000 North 72nd Street
Omaha, NE 68114
and
Kevin Calcagnie
28202 Cabot Road, Suite 200
Laguna Niguel, CA 92677
and

SELECTED

INDUSTRIAL COMMISSIONER

FINAL AGENCY ACTION/

APPEAL DECISIONS AND

LEGISLATIVE SUMMARY

September 1, 1996 - August 30, 1997

Iris J. Post
Industrial Commissioner
Division of Industrial Services

ALTERNATE MEDICAL CARE

Cordero v. Florilli Corp., File No. 1134333 (September 5, 1996)

Alternate medical care was awarded to claimant who was a resident of San Mateo, California. Defendants had designated treatment in Iowa and they had required claimant to stay at a motel in West Liberty, Iowa. It was determined that such treatment was unduly inconvenient to claimant. Defendants were ordered to designate alternate medical care within a 50-mile radius of claimant's home.

Dawson v. 310 Credit Union, File Nos. 1058914/1058915 (October 9, 1996)

Employer not required to furnish ongoing health club membership to provide the claimant use of a hot tub, even though the treating physician had indicated that it was desirable. A specialist from the University of Iowa Hospitals and Clinics had indicated that a home exercise program would be equally effective. It was held that an employer is not liable for providing everything to an injured employee that can possibly help the employee feel better. The employer's obligation is limited to matters that provide recuperation or permit continued physical functioning. An employer is entitled to choose the least costly of the available options.

Long v. TMC Transportation, Inc., File No. 1165738 (March 11, 1997)

Claimant's request for alternate medical care denied. Claimant wanted treatment in Pennsylvania but had surgery in Des Moines, Iowa and worked light duty employment in Des Moines. Employer accommodated claimant by providing reasonable transportation expenses to and from home every other week as would be the case if claimant had not been injured. Claimant

was in no worse position by receiving treatment in Des Moines than he would be if he had not been injured. Continued care in Des Moines was ordered contingent upon the employer paying claimant's meal expenses to and from his home in Pennsylvania.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Coulter v. Holdiman Motors, File No. 1033115 (December 19, 1996)

Claimant was a used car salesman who was delivering a car to a car wash for the employer. While en route he stopped at a grocery store. While in the grocery store he fell and was injured. The evidence failed to show a business purpose for the stop in the grocery store. One purpose was to purchase a pack of cigarettes for a supervisor. While the evidence was disputed, it was also found that the claimant had some other purpose in choosing that place to stop, most likely to obtain his own lunch. The act of purchasing cigarettes was held to be simply a favor for a co-employee and did not bring the activities within the grocery store into the course of employment. Claimant's claim was denied.

Najera v. Iowa Erosion Control, Inc., File No. 1120087 (September 23, 1996)

Claimant was run over by a company truck while taking a break in the shade of the truck. Although defendants argued that claimant had violated a work rule, it was found that there was no work rule that prohibited the activity of seeking shade. This case was factually different from Buehner v. Hauptly, 161 N.W.2d 170 (Iowa 1968). Claimant's injury arose out of and in the course of his employment.

Rausch v. Surgical Specialists, P.C., File No. 1039577 (August 29, 1997)

Claimant alleged a back injury occurred on February 8, 1993, Monday, when she retrieved a patient's chart from the basement. On February 10, 1993, Wednesday, while retrieving another file, she injured her back again and reported it to her supervisor. She worked Thursday and Friday, and on Sunday while helping her spouse with stacking wood for her in-laws. Claimant's spouse called her supervisor at home and reported claimant hurt her back on Sunday cutting wood and would not be in for work on Monday. Claimant saw a physician on Mayday, February 15, 1993 for back complaints. Supervisor disciplined claimant on Friday, February 12, 1993 and denied claimant reported injury to her until February 16, 1993.

Medical causation evidence rejected as premised on history of back pain from February 10, 1993. This history is not borne out by the record. No work injury was reported to her supervisor and claimant worked without complaint the remainder of the week.

Claimant failed to prove that she incurred an injury on February 10, 1993.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT - GOING AND COMING - REQUIRED VEHICLE

Wipperman v. Dallas Home Builders Corporation, File No. 1138754 (February 28, 1997)

Claimant met required vehicle exception to the going and coming rule where he provided his personal vehicle to the employer for use by other employees during the day, used the

vehicle "on call" at night to pick up tools and materials for the next day, and was partially reimbursed for expenses.

CAUSAL CONNECTION

Hermance v. Weissman Iron & Metal, Inc., File No. 1036111 (May 30, 1997)

Claimant had posttraumatic stress disorder and major depressive disorder symptoms that predated his injury. His behavior both before and after the injury was basically unchanged. Claimant failed to prove that his head injury also caused a brain injury. Claimant failed to prove his work injury was the cause of a permanent disability.

Fazio v. Sheraton Inn, a/k/a 35th Street Corporation, File No. 1029650 (July 25, 1997)

Decedent, who was a janitor at a hotel, was stung by a bee. He had an allergic reaction and was treated at a local medical clinic. The next day decedent suffered a stroke which, after a few days of treatment, ultimately resulted in his death. Claimant argued that the bee sting was the medical cause of the precipitating factor of the stroke. Expert medical opinions were in opposition. The greater weight of the evidence supports the defendants' contention that the medical evidence failed to prove by a preponderance of the evidence that the bee sting was actually the cause of the factor of decedent's stroke. Thus, claimant took nothing.

DEPENDENTS - ACTUALLY DEPENDENT

Sanchez v. Iowa Erosion Company, File No. 1058141 (April 30, 1997)

One who is actually dependent upon the deceased worker need not also be "physically or mentally incapacitated from earning" in order to receive survivor's benefits. Benefits are paid for so long as the recipient is incapacitated from earning. The claim of the mother of the deceased worker who was from Mexico but living in Iowa was granted, as she was shown to be actually and wholly dependent upon her son at the time of his death.

DISABILITY, EXTENT

Bunner v. M. Harper, Ltd., File No. 1052838 (August 21, 1997)

Claimant, who sustained a hernia and an injury requiring the removal of his left testicle while employed as a truck driver, was awarded 15 percent industrial disability after treating physicians determined he had no permanent physical restrictions, other than a suggestion that he not engage in off-road truck driving and claimant was clearly able to secure employment as an over-the-road truck driver making more money per hour than he had for defendant employer. Although terminated by defendant employer, claimant's termination was as a result of his failure to show up for work and not as a result of his inability to physically perform the work or as a result of a physician's limiting him from working.

Claimant awarded penalty benefits where claimant had sustained a previous injury with the same employer that was covered by another insurance carrier and the medical evidence established that claimant's current problems could have come from either injury. Defendant employer was liable to claimant

in either case, and the insurance carrier should have utilized Iowa Code section 85.21 rather than withholding benefits from claimant.

Frausto v. Louis Rich, Inc., File No. 1063389 (May 22, 1997)

It was held that in order to obtain benefits for permanent total disability using the odd-lot doctrine it is necessary for the individual to make reasonable efforts to be as employable as the circumstances permit. It is a duty similar to the duty to mitigate damages found in tort cases. The duty includes the duty to make efforts to learn to speak the prevailing language in the area where the individual resides. The workers' compensation system exists to pay for disability that results from workplace injuries. It is not intended to reward self-imposed limits on employability. Were the rule otherwise individuals with very minor injuries would be entitled to large awards simply because they have not made the effort to learn to speak the prevailing language. Such a rule would serve no societal purpose.

The claimant alleged she was permanently, totally disabled and relied upon the odd-lot doctrine. The only activity restrictions were upon the claimant's left upper extremity as a result of mild chronic rotator cuff tendonitis. She declined to work with a vocational consultant offered by the employer. She had been in the country over 20 years without learning to speak English proficiently. Claimant awarded 40 percent permanent partial disability.

Hogan v. Ready Mixed Concrete, File Nos. 1058983/1058982 (August 29, 1997)

Claimant awarded 30 percent industrial disability based on all factors.

Defendants were not liable for unauthorized medical care. After claimant visited the company physician he chose treatment by his own physician. He also chose his own personal health insurance benefits to pay for that treatment. In Iowa the employer has the right and responsibility to chose the care. The employer provided claimant with suitable care and claimant did not apply for alternative care.

Meyers v. Burgin Drapery, File No. 1055815 (February 27, 1997)

Claimant sustained bilateral carpal tunnel syndrome while at work and underwent subsequent surgeries. Claimant had other medical conditions not related to her work-related injuries which included hepatitis C, back and neck complaints, and stomach ailments. The claimant also suffered from profound mental health problems. She had limited educational abilities, completing only the seventh grade, and her reading and writing skills were minimal at best. Her work experience was limited. She had work restrictions after her carpal tunnel surgery that included no heavy lifting and no repetitive use of her fingers or hands. Based on the fact that claimant had profound mental health problems in addition to her limited educational abilities, her work restrictions and her other medical problems, it was determined that the claimant was permanently and totally disabled.

Moore v. Davenport Muffler Shops, Inc., File No. 944606 (December 31, 1996)

Claimant suffered an injury to his right lower extremity, and later, severe depression. The treating psychiatrist, Dr. Michael Taylor, causally related the depression to the work injury even after learning of claimant's substance abuse, financial situation, death of his brother, etc. The treating psychiatrist also testified shortly before the hearing that claimant was still totally disabled by his depression, but might improve if the correct medication was found. The only other psychiatrist's opinion in the record stated he "would not contradict" that opinion that claimant was currently disabled, but did not agree with Dr. Taylor's opinions regarding causation. Claimant awarded permanent total disability.

Rauch v. Millard Warehouse, File Nos. 1082049/1057951 (August 29, 1997)

Claimant was 31 years old at the time of the injury. He had a lower back strain that results in restrictions. The most severe restriction was not lifting over 50 pounds and no repeated bending. He had impairment ratings of 0 and 8 percent of the body as a whole. He had no surgery and no radiating pain. He was classified as able to medium to heavy work. Shortly after his injury he actively, regularly and aggressively played softball. Claimant's physical limitations appeared to be selectively, self-imposed. He was a high school graduate with one year of formal education beyond high school. He was earning more at the time of the hearing than he did for defendant employer. Claimant had an industrial disability of five percent.

Defendants were not liable for unauthorized chiropractic care.

DISABILITY, NATURE

Frank v. Clear Lake Bakery, File Nos. 1026735/966951 (October 30, 1996)

Claimant suffered, in order, a partial finger amputation, a partial hand amputation, and a leg injury.

The partial hand amputation resulted in psychological injury, which is not disabling so long as claimant remains under a regimen of active treatment and medication. However, the need for continued treatment renders the psychological injury permanent and to the body as a whole, even though not disabling at present. Therefore, the entire injury was compensated industrially under Mortimer v. Fruehauf Corp, 502 N.W.2d 12 (Iowa 1993).

EMPLOYER–EMPLOYEE RELATIONSHIP

Langel v. Carroll County, File No. 1053572 (August 29, 1997)

It was held that a township trustee is not an elected county official of the county in which the township is located and is therefore not entitled to workers' compensation coverage under sections 85.2 and 85.61(11). Both sections analyzed and read in *pari materia*.

HEART ATTACK

Holst v. Abell-Howe Company, File No. 1056549 (June 27, 1997)

As the onset of symptoms was several days before the attack, claimant's dedication to work was not shown to play

a part in the decision to forgo treatment. Claim was denied.

INDEMNIFICATION

Ewing v. Allied Construction Serv., File No. 928362 (April 28, 1997)

This is a case involving issues of indemnification and of attorneys' fees. Defendants, under Shirley, are entitled to a lien against claimant's net recovery, for the total sum of the benefits the workers' compensation carrier owes to claimant, including future benefits, less a pro rata share of the costs and the attorney fees incurred at the time of the third-party settlement. The lien includes the payments made from the time the Fisher case was decided up until the time of the Shirley decision when the weekly benefits were no longer paid to claimant. This included $8,756.13, which was paid to claimant for the aforementioned period.

Claimant's attorney received a one-third contingency fee on claimant's third-party settlement. Defendants compensated claimant's counsel on a one-third contingency fee for the amount claimant's attorney recovered for them from the third-party defendant at the time the third-party case was settled. The fee paid to claimant's attorney was reasonable. The fee was fair as provided in the Ahlers v. EMCASCO Ins. Co., 548 N.W.2d 892 (Iowa 1996) case. The workers' compensation carrier also paid the necessary costs to pursue the third-party action. Neither, claimant nor his attorney is entitled to additional monies or fees from the defendants' lien on the third-party settlement.

Marin v. DCS Sanitation, File No. 1009732 (May 14, 1997)

Neither claimant nor her attorney is entitled to additional monies or fees from the defendant's lien on the third-party judgment for further benefits owed to the claimant pursuant to Iowa code section 85.22.

INDEPENDENT MEDICAL EXAMINATION

Brammer v. Glenwood State Hospital School, File No. 1035917 (October 22, 1996)

Claimant's original notice and petition for an independent medical examination was served on the employer. This petition was filed while an arbitration proceeding was pending. The employee failed to serve the petition for the IME on employer's counsel who had previously filed the answer to the arbitration petition. On appeal it was held that the order granting the independent medical examination because defendant employer was in default should be set aside under Iowa Rule of Civil Procedure 236. A timely request to set aside the default had been filed and defendant employer was "surprised" by the order granting the petition for independent medical examination.

Stevenson v. Metro Temp, File No. 974182 (October 30, 1996)

Claimant was entitled to have only one independent medical examination paid for by the employer. Employer paid for an independent medical examination following a first surgery and a preliminary impairment rating by employer chosen treating physician. Treating physician later lowered the impairment rating. The lowered rating remained unchanged following a second surgery. Employer was not liable for second independent medical examination which followed second surgery and treating physician's subsequent impairment rating.

JURISDICTION - PERSONAL

Dale Dekok, et al. v. Gateway 2000, Inc., File Nos. 1132907/1133116/1132898/1132897/1133257/1078861/1133286/1059157 (December 20, 1996)

Agency lacks personal jurisdiction over defendant employer. Defendant employers pre-answer motion to dismiss was granted.

JURISDICTION - SUBJECT MATTER

Toulouse v. Nestle Beverage Company, File No. 1094026 (June 23, 1997)

Claimant's petition dismissed on summary judgment as it was based on acts of sexual harassment. This agency has no subject matter jurisdiction. Fact that harassment originated with coworkers rather than a supervisor did not change result.

Veasley v. CRST, Inc. and Lincoln Sales and Service, Inc., File No. 1018202 (March 31, 1997)

Claim dismissed for want of subject matter jurisdiction. Claimant was an Ohio resident injured in Arizona while performing duties as an over-the-road trucker for an Iowa employer whose employment was not principally localized in any state. However, as the acceptances of employment offers were made in other states, the contract of hire was held not to be in Iowa. Therefore, Iowa Code section 85.71 was not applicable.

MEDICAL BENEFITS

Vallejo v. Perry State Bank, File No. 1019057 (February 28, 1997)

Employer held responsible for the costs of reconstructive or cosmetic surgery caused by the injury. There was no statutory exclusion from the requirement to provide reasonable care.

PENALTY

Bunner v. M. Harper, Ltd., File No. 1052838 (August 21, 1997)

Claimant, who sustained a hernia and an injury requiring the removal of his left testicle while employed as a truck driver, was awarded 15 percent industrial disability after treating physicians determined he had no permanent physical restrictions, other than a suggestion that he not engage in off-road truck driving and claimant was clearly able to secure employment as an over-the-road truck driver making more money per hour than he had for defendant employer. Although terminated by defendant employer, claimant's termination was as a result of his failure to show up for work and not as a result of his inability to physically perform the work or as a result of a physician's limiting him from working.

Claimant awarded penalty benefits where claimant had sustained a previous injury with the same employer that was covered by another insurance carrier and the medical evidence established that claimant's current problems could have come from either injury. Defendant employer was liable to claimant in either case, and the insurance carrier should have utilized Iowa Code section 85.21 rather than withholding benefits from claimant.

Davidson v. David Bruce and Estate of Keith Bruce, d/b/a Bruce Feedlot, File No. 1052869 (October 23, 1996)

Claimant awarded penalty benefits of 25 percent for three-month delay by defendants in seeking a permanency rating. There was a three-week delay from the time the physician made an impairment rating until the first check for permanent disability benefits was issued. A 10 percent penalty was assessed for the three-week delay.

Hanna v. Fleetguard, Inc., File No. 1019228 (June 25, 1997)

On remand, applied Robbennolt and imposed 50 percent penalty where 47 of 47 payments were from 2 to 15 days late and at the wrong rate.

PROCEDURE

Blint v. Mendenhall Oil Company, File No. 1054844 (February 24, 1997)

Claimant's case had been dismissed by deputy following order to show cause why case should not be dismissed for lack of prosecution, based on claimant's failure to schedule mediation he had requested and based on claimant's counsel's indication he had not had contact with claimant. Because claimant's counsel requested the case be set for hearing, agency efficiency required that case be scheduled for prompt hearing rather than dismissed.

PSYCHOLOGICAL INJURY - SUICIDE

The greater weight of evidence in this case showed that the decedent's work was the proximate cause of his mental condition (depression). The depression was the result of severe

depression caused by job stress of greater magnitude than the day-to-day stresses routinely experienced by superintendents of schools in Iowa. The unusual stress was from a community controversy over the district's plans to implement a new program called "outcome based education." Christian fundamentalists nationally opposed this program and claimant's husband was subjected to personal threats and attacks and even attacks on his Christian beliefs, which caused him extreme stress. Seven other school superintendents in Iowa testified that although they had experienced similar controversies, all agreed that the stress experienced by claimant's husband was unusual compared to the day-to-day routine stress of being a school superintendent.

The persuasive medical opinions and the facts of this case showed that there was a direct chain of causation between the decedent's depression and his suicide. Claimant, as surviving spouse, was entitled to workers' compensation benefits.

Blanchard v. Belle Plain/Vinton Motor Supply Company, File No. 1048262 (May 19, 1997)

Claimant, surviving spouse of employee who committed suicide, failed to prove either medical or legal causation pursuant to Dunlavey. Decedent was in process of selling business to a larger competitor and became fixated with the idea that the sale of the business would fall through. Claimant was suffering from depression at time he took his own life. The most persuasive psychiatric opinions determined that claimant's depression was endogenous and his false fixed ideas were a symptom of depression.

Claimant also failed to prove legal causation. Claimant did not establish that stress decedent was under was of an equal

or greater magnitude of similarly situated employees, regardless of employer.

Benefits were denied.

REVIEW-REOPENING

Roberts v. Second Injury Fund of Iowa, File No. 958248 (July 25, 1997)

Claimant failed to prove his physical condition had changed.

Claimant voluntarily quit the job he held at the time of the arbitration hearing. He quit his job for employment security reasons. He subsequently found work at several other employers. Claimant failed to prove a nonphysical change of condition that was caused by his work injuries.

Claimant took nothing in this proceeding from defendant Second Injury Fund.

SECOND INJURY FUND

Frank v. Clear Lake Bakery, File Nos. 1026735/966951 (October 30, 1996)

Where claimant's injury was limited to scheduled member, it was improper to assess industrial disability effects of the injury (claimant's discharge by employer) to the Second Injury Fund. The Fund compensates only the combined effect of the two injuries. Industrial disability aspects of the scheduled member injury remain uncompensated under the schedule and cannot be shifted to the Fund.

Michael v. Bridgestone/Firestone, File Nos. 1006941/1053536 (April 28, 1997)

Claimant had a one percent loss to his left arm from a 1980 nonwork injury. In 1990 he suffered work-related bilateral carpal tunnel and cubital tunnel syndromes that resulted in multiple surgeries. His functional impairment ratings were 19 percent of the left arm and 10 percent of the right arm. Claimant's cumulative industrial disability following the 1990 injury was 20 percent. Second Injury Fund liability following the 1990 injury was 25 weeks.

In 1993 claimant suffered work-related epicondylitis of the left arm that resulted in an additional three percent functional impairment of the left arm. Claimant's cumulative industrial disability following the 1993 injury was 35 percent. Second Injury Fund liability following the 1993 injury was 92.5 weeks.

SURVEILLANCE

Jackson v. Alter Company, File No. 1043313 (July 23, 1997)

Thirty-minute "summary" tape of five hours of surveillance taping was held admissible in that claimant's counsel was not surprised or prejudiced and knew tape had been edited. Edited tape was evidence a reasonably prudent person would rely on.

UNAUTHORIZED MEDICAL CARE

Hogan v. Ready Mixed Concrete, File Nos. 1058983/1058982 (August 29, 1997)

Claimant awarded 30 percent industrial disability based on all factors.

Defendants were not liable for unauthorized medical care. After claimant visited the company physician he chose treatment by his own physician. He also chose his own personal health insurance benefits to pay for that treatment. In Iowa the employer has the right and responsibility to chose the care. The employer provided claimant with suitable care and claimant did not apply for alternative care.

Rauch v. Millard Warehouse, File Nos. 1082049/1057951 (August 29, 1997)

Claimant was 31 years old at the time of the injury. He had a lower back strain that results in restrictions. The most severe restriction was not lifting over 50 pounds and no repeated bending. He had impairment ratings of 0 and 8 percent of the body as a whole. He had no surgery and no radiating pain. He was classified as able to medium to heavy work. Shortly after his injury he actively, regularly and aggressively played softball. Claimant's physical limitations appeared to be selectively, self-imposed. He was a high school graduate with one year of formal education beyond high school. He was earning more at the time of the hearing than he did for defendant employer. Claimant had an industrial disability of five percent.

Defendants were not liable for unauthorized chiropractic care.

Bills Passed and Signed

House File 167

This bill raises the earnings threshold for domestic and casual employees for the employees to be exempt from workers' compensation laws. The threshold is raised from $200 in the quarter prior to the injury to $1500 in the twelve consecutive months prior to the injury.

House File 370

This bill relates to workers' compensation benefits for an individual who was injured in the course of performing as a professional athlete. For purposes of healing period and temporary disability benefits the phrase "substantially similar to the employment in which the employee was engaged at the time of the injury" includes any employment the individual has previously performed. The degree of industrial disability of the individual shall not be determined based upon employment as a professional athlete but shall be determined based upon other occupations the individual has previously performed or was reasonably suited to perform at the time of the injury. The basis of compensation for weekly earnings shall be one-fiftieth of total earnings which the employee has earned from all employment for the twelve months prior to the injury. The bill was effective April 18, 1997.

House File 655

Section 10 of this bill appropriates $2,258,254 to the Division of Industrial Services from the general fund. Section 13 of the bill appropriates $175,000 to the Division of Industrial Services from the Employment Security Contingency Fund. Section 12 continues the $65 filing fee for workers' compensation cases.

House File 693

Section 2 of this bill specifies that interest for judgments and decrees under Iowa Code section 535 shall be a variable rate of interest except that the interest due under Iowa Code section 85.30 shall be ten percent.

Senate File 109

This bill makes several changes to Iowa claims for workers' compensation benefits when the injury occurs outside of Iowa. The bill adds the requirement that an employer have a place of business in this state for an individual domiciled in Iowa. The bill also adds the requirement that the employee spend a substantial part of working time working for the employer in this state for an employee working under a contract for hire in this state in employment not principally localized in any state. The bill provides that an employee shall not be entitled to Iowa workers' compensation benefits if the employee has initiated a judicial proceeding for the same injury and receives benefits in another state. The bill also provides that a claim for Iowa benefits is stayed pending resolution of the out-of-state judicial proceeding. The bill further provides that the employer shall have credit for benefits payable under Iowa law for any benefits paid in another state or country.

Senate File 296

This bill provides that if an employer denies liability for payment of workers' compensation medical benefits and the employee is a beneficiary under an individual or group plan for nonoccupational illness, the nonoccupational plan shall not deny payment for medical services on the basis that the employer's liability for workers' compensation medical services is unresolved.

Senate File 361

This bill relates to students participating in school-to-work programs. If the student is providing unpaid services, the school district is the employer. If the student is paid for the services provided, the entity which pays the student is the employer. The exclusive remedy protection applies to the school district.

Senate File 529

Section 3 subsection 5 of this bill specifies that at least $120,000 of the amounts appropriated to the insurance division shall be used for the investigation of insurance fraud.

THE TRIPARTITE RELATIONSHIP
Update on Ethical Issues

Insurance Company Perspective

David O. Narigon, Vice President
EMC Insurance Companies
Des Moines, Iowa

Private Defense Counsel Perspective

Mark S. Lagomarcino
Hanson, Bjork & Russel
Attorneys At Law
Des Moines, Iowa

TRIPARTITE RELATIONSHIP: UPDATE ON ETHICAL ISSUES INSURANCE COMPANY PERSPECTIVE

David O. Narigon, Vice President
EMC Insurance Companies
Des Moines, Iowa

I. Restatement of the Log Governing Attorneys

I have been advised that the American Law Institute will meet in September to consider proposed texts for Preliminary Draft 13, which includes Section 215. This section addresses the relationship between attorneys employed by insurance companies pursuant to the terms of insurance policies, the insurer and the insureds who are represented by such attorneys who are defending claims made against these insureds by third parties. The ALI will then release Preliminary Draft Number 13 for comment. The time period for comment will be significantly limited. There is speculation that the reason for this reduction in time is to avoid the embarrassment caused by last year's uproar.

I have included a copy of the "Proposed Movants'-Reporters' Text on Liability - Insurance Issues". This is the text of proposed changes to Section 215. Hopefully, I will be able to distribute copies of the final draft of Section 215 at this meeting.

II. Iowa Code of Professional Responsibilities - Canons Ethical Considerations and Disciplinary Rules.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that the lawyer's judgment may be impaired or loyalty divided if the employment is accepted or continued. The lawyer should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, the lawyer would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that the employment be refused initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that the lawyer can retain independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of the lawyer's clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate the need for representation free of any potential conflict and to obtain other counsel if desired. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients

consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, the lawyer should also advise all of the clients of those circumstances

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each ase. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon the lawyer's judgment is not unlikely.

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment

(A) Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests.
(B) A lawyer shall not engage in sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the attorney-client relationship. Even in these provisionally exempt relationships, attorneys should strictly scrutinize their behavior for any conflicts of interest to determine if any harm may result to the client or to the representation If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the attorney should immediately withdraw from the legal representation
(C) A lawyer or the lawyer's partners or associates shall not prepare an instrument in which a client desires to name the lawyer beneficially unless the lawyer is the spouse of, or is the son-in-law or daughter-in-law of, or is otherwise related by consanguinity or affinity, within the third degree, to the client.
(D) A lawyer shall not accept employment in contemplated or pending litigation if it is known or it is obvious that a member of the lawyer's firm ought to be called as a witness, except that the employment may be undertaken and the lawyer or a member of the firm may testify:
(1) If the testimony will relate solely to an uncontested matter.
(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the firm to the client.
(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the firm as counsel in the particular case. [Court Order December 16, 1977; August 22, 1994, effective January 2, 1995].

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

(A) In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement
(B) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(D).
(C) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the representation of another client, except to the extent permitted under DR 5-105(D).
(D) In the situations covered by DR 5-105(B) and (C), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.
(E) If a lawyer is required to decline employment or to withdraw from employment, no partner or associate of the lawyer or the lawyer's firm may accept or continue such employment. [Court Order February 17, 1978; amendment effective March 20, 1981, received for publication May 6, 1983].

Duty of the Lawyer to a Client
EC 7-4 The advocate may urge any permissible construction of the law favorable to a client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail. A lawyer's conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

Disciplinary Rules

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules, except as provided by DR 7-101(B). A lawyer does not violate this disciplinary rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but a lawyer may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105

(3) Prejudice or damage a client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In the representation of a client, a lawyer may:

(1) Where permissible, exercise professional judgment to waive or fail to assert a right or position of a client.

(2) Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In the representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that a lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

CANON 9 A lawyer should avoid even the appearance of professional impropriety.

Ethical Considerations.

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laypersons to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform the lawyer's client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, a lawyer's duty to clients or to the public should never be subordinate merely because the full discharge of an obligation may be misunderstood or may tend to subject the lawyer or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should act in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Definitions:

As used in the disciplinary rules of the Code of Professional Responsibility:

(1) "Differing interests" includes every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

III. Standards for Professional Conduct - Lawyers' Duties to Other Counsel.

(1) We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

(2) We will promptly acknowledge the receipt of contacts from other attorneys, whether those contacts are by telephone or in writing, and we will make an appropriate response to the subject matter of the contact as soon as reasonably possible.

(3) We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

(4) We will not use any form of discovery or discovery scheduling as a means of harassment.

(5) We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

(6) We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters

(7) We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

(8) We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

(9) We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

(10) We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

(11) We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party

(12) We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

IV. Section 507.B4 Insurance Trade Practices Paragraph 9, Unfair Claims Settlement Practices:

9 Unfair Claim Settlement Practices. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages of issue.

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising

under insurance policies.

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

d Refusing to pay claims without conducting a reasonable investigation based upon all available information.

e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

f Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear, or failing to include interest on the payment of claims when required under Section 511.38.

g Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

h Attempting to settle a claim for less than the amount to which a reasonable person would have believed the person was entitled by reference to written or printed advertising material accompanying or made part of an application.

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured.

j. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

l. Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

m Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a

compromise settlement.

V. Issues

A. Is the insured a client or a third party payor?

See Atlanta International Insurance Company v Bell 475 NW 2d 294 (Mich. 1991).
See Charles Silver and Kent Syverud, "The Professional Responsibilities of Insurance Defense Lawyers", 45 Duke Law Journal 255 (1995).

B. What is the basis of the tripart relationship?

1. Should State Insurance Policy

a. Insuring agreement - duty to investigate, defend, and settle covered losses

See Commercial General Liability Coverage Form ISO CG 00 01 10, page 1.

b. Cooperation Clause: The standard insurance policy contains a condition that requires the insured to cooperate.

See Section IV - Commercial General Liability Conditions.

c. Duties In The Event Of Occurrence Offense, Claim Or Suit.

d. Reasoning: By paying the premium, the insured transfers to the insurer the obligation to investigate, defend and settle.
Part of the consideration under the contract is also inherently the transfer of control. Thus, the insurer has total discretion without consent of the insured.

2. Retainer Agreement
a The agreement directly regulates defense counsel's professional relationship with the company and the insured. For a detailed discussion see Charles Silver and Kent Syverud's article.

The authors assume that there is a retainer agreement and that the liability contract language is incorporated into the retainer agreement. By doing so, the insurer becomes a client and the

retainer establishes a three party contract. Without such an agreement, the insurer is merely a third party payor. Based upon my 18 years of experience, seldom is there a formal retainer agreement between the insurer and the defense firm. The normal business practice with previously approved defense firms is simply to attach a referral letter with the pleadings directing defense counsel to enter a defense and giving direction to take certain actions. Generally, there will be a brief statement as to the facts

C. Impact of Non-Client Status

1. No duty of loyalty.
2. No attorney client privilege
3. Limits ability to direct counsel because defense counsel must act primarily for the benefit of the insured
4. Loss of right to sue counsel for malpractice in the event of misconduct

VI. Potential Conflicts and Non-Access of Limits or Reservations of Rights Situations

A. When does the insurer's right to defend and assign a crew? Can we take over the claim before it has been tendered?
B. Cost of defense exceeds settlement value, i.e., use of expensive demonstrative evidence.
C. Defending may not be in the best interest of the insured, i.e., key customer or supplier
D. Settling may not be in the best interest of the insured, i.e., governmental sub-unit subject to nuisances or "good name" of the insured is involved.
E. Insured may want a more expensive defense effort than the insurer.
F. If co-clients, does defense counsel have a duty to serve as coverage counsel for the insured or provide advice as to coverage issues.
G. Should defense counsel control settlement negotiations?
H. If co-clients, is it ethical to serve insurer with a demand to settle within policy limits?
I. Does defense counsel have the obligation to inform insured of settlement demands and advise of pros and cons?
J. Insurer directs defense counsel to do something that runs contrary to the interests of the insured.
K. Does counsel have a duty to investigate potential conflicts before they arise?

L. Duty of confidentiality/duty of communications.

1. When provided with confidential information by the insured, does defense counsel have a duty to inform the insurer?

   The majority rule is that there is no duty of confidentiality within the tripartite relationship that applies to relevant information received from the insured. See EC 5-16 and Richard L. Neumeier, "Serving To Masters: Problems Facing Insurance Defense Counsel and Some Proposed Solutions," Mass. Law Review, June 1992, at 66,75.

   a. Does defense counsel have an obligation to ask questions that have a direct bearing on coverage?
   b. Does defense counsel have an obligation to notify insurer of such answers?
   c. Does defense counsel have an obligation to impeach insured?

2. Duty to inform the insured vs. duty of confidentiality to the company. See EC 5-16 and 9-2

   a. Should defense counsel alert insured to the possibility of taking control of the representation?
   b Should defense counsel inform insured to seek separate counsel?
   c. Should defense counsel provide all information and documentation to the insured?

VII. Conflicts in Excess of Limits - Insurance Company vs. Insured

A. Industry standard - insurer advises insured of exposure beyond limits and right to hire separate counsel at insured's expense to protect insured on excess exposure

B. Issue is recognition.

1. Is excess letter boiler plate or specifically tailored to the particular file?
2. If the insured decides not to hire counsel, is the insurer adequately communicating with the insured and fully explaining?
3. Should communications be left to defense counsel on the primary exposure?
4. Is there a coordinated defense effort with the excess counsel?
5 Can company control defense costs and the use of experts, etc., on the primary case when there is substantial exposure on the excess?
6. Who is responsible for communicating offers of settlement to the insured?

7. Who is responsible for settlement negotiations - defense counsel, insurer, or excess defense counsel?

8. Is the insured's interests being considered equally with the insurer's.

VIII. Conflicts Arising Under Reservations of Rights

A How does the insurance company handle reservation of rights situations?
   1 Is the letter tailored or shotgunned?
   2 Is there a Chinese Wall procedure? Is it seriously maintained?
   3 Are adjusters trained in policy interpretation?
   4 What is the company's procedures if the reservation of rights letter is rejected?

B Potential conflicts under First Newton, A.Y. McDonald and Cedar Rapids Television.
   1. Arguably, under these lines of cases, the insurer is responsible for providing a defense for non-covered claims as long as there is potential for a covered claim contained within the underlying facts even though neither plead nor argued at trial. Does this give the insured and insured's counsel an open checkbook for defense expenses with no motivation to control costs since they would be totally within the insurance policy

IX. Consequences to the Insurance Company.

A. Breach of contract - failure to provide a defense.

B Bad faith.

C. Vicarious liability for defense counsel's malpractice.

BIBLIOGRAPHY

Robert R. Johnson, "In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibilities", 57 Ohio State Law Journal 945 (1996).

Charles Silver and Kent Syverud. "The Professional Responsibilities of Insurance Defense Lawyers", 45 Duke Law Journal, 255 (1995)

William T. Baker, "When Does the Insurer Lose the Right to Control the Defense", October 1991 Defense Counsel Journal 469

Eric Mills Holmes, "A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net", 26 Willamette Law Review 1 (1989).

Douglas L. Getter, "Standard of Care in Malpractice Actions Against Insurance Defense Counsel: Inapplicability of the Code of Professional Responsibilities", 51 Fordham Law Review 1,317 (1983).

Robert E. Keeton, "Liability Insurance and Responsibility for Settlement", 67 Harvard Law Review 1,136 (1954)

For an interesting comparison contrast, see the Silver and Holmes articles. Both adopt the two client approach but come to different conclusions as to some of the duties owed. Further, the Holmes article is an excellent primer for insurance staff and defense counsel from an analytical perspective. The article provides an overview of the steps in analyzing insurance contracts and the Nexis with the legal defense process.

Tripartite Relationship and the Restatement Section 215

Action Requested: The Committee is asked to recommend a position the Alliance should take concerning the proposed Restatement in light of recent developments regarding its impact on the tripartite relationship.

Background

In March 1995, the Alliance and the AIA filed joint comments with the American Law Institute on the conflict of interest provisions contained in Tentative Draft number 4 of the *Restatement of the Law: The Law Governing Lawyers*. The comments reflected concern over the *Restatement's* failure to treat and insure as a co-client of retained defense counsel. The Alliance and the AIA asserted the draft's definition of conflict of interest made the insured the only client of retained defense counsel in the vast bulk of situations, including those where there is no actual conflict of interest. It was further maintained that the proposed definition eroded the traditional tripartite rule, which recognizes the defense attorney has two separate attorney-client relationships: one with the insured and one with the carrier. As a result the *Restatement* could easily read to mean that the insured is not a co-client, and interpretation contrary to the law and the majority of jurisdictions which have considered the issue.

Preliminary Draft No. 11 contained a version of Section 215, entitled "Compensation and Direction by Third Person." Although Preliminary Draft No.11 was an improvement from earlier drafts, it still had problems. At the direction of the Alliance Claims Committee the Alliance, AIA and NAII adopted a tactical plan to prevent adoption of the draft *Restatement*.

Member companies were asked to widely distribute the ALI membership list, which had been obtained by the trade associations, to their staff. As staff identified ALI members that were personally known to them, we asked that a senior executive send the ALI member a letter indicating the insurance industry position on the *Restatement*. Along with the ALI membership list, members received a few talking points that were incorporated into the letter.

Three or four days after the letter from the senior executive was sent, the staff person who identified the member was asked to call as a follow-up to the letter.

Section 215 as Contained in Preliminary Draft No. 13

Preliminary Draft No. 13 has recently been circulated and will be discussed at meetings of the Advisors and Members Consultative Group for this *Restatement* in early September. There has a disappointing amount of "backsliding" from the draft that Professor Wolfram and William T. Barker, Esq. agreed to last year. A detailed comparison to the agreed draft and the version contained in Proposed Final Draft No. 1 is being prepared by Sonnenschein, Nath and Rosenthal

2 - Agenda Item No 9

The agreed draft avoided various contentious issues by identifying them and saying that they were issues of insurance law. Preliminary Draft No. 13 puts in comment and a general statement that the relationship between insurer and insured is governed by other law and not addressed by the *Restatement*. Even if none of the contentious issues were addressed, this would not have the same effect of avoiding any implication that the *Restatement* speaks to those issues or that they can be decided purely under the law of lawyering. The now omitted specific references were in comment d (just before Illustration 2) and at several places and comment f.

Comment f formerly stated that the existence of an attorney-client relationship between insurer and defense counsel would be determined under Section 26, a test that the industry could live with. It now says it's determined under Section 26 "subject to the law of the jurisdiction." If nothing else this limits the ability for us to use the *Restatement* affirmatively to say that the law should treat the insurer as a client if Section 26 is satisfied. If nothing else this ought to be clarified to refer to the "other law" of the jurisdiction, that is — law other that the law of lawyering. Comment f now characterizes an insurer as an agent of the insured, an error that had been previously corrected.

Illustration 4 conditions the lawyer's ability to follow insurer direction to refrain from taking depositions on the lawyer's belief "that the additional depositions can be foregone without violating any duty owed by the Lawyer to Policyholder." This is the unfortunate effect that insisting that lawyers impose their personal notions of proper (typically expensive) defense to defeat the insurer's efforts at cost control. The agreed draft allowed the lawyer to follow the instruction if "there is no substantial risk that Policyholder will be exposed to personal liability."

The paragraphs following Illustration 4 extensively return to implications that the insurer is, at best, a second class client. The agreed draft had avoided this implication by making uncontroversial narrower statements which covered most of the subject matter and noting that the few controversial points were issues of insurance law.

Attached to this agenda item is the present version of Section 215

Among the issues to consider:

- Whether the Alliance should continue to coalesce with the other trade associations to positively impact the Restatement process?
- If so, whether any improvements can made on the previous process as described?

agsep9 97

amount, or priority of claims, the voidability of a pre-bankruptcy transfer, or the nature of a claim as secured or unsecured. Whether a conflict exists in such multiple representations must be analyzed under Subsection (1) (see also § 211). In addition to general conflict rules that may apply, a lawyer must also comply with statutory and regulatory requirements if more stringent, such as applicable provisions of the bankruptcy code.

A dispute between two clients--either before or after filing of a bankruptcy proceeding--may not disqualify a lawyer from representing one client with respect to aspects of the matter not involving that dispute. For example, as may be true in other contexts as well, a separable disputed matter may be handled by one or more special counsel not affiliated with the lawyer or law firm in question (see § 203)

TOPIC 5. LAWYER'S OBLIGATION TO THIRD PERSON

Introductory Note

Section

Introductory Note:

This Topic examines the effect on current clients of a lawyer's obligations to or relationships with third persons that might affect the representation. The issue of a lawyer's responsibilities to other clients, both past and present, is considered in Topics 3 and 4.

Section 215 considers payment of compensation to a lawyer by a third person, including another client, whether pursuant to a contract between the client and the third person or because the third person is otherwise interested in the outcome of the proceeding. The Section also considers the extent to which a lawyer may enter into a relationship in which a third person will exercise the client's prerogative to direct the lawyer's provision of legal services for a client. Section 216

examines the effect of other non-client obligations of the lawyer, including service as a trustee, corporate director, or public official, on representation of the lawyer's clients.

§ 215. Compensation or Direction by Third Person

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

Comment:

a. Scope and cross-references. This Section applies the general conflicts prohibition of § 201 to situations in which a third person pays a lawyer's fee for representing a client or directs a lawyer's work for a client. The third person might otherwise be a stranger to the matter, or be interested as a relative or friend or because of indemnification or similar obligations, such as a liability insurance company, or interested directly in the matter because a co-client, such as a corporation sued along with one or more of its employees (*see* § 212, Comment *e*). The risk of adverse effect on representation of the client is inherent in any such payment or direction. Accordingly, this Section, following the standard rule of the lawyer codes, requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work.

While discussion in the following Comments (*see* Comment *f*) will consider issues of the law governing a lawyer representing an insured person, the relationship between the insured person and the insurer or indemnitor will be controlled by other law, such as the law of insurance or of contract. The latter issues are beyond the scope of the Restatement.

The prohibition imposed by this Section applies to all affiliated lawyers (*see* § 203). Sanctions and remedies listed in § 4 [Chapter 1], are available for violation of this Section. Where a violation of this Section has caused actionable harm to a client, the remedy of professional malpractice (*see* [Chapter 4]) is available.

Issues relating to payment of legal fees generally are considered in Chapter 3. Chapter 5 examines a lawyer's duty to protect confidential information of a client.

b. Initial client consent. As stated in the Section, client consent pursuant to § 202 is a precondition to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created, such as risks of interference with the lawyer's independent judgment (see § 202, Comment *c*). When there is no significant risk to the client, as when a claim against a client will be fully covered by the insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the insurance agreement is not required. A lawyer may proceed on that basis when there is no substantial risk that the client-insured will not be fully covered. The lawyer should either withdraw or consult with the client-insured (*see* § 202) when such a risk becomes apparent (*see* § 201, Comment *c(iii)*).

c. Third-person fee payment. This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the non-client source of payment. The lawyer's duty of loyalty is to the client alone, and may also extend to any co-client when that relationship is either consistent with the duty owing

to each co-client or is consented to in accordance with § 202 Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (*see also* Comment *f* hereto). Lawyers paid by civil rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance

d. Third-person direction of representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client. However, the third person may direct the lawyer's representation of the client in the circumstances stated in Subsection (2). The directions must allow for effective representation of the client, and the client must give informed consent to the restrictions. Such restrictions are reasonable in scope and character if, for example, they reasonably limit the cost of the lawyer's services by requiring the lawyer to adhere to a reasonable budget for the case. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as a designated agent of the client, or an insurer or indemnitor on whom the client has contractually conferred the power of direction.

Illustration:

1. Resettle, a non-profit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may

accept payment by Resettle and may agree to make non-frivolous contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 202, there are limits to the restrictions on scope of the representation permitted under this Section. In general, unless the third person who is paying the lawyer bears substantially all of the consequences of the result in litigation, the third person may not direct or restrict the lawyer's decisions except with the client's informed consent.

Illustration:

2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (*see* § 33).

e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 114.

Illustration:

3. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks

Lawyer what Employee intends to testify about the circumstances of his actions Without consent of Employee as provided in § 114, Lawyer may not give Employer that information

f Representing insured A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. It is clear in such an arrangement that the designated lawyer represents the insured The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26 subject to the law of the jurisdiction. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement are communications with an agent of the client within the meaning of § 120 or should be otherwise regarded as immune from discovery by the claimant or another party. Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer has standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer to the extent set forth in § 73, Comment *g* [Chapter 4]

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment *d* hereto. The consent of the insured to direction of the lawyer by the insurer may be provided by a clause to that effect in the policy, where the insured bears no significant risk of loss because any likely recovery will be covered by the policy. *See* Comment *b* hereto.

Illustration:

4. Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits.

Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating duty owed by Lawyer to Policyholder (*see* § 74 [Chapter 4]), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured with significantly exposed personal assets. If the lawyer knows or should be aware of such an excess claim, the lawyer may not prefer the interests of the insurer so as to put the insured at risk of liability in excess of the policy coverage. Similarly, when there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (*see* § 112) without explicit informed consent of the insured (*see* § 114). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (*compare* § 112, Comment *l* (confidentiality in representation of co-clients in general)). On discretionary disclosure to prevent substantial financial loss, *see* § 117A; on a lawyer's duty not to assist client fraud, *see* § 151(2) [Chapter 6] and Comment *c* thereto.

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (*see* § 151 [Chapter 6]) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (*see* § 112, Comment *l*). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 44 (*see*

also § 112, Comment *l*) The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

REPORTER'S NOTE

Comment b. Rationale. The traditional rule on third-person fee payments is expressed in Rule 1.8(f) of the ABA Model Rules of Professional Conduct (1983):

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client consents after consultation;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by [the duty of confidentiality].

See also ABA Model Code of Professional Responsibility, DR 5-107(A) and (B) (1969) (similar).

Comment c. Initial client consent. See, e.g., Arrington v. Nat'l Broadcasting Co., 531 F. Supp. 498 (D. D.C. 1982) (union may pay costs of lawsuit on behalf of its members seeking overtime compensation where full disclosure and consent shown). On consent in policyholder-insured relationships, *see* Comment *f*, Note.

Comment d. Third-person direction of representation. On cases involving insurer control of litigation, *see* Comment *f*, Note. Cases involving lawyers for public interest causes have proceeded on a different rationale, typically founded on the basic right of a public interest organization to provide legal services. In upholding that right, courts have implicitly sustained

the right of the organizations to specify the legal issues to be tested *See, e.g.*, American Civil Liberties Union v. State of Tennessee, 496 F. Supp. 218 (M.D. Tenn. 1980) (state barratry statute, which forbade groups paying legal fees in public interest cases, ruled unconstitutional); *In re* Education Law Center, 429 A.2d 1051 (N.J. 1981) (general state rule against corporate practice of law held not to apply to not-for-profit corporation representing persons without charge on issues relating to equal educational opportunity). *But cf. In re* Primus, 436 U.S. 412, 447-448 (1978) (Rehnquist, J., dissenting) (overreaching of private client can occur even if organization has best of motives)

The risk of outside control by third-person payers in criminal cases has led to results consistent with Illustration 2. *See, e.g.*, United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976) (appropriate to require separate counsel where individual defendants might have tried to place blame for crime on corporation alone while corporation might have tried to blame crime on them); *In re* Adams, 266 A.2d 275 (N.J. 1970) (lawyer reprimanded for accepting payment from illegal lottery organization to defend employees who might be charged with lottery violations) *See also* Wood v. Georgia, 450 U.S. 261 (1981) (when employer set up test case putting employees at risk and employees expected employers to pay fines as well, but they did not do so, case remanded for investigation of conflicts because of counsel's possible divided loyalties).

In some of the reported criminal cases, the government has succeeded in disqualifying a lawyer whose fee was being paid by someone else, asserting that the common payment scheme interfered with its investigation or with the rights of the defendants to turn state's evidence. *See, e.g.*, Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975) (proper to disqualify single lawyer being paid by police fraternal order and representing all 12 policemen called before grand jury investigating police department corruption). *But see, e.g., In re* Special Grand Jury, 480 F. Supp. 174 (D. Wis. 1979) (when target company was paying for lawyer for its past and present employees, government could show no reason why employer should be denied counsel of choice). Cf. Polk County v. Dodson, 454 U.S. 312 (1981) (although state that prosecutes also pays public defender, defender represents only defendant and thus no improper conflict of interest).

A similar issue can arise in civil cases. *E.g.*, Purdy v. Pacific Auto Ins. Co., 203 Cal. Rptr. 524 (Cal. Ct. App. 1984) (when conflict arises over settlement strategy, insurer must provide new counsel for insured at insurer's expense); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 131 N.Y.S.2d 393 (N.Y. Sup. Ct. 1954) (insurer seeking in settlement negotiations to shift greater portion of risk to parties other than insurer improperly put insured at higher risk of liability); *see also* Comment *f*, Note.

Comment e. Preserving confidential client information. *See* Comment f, Note.

Comment f. Representing insured. See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:700 (2d ed. 1990); R. Keeton & A. Widiss, Insurance Law 824-41, 846-47, 853-57 (1988) (consideration of multiple issues from perspectives of both insurance law and law governing lawyers); C. Wolfram, Modern Legal Ethics §§ 8.4, 8.8 (1986); Hazard, Triangular Lawyer Relationship: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987); Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Cornell L. Rev. 825 (1992); Richmond, Lost in the Eternal Triangle of Insurance Defense Ethics, 9 Geo. J. Leg. Ethics 475 Neumier, Serving Two Masters: Problems Facing Insurance Defense Counsel, 77 Mass. L., Rev. 66 (1992); Hall, Confusion Over Conflicts of Interest: Is There a Bright Line for Insurance Defense Counsel?, 41 Drake L. Rev. 731 (1992). Statements in the Comment are limited to aspects of the "triangular relationship" set of problems that directly concern the legal constraints under which the designated defense counsel must operate. Nothing stated there about the substantive law of insurance necessarily reflects the policy of the Institute.

On whether a defense lawyer designated for an insured by an insurer represents only the insured or both insured and insurer as co-clients, *compare e.g.*, O'Malley, Ethics Principles for the Insurer, the Insured and Defense Counsel: the Eternal Triangle Reformed, 66 Tulane L. Rev. 511 (1991) (arguing for insured-as-sole-client position), *with, e.g.*, Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev 1583 (1994) (arguing for dual-client view). The Comment take the position that whether only the insured or the both insured and insurer (as co-clients) enter into a client-lawyer relationship with the designated lawyer is a question to be determined on the facts of the particular case, employing the approach indicated in § 26. For acceptance of such a view, *see, e.g.*, ABA Formal Opin. 96-403, at 2, 3 (1996) ("... Provided there is appropriate disclosure, consultation, and consent, any of these arrangements would be permissible. ... For purposes of this opinion, nothing fundamental turns on whether the lawyer represents the insured alone or both the insurer and the insured. ..."); *cf.* Silver & Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke L. J. 255 (1995). The requirements of third-party payor rules such as ABA Model Rule 1.8(f), quoted Note a, *supra*, apply whether or not the insurer is also regarded as a client. *Cf., e.g.*, Wood v. Georgia, 450 U.S. 261 (1981) (conflict when lawyer, paid by co-client employer, represented employee); *but see* 3 R. Mallen & J. Smith, *supra* § 28.18, at 566 (asserting, without citation of authority, that Model Rule 1.9(f) is inapplicable when the third-party payor is a co-client). The role of designated defense counsel who is an employee of the insurer is considered in, *e.g.*, Keeton & Widiss, *supra* at 827-28; *see also* Mallen, A New Definition of Insurance Defense Counsel, 1986 Def. Counsel J. 108. On judicial attitudes toward such arrangements, *compare, e.g., In re* Youngblood, 895 S.W.2d 322 (Tenn. 1995) (approving such arrangements when properly structured and operated); *In re* Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987); *In re* Rules Governing Conduct of Attorneys in Florida, 220 So.2d 6 (Fla. 1969) (same), *with* Gardner v. North Carolina St. Bar, 341 S.E.2d 517 (N.C. 1986) (lawyers may not enter such arrangements); American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996) (same).

On application of the attorney-client privilege to communications between an insured and an agent of the insurer, *see* § 120, Comment *g*, Note. On the ability of the insurer to maintain against insurance defense counsel an action for legal malpractice in the absence of a conflict with the insured, *see, e.g.*, Unigard Ins. Group v. O'Flaherty & Belgum, 45 Cal. Rptr.2d 565 (Cal. Ct. App. 1995); *see generally* § 73, Comment *g*, Note.

On consent by the insured to the lawyer's role, *see, e.g.*, ABA Formal Opin. 96-403, at 3 (1996) ("If the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of [the lawyer's] representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract. . . ."); *see also id.* at (appropriate disclosure and consent can be accomplished in short letter; client-insured's acceptance is sufficiently manifested by accepting defense after being advised of its limitations). As a matter of insurance law, courts have found policyholder consent to the role of the insurer in designating counsel and controlling the defense through execution of an insurance contract containing a duty-of-cooperation clause. *E.g.*, Crum v. Anchor Ins. Co., 119 N.W.2d 703 (Minn. 1963) (insurer obliged to defend where pleadings showed incident within terms of policy). Closer questions about the adequacy of consent arise when the complaint alleges one or more claims not covered by the policy, or when (for whatever reason) the insurer defends under a reservation of rights. As a matter of insurance law, the majority of jurisdictions hold that, if the insurer timely asserts non-coverage, either the insurer must pay for separate counsel for the insured or the insured must specifically give informed consent to defense by a lawyer selected by the insurer. *E.g.*, N.Y. State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984) (insurer may participate in selection of the insured's independent counsel); San Diego Federal Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494 (Cal. Ct. App. 1984) (consent to insurer's choice of counsel deemed withdrawn when insured retained independent counsel); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988 (Ill. App. Ct. 1985) (insurer obliged to pay for separate counsel for insured).

Most of the case law on control of litigation strategy by the insurer turns on questions of who controls the decision to settle, particularly when the insured need not expect to bear the financial risk of loss. As a matter of insurance law, the ability of the insurer to control the defense is ceded by the insured under a policy so providing. *E.g.*, Buchanan v. Buchanan, 160 Cal. Rptr. 577 (Cal. Ct. App. 1979) (insurer may assert claim of non-liability in face of insured's wish to concede liability to victim-relative); Feliberty v. Damon, 527 N.E.2d 261 (N.Y. 1988) (malpractice insurer not liable to doctor for settlement within policy limits despite adverse publicity). When a dispute between insured and insurer exists over settlement, the duties of a defense lawyer representing the insured are controlled, not by the policy, but by the lawyer's professional duties. *See, e.g.*, ABA Formal Opin. 96-403, at 5-6 (1996) (dispute may require lawyer's withdrawal; thereafter, former-client conflict rule precludes lawyer from assisting insurer in reaching settlement objected to by insured); Rogers v. Robson, Masters, Ryan, Brummund &

Belom, 407 N E 2d 47 (Ill 1980) (lawyers designated by medical-malpractice insurer to defend doctor had duty to tell insured doctor of insurer's intent to settle claim within policy limits contrary to doctor's insistence against settlement).

Decisions based on the law of insurance have resolved the settlement problem consistent with the rule in this Section in the case of an insurer's bad-faith refusal to settle within policy limits. The insurance company is typically held liable for any damages awarded in excess of the policy limits. *See, e.g.*, Parsons v Continental Nat'l American Group, 550 P 2d 94 (Ariz. 1976); Crisci v Security Ins Co , 426 P 2d 173 (Cal 1967); Gibson v Western Fire Ins Co., 682 P 2d 725 (Mont 1984). Where the lawyer behaves improperly in such cases, there is potential malpractice exposure to the insurer or the insured for any resulting loss. *E.g.*, Lysick v Walcom, 65 Cal Rptr 406 (Cal Ct App 1968) (lawyer who failed to tell insurer of settlement offer within policy limits required to pay insurer amount by which eventual judgment exceeded settlement offer); Lieberman v Employers Ins of Wausau, 419 A 2d 417 (N J 1980) (in medical malpractice case settled after doctor had withdrawn consent, lawyer's duty was to insured, and malpractice claim lies against lawyer for so settling). *See also* Betts v Allstate Ins Co , 201 Cal Rptr 528 (Cal Ct App 1984) (in case involving bad-faith refusal to settle, judgment against lawyer upheld for negligent infliction of emotional distress on insured).

Most of the decisions involving the question whether a lawyer designated by the insurer may use information obtained in the client-lawyer relationship against the interests of the client-insured (typically to enable the company to deny coverage) have arisen under the substantive law of insurance. They typically find such use impermissible. *See, e g.*, Parsons v Continental Nat'l American Group, 550 P 2d 94 (Ariz. 1976) (when lawyer learned confidential medical information that child's assault had been intentional and thus not covered by the policy, lawyer was required to keep information confidential but should withdraw from representation; where lawyer used information to benefit insurance company, company was estopped to deny coverage); Employers Casualty Co v Tilley, 496 S W 2d 552 (Tex 1973) (because insurer did not tell insured that it might deny coverage and even interviewed insured's employees without revealing that it was building case against liability, prejudice to insured shown, so insurer estopped to deny coverage).

Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606-6404
312-876-8000
Facsimile: 312-876-7934

Kansas City • London • Los Angeles • New York • San Francisco • St. Louis • Washington, D.C.

Facsimile Transmittal Sheet

Date: August 19, 1997

DELIVER TO	**FROM**
Name: Marema, Lenore S.	Name: WTB
Company: Alliance of American Insurers	Sender: Barker, William T
Facsimile Number: 1-847-330-8602	Voice Phone: (312) 876-8140

Total number of pages transmitted, not including this sheet: 013

Message:

Draft for your review and comments. I will be out Wednesday and on Thursday morning. I intend to send something out on Thursday or Friday.

IF YOU DO NOT RECEIVE ALL OF THE PAGES INDICATED ABOVE, PLEASE CALL THE SENDER AT THE VOICE NUMBER ABOVE

Wolfram **DISCUSSION DRAFT**

Morgan

Leubsdorf

Re: Restatement § 215

Dear Charles, Tom and John:

In reviewing Preliminary Draft No. 13, I was disappointed to see that quite a number of the improvements we arrived at last year have been dropped. I also found some statements in the Reporter's note which I think erroneous. This letter will provide my comments for your review prior to the September meetings. In order to maximize the opportunity for informed reactions to the draft and to my suggestions, I am sending copies of this letter to Geoff Hazard, to Judge Keeton (who is uniquely able to speak to these issues if the press of his judicial duties permits him the time), to Bob O'Malley (whom I know to have a different perspective on these issues), to the participants in January's AALS symposium and to those other ALI members whom I know to be interested. **[discuss distribution]**

Before beginning my comments, I would like to inquire about the fate of Amendments 1-3 from the Proposed Movants-Reporters' Text on Liability Insurance Issues ("PMRT"). I tentatively assume that none were controversial and that they will be incorporated in the final product in accordance with the Reporters' usual stylistic prerogatives. But if that's not true, then I may need to write another letter.

Comment a

In comment a to Section 215, the second sentence reads, as it did in Proposed Final Draft No. 1 ("PFD1"):

> The third person might otherwise be a stranger to the matter, or be interested as a relative or friend or because of indemnification or similar obligations, such as a liability insurance company, or interested directly because a co-client, such as a corporation sued along with one or more of its employees (*see* § 212, Comment *e*).

My problem with this is that it implies either that the insurer is not a client or that its status as such is problematic in some way that the corporation's is not. I think we agree that the status of either the corporation or the insurer as a client is governed by § 26, not by any per se rule. I would suggest reversion to the PMRT, with one modification. After the words "liability insurance company," substitute the following (words added to the PMRT underscored):

> or interested directly, such as a corporation sued along with one or more of its employees (*see* § 212, Comment *e*). The third person, if interested in the outcome, may or may not be a co-client, a question determined under § 26.

The following paragraph on the significance of other law is entirely appropriate. The literature on this subject has tended to assume that the law of lawyering trumps the insurance contract and effectively confers on the insured extra rights, so the need to consider the impact of other law is a point that needs to be made. But I am concerned with the omission of references to that point at key places in subsequent comments, a matter I will address when it comes up. I assume that Tom has provided Charles and John with copies of my AALS paper on *Insurance Defense Ethics and the Liability Insurance Bargain*, in which I try to develop an integrated understanding of both the insurance law and the professional responsibility requirements. If not, I will be glad to do so.

Comments b-e

Comment b follows the PMRT, except that it adds the alternative of withdrawal when the possibility of uncovered exposure arises. I have no problem with that addition.

Comment c follows the PMRT. I am not concerned particularly about the impact on insurance defense representations, but I am puzzled by the third sentence. It states that the lawyer's duty of loyalty "may extend to any co-client" under certain circumstances. It is my understanding that a lawyer owes a duty of loyalty to every client, unless that client has given informed consent to a modification of that duty. My view would be that the lawyer has such a duty to the co-client even if the conditions stated in comment c do not hold. But, in that event, the lawyer may have inconsistent duties to the client whose representation is being discussed in comment c and to the co-client.

Inconsistent duties are a source of liability for the lawyer and of conflict of interest problems, but that does not modify the existence of such duties if the lawyer has failed to assure their consistency.

While my puzzlement at comment c is not a product of any change in its text, I suggest that it should be clarified. Perhaps one could say that:

> The lawyer's duty of loyalty is to the client alone, if there is only one client, or to each client individually if there are more than one. The lawyer is responsible for assuring that any duties to co-clients are consistent with one another, either by limiting the scope of the duties to one or both in a way which avoids conflict or by obtaining any necessary consents. If the lawyer fails to do this, the lawyer may have or later encounter a disabling conflict of interest or may incur liability to one or more clients.

In comment d, I would have preferred to retain the sentence from the PMRT, appearing just before Illustration 2, specifically reserving the issue of contractual consequences if the insured withheld consent. But I suppose that this is sufficiently covered by the comment a paragraph on other law, so I shan't press the point.

Comment e follows the PMRT. I have no problem with it.

One or Two Clients

In comment f, the first four sentences read:

> A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. It is clear in such an arrangement that the designated lawyer represents the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26 subject to the law of the jurisdiction.

As compared with the PMRT, and ignoring some minor linguistic improvements, this drops the acknowledgement that "many jurisdictions hold

that the insurer is a co-client," and adds to the reference to § 26 a qualification that this is "subject to the law of the jurisdiction." I can tell you that insurers and the insurance defense bar are going to read removal of even the former bland acknowledgement of the existing co-client law as indicating a hostility to that law, and that will make them very fearful and unhappy. Those reactions will be amplified by the lack of any other apparent reason for the omission. The new provision is not even similar to the omitted one, because "subject to" is likely to be read as meaning that the law referenced can only preclude a relationship that § 26 would otherwise find to exist.

In looking for alternative language, I have two other concerns, one minor and one more serious. The minor one relates to the fact that the insured is said to be a client without ever having manifested consent to be so, as required by § 26. Ordinarily, that happens when the insured requests the insurer to provide a defense, so I'm going to propose a rewording that makes such a request express.

The major concern is the identity of the law to which the "subject to" language refers. Because the drafting premise is that the jurisdiction has no existing common law within the scope of the Restatement, I assume that the reference is to other law. But I'm afraid that this will be read by courts not familiar with ALI drafting conventions also to refer to local law of lawyering. That would create a one-way valve: the Restatement could be used to argue for limiting the existence of a client-lawyer relationship (pursuant to § 26) but not to critique law which imposes other limits without rooting them in something outside the law of lawyering. Such rooting is important because it forces courts to pay attention to the policies of the other law being utilized, instead of assuming that the issue is somehow resolved by the policies of the law of lawyering.

So, I propose the following:

> Liability insurance policies commonly provide that the insurer will indemnify the insured and provide a defense. When an insured under such a policy requests the insurer to provide a defense and the insurer appoints a lawyer to do so, the lawyer represents the insured. Many jurisdictions hold that the lawyer usually also represents the insurer. Whether the lawyer also represents the insurer is determined under § 26, unless other law in the jurisdiction limits the formation of such a relationship (see comment *a*).

Privilege

The fifth sentence of comment f reads: "Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement are communications with an agent of the client within the meaning of § 120 or should otherwise be regarded as immune from discovery by the claimant or another party." As Judge Keeton pointed out last year, the one thing a liability insurer (under any normal policy form) is not is an agent of the insured: the insured has no right to direct the insurer.

If not a co-client, the insurer could be regarded as a person of common interest, but under § 126 that only works if the insurer has its own counsel. I suppose the insurer's in-house counsel might fill this role, though they're not usually involved in claim handling. The work product waiver rules create no problems here, so the issue is purely privilege.

The difficulty in assuring that these communications will truly be privileged if the insurer is not regarded as a client is one of the reasons why insurers wish to be so regarded. But the PMRT bypassed the theoretical issue and avoided the agency mistake by simply stipulating that these communications

> are comunications protected against attempts by a non-client third-person to obtain them as either within the attorney-client privilege (*see* §§ 118 and following) or work product (*see* §§ 136 and following).

While theoretically untidy, this would be practically acceptable, in part because I expect insurers to continue to be recognized as co-clients entitled to share in the privilege. But nothing in the PMRT commits the Restatement to sharing in that expectation.

Illustration 4 and Cost Controls

Illustration 4 has now reverted to the version in PFD1, which conditions Lawyer's ability to accept the limitation on the number of depositions on whether "Lawyer reasonably believes that the additional depositions can be foregone without violating [any?] duty owed by Lawyer to Policyholder." The PMRT instead conditioned it on the lack of any "substantial risk that Policyholder will be exposed to personal liability."

This is a very important Illustration. Insurers are strongly committed to the proposition that, when what is at stake is their money, as opposed to the insured's money, they are entitled to make cost-benefit judgments on whether to pay for additional legal services.[1] I suggest that if the PMRT condition is satisfied, then the PFD1 condition should be as well, so you ought to be able to accept the PMRT version of this Illustration.

Moreover, the PFD1 version feeds the common misconception among lawyers that the ethical rules or the standard of care somehow impose some floor on the amount of work they must do in defending a client at an insurer's expense. In fact, the amount of work required depends on what a client wants to pay for, after the lawyer advises the client on costs and benefits. Nobody ever forgets that when the client being defended is also the one paying the bills. If the client says, I don't want to pay for work you recommend, the lawyer doesn't have to do it (and doesn't get to do it, unless the lawyer wants to provide free service as a matter of professional pride).

But when a third party, such as an insurer, must pay, it is in the interest of the lawyer to believe that a more extensive (and expensive) defense is the minimum that will satisfy the lawyer's duties to the non-paying defendant (who surely has no objection to a more expensive defense). Not surprisingly, lawyers (in entire good faith) easily develop such beliefs. Then they claim that this fictitious ethical obligation (in which they sincerely believe) creates an obligation of the third party to pay the lawyer. But the extent of the services due pursuant to the insurance contract is governed by that contract, not by what the lawyer may happen to think would be the "right" way to conduct the defense.

If one really wanted to be complete in Illustration 4, Lawyer would go to Insurer and conduct the discussion mentioned. Lawyer could then go to Policyholder and ask whether Policyholder would like to pay for the extra depositions. If neither client thinks the depostions are worth paying for, then Lawyer doesn't have to take them.

At least under the PMRT version of Illustration 1, Policyholder would respond to Lawyer's inquiry approximately as follows: "Are you nuts? Why

---

[1] I think the contract entitles them to make such decisions even when the insured's money is also at risk, subject to liability for negligent or bad faith use of that power, but I do not ask the Restatement to endorse that view of other law.

are you bothering me? Of course I don't want to pay my own money for extra depositions to possibly reduce the amount that Insurer will have to pay. Let Insurer pay for them if it thinks them worthwhile." (Less refined individuals might insert some profanity.)

Now Policyholder could also say: "I think you should take the depostions and Insurer should pay for them." (That's a very Policyholder-like thing to say.) If Policyholder feels that way, there are options available. Policyholder could sue to compel payment. Policyholder could advance the funds and sue to recover them. But in the circumstances specified in the PMRT version, any such conduct would be irrational, and the suit would be a sure loser.

This is not a case where Policyholder's interests are at the mercy of Insurer. It is a case where Insurer is trying to serve both its own interests and those of the insurance-buying public by avoiding wasteful defense expenditures. The law of lawyering ought not to encourage lawyers to resist such cost-controls beyond what their own self-interest already encourages.

Equality of Clients

The final two paragraphs of comment f have reverted to the PFD1 version. Essentially, they present the issue of whether the Restatement will take the position that, as a matter of the law of lawyering, co-client insurance companies are mere secondary clients. This would be a rule unique among co-client relationships. In all other cases, a lawyer with multiple clients owes them equal duties of undivided loyalty and equal duties of disclosure of information material to the representation. (*See* § 112, comment *l*)

If there is any reason to impose a special rule here, it must be a reason pertaining to the relationship between insurer and insured, not to the relationship of either with defense counsel. In short, if there is a special rule, it properly derives from insurance law, on which the Restatement takes no position. And remember, I'm not asking that the Restatement take the position that an insurer is not a secondary client, only that it remain agnostic.

I know there are a lot of statements in cases asserting that the insured is the "primary client." But almost all of those are either pure dicta or unnecessary because what happened was an improper subordination of the insured's interests to those of the insurer, something an equal loyalty rule also forbids.

Insurers, too, have interests in the loyalty of their lawyers, interests going beyond mere abstention from actively assisting fraud. If defense counsel cannot deal honestly and loyally with an insurer which is its client, the usual rule would be that defense counsel must withdraw, rather than that defense counsel must covertly subvert the interests of a client who is blissfully unaware that any issue affecting its interests has even arisen.

Unless divergences of this sort are simply unmanageable using the normal rules or unless insurance law dictates someting different (both of which are at least subject to dispute), insurers ought not to be thrown to the wolves in this manner. Cases in which these problems arise have been too infrequent to really press anyone to work the issues through until the recent and welcome onset of academic attention, stimulated in part by the Restatement. Now that those issues are being addressed, the Restatement ought not to interpose an obstacle to reconsideration of dicta which at least may considerably overstate the proper rule.

In particular, ABA Opinion 96-403 and my AALS paper have begun exploring a previously neglected problem: what disclosures must be made and what consents obtained after the relationship has been formed but before it proceeds to a point where a divergence of interests is imminent. This subject has also begun to receive attention from the organized defense bar, notably in a workshop of the Illinois Association of Defense Trial Counsel shortly after the AALS meeting.

It was and is important to show that no special informed consent is necessary to creation of the relationship (comment *b)*, because defense counsel must frequently file appearances before communicating with the insured. But once the relationship has been formed, there are opportuities for normal consultations and consents. I believe that, once these are better defined and the defense bar educated about them, these will resolve or avoid many of the problems which have plagued this practice area.

But the Restatement now threatens to prevent effective continuation of this project by telling busy courts that the problems have been resolved already, by the ill-considered and arguably overbroad dicta in a not very large group of cases, dicta picked up and amplified in a large body of articles and state bar ethics opinions which are even less analytic than the cases pronouncing the dicta.

In light of this argument, let me review the handling of these issues in the PMRT version. The first two sentences of the next to last paragraph were the same as in the PFD1 version, but were set off as a separate paragraph.

The first step in addressing the problem of confidences bearing on coverage was to point out how insurance law prevents the problem from arising in most cases where there is some coverage issue:

> Material divergence of interest might also exist because of a question of coverage under the policy that could adversely affect the handling of the lawyer's defense of the insured. In such situations, insurance law in many jurisdictions provides that the insured is entitled to independent counsel who is not subject to the direction of the insurer. But if the lawyer does represent both insurer and insured, the lawyer may not prefer the interests of the insurer so as to assist in establishing its coverage position.

As far as I know (and I've looked, hard), the "many jurisdictions" are all jurisdictions which have addressed the subject, though there are two variants of the rule. I'd be shocked if any ever took the contrary position. The counsel who is not subject to direction of the insurer does not represent the insurer and owes it only contractual duties of the sort which § 215 permits for other types of third-party payors. And none of the statements in the foregoing paragraph are either adverse to the interests of insureds or otherwise controversial.

Then, the next step was to separate out two subsets of the problem of disclosure of confidences where the equal loyalty rule gives the same results as the insurer-as-secondary-client rule:

> If the insurer is not a client, the lawyer may not reveal confidential information commnicated by the insured unless authorized to do so (*see* § 112). If the insurer is a co-client with the insured, the lawyer may not, without consent of the insured reveal to the insurer confidential information communicated by the insured that is outside the scope of the joint representation, such as information bearing on coverage issues between the insurer and the insured but not bearing on liability and damages issues involved in the lawyer's defense of the claim against the insured.

The latter sentence accounts for *Tilley* and a few other cases of that genre. (The common wisdom on many of these points comes from a small number of cases which are mostly old and involved clearly abusive practices which could have been proscribed under narrower and uncontroversial rules had anyone thought very hard about the proper limits of the proscription.)

Finally we came to the *Parsons* case, which is the only holding supporting the categorical non-disclosure rule set forth in the PFD1 version. In fact, there has never been another reported case, before or since, with anything like similar facts. The PMRT version said this:

> This Restatement does not address whether the rules regarding disclosure to a co-client of confidential information that would be damaging to the client who disclosed it to the lawyer (*see* § 112, comment *l*) may be modified in insurance defense situations due to considerations of insurance or other law.

I hasten to point out that, even if the usual rule does apply to insurer co-clients, that's a point which defense counsel needs to communicate to the insured at the outset of the relationship, before the insured transmits any confidences; counsel needs to obtain informed consent to proceed on that basis. (*See* § 202(c)(i)) If defense counsel fails to do this, as the lawyer in *Parsons* surely must have failed, then the lawyer will be liable to the insured for any disclosure, although the lawyer would also be liable to the insurer for failure to disclose unless the insurer had agreed to vary the default rule. (That's another instance of the conflicting duties problem that the lawyer needs to prevent.) Because insurers are generally liable to the insured for defense counsel's malpractice, the failure to obtain consent up front means the result in *Parsons* is correct, but for a reason different from that advanced by the court. (If defense counsel were good for it or had enough insurance, defense counsel would then be liable to the insurer, but that point was not explored in *Parsons*.)

The *Parsons* example illustrates the potential for proper disclosures and consents at the outset to avoid problems which appear intractable when they arise (and so motivate courts to cut the Gordian knot, if they even recognize the problems).

In closing on this confidentiality issue, let me say that I don't regard the *Parsons* issue itself as very important: the case is a freak which appears never to have been repeated. My guess is that insurers will prefer to avoid an uphill

battle against the overbroad statements which have become common wisdom and simply consent to have counsel keep this sort of information secret. (And if they didn't do so, that consent would likely be imposed as a matter of insurance law.) But I do think the broader issue of categorically treating insurers as second-class clients who cannot trust their lawyers is an important one, and much of the thinking about that issue is based on this freakish case. Thus, I am even more concerned about the broad statement of the "primary loyalty" rule in the first sentence of the last paragraph of comment *f* than I am with the confidentiality discussion.

I also know that professional responsibility scholars have been accustomed to thinking of *Parsons* and related cases as part of the bedrock of the law of insurance defense ethics. With no understanding of the insurance context, they have no reason to think otherwise. And until the recent elucidation of the analytic issues involved, even I had assumed the case msut be right, without having figured out how to fit it into the larger picture. (Now I think the result is right but the reasoning wrong.) I know that some of your coleagues in the professional responsibility discipline felt that you "caved in" to insurance industry pressure last year and have criticized you for doing so. Given the long history of what insurers and the defense bar perceived as unyielding resistance to requests for change, I know that the changes reflected only a belief that a proper way had been found to reconcile what you see as the proper mode of analysis with our concerns. I hope that you will again see it that way.

Reporter's Note

Because the Reporters Note is not subject to consideration by anyone but yourselves, there is no need at this time to offer extensive commentary. I will do that at a later time, so that the final product may be as nearly perfect as we (the ALI) can make it. I regard all of the matters stated in this section as technical corrections regarding insurance law, not argument of matters whose resolution under existing law is unclear. (In a similar vein, once the AALS papers are published, I expect you will want to cite some of them under comment *f*.)

Consent to the insurer's role in designation of defense counsel has sometimes been found in the insurance contract, as *Crum v. Anchor* illustrates. But the better view finds that consent in the insured's request for a defense under the policy. [cites]

The statement of the circumstances in which the insured has a right to independent counsel is overbroad, except in New York. Elsewhere, a reservation of the right to deny coverage only creates such a right if it raises a coverage issue which turns on facts which must be determined in the tort action against the insured, so that defense counsel loyal to the insurer would have an opportunity to benefit it at the insured's expense by the way in which the defense would be conducted on that issue. **[cites]**

With one exception, control of settlement does not seem to me a relevant subject for this Restatement. In general the insurer has it, and sometimes courts (properly or not) shift it to the insured. But defense counsel never has it. and its always governed by insurance law, never by the law of lawyering. And it rarely is thought to create a problem for defense counsel, though the problem created when it does is exquisite. **[cite foster]** I am part of a defense bar task force which is going to take a run at this problem starting this week, aided by Profs. Silver and Ellen Pryor.

As you note, most jurisdictions (properly, I think) preclude counsel for the insured from effectuating a settlement to which the insured objects, even though the insurer has the contractual right to make that settlement. (Of course, I also think an insured who objects breaches the contract, but that doesn't matter here.)

If the issue is the right to control litigation strategy, more relevant cases would be: **[cites]**

It is flatly untrue that an insurer is typically held responsible for any damges awarded in excessof policy limits. **[cite Ashley]** It is true that the insurer will be so held if it improperly refuses to settle, which may be what you intend to imply. At very least this needs clarification. The statements about the lawyer's liability, which are the real point here are correct.

The final paragraph is accurate, even though I would describe those cases more narrowly, as the above argument indicates.

Thank you for bearing with me through so long a letter on what is a very small part of the overall project. But the issues are of great practical significance, as well as being intellectually complicated. I hope we can yet arrive at a better resolution than that contained in Preliminary Draft No. 13.

Sincerely, William T. Barker

SELECTED ISSUES ON THE TRIPARTITE RELATIONSHIP FROM THE DEFENSE COUNSEL PERSPECTIVE

Mark S Lagomarcino
Hanson, Bjork & Russel
Suite 1300
Des Moines Building
405 6th Ave
Des Moines, Iowa 50309-2413
(515) 244-0177

Introduction

The drafting of *Restatement (Third) of the Law Governing Lawyers* began in 1986 At the ALI Annual Meeting in May 1996, the latest draft of Section 215 was the center of attention and controversy The debate focused on the issue of "Who is the client in the tripartite relationship?" The ALI draft seems to be leaning heavily in favor of the minority view, which is that the insured is the only client in the tripartite relationship Due to input from the Defense Research Institute, which spoke on behalf of defense attorneys, the ALI has voted to send the issue of the tripartite relationship back to the Reporters for further revisions numerous times The ALI is now close to deciding the relationship between defense counsel, insureds, and insurers

I. Working Hypothesis About Liability Insurance

Insureds buy liability ins to

- protect against paying costs to defend lawsuit
- protect against paying plaintiff as a result of lawsuit

Where insurer controls defense and loss is fully covered

- co has greater incentive than insured to defend the suit
- co has substantial judgment and experience in defending claims and managing lawyers
- because of both the above, claims costs kept lower

Disagreements about defense arise for four reasons

1 where insured no longer bears a risk of paying a judgment or settlement but bears other risks i e publicity, reputation, etc
2 where co bears costs of defense and insured will not
    - insureds prefer more expensive defense effort
    - insured may value vindication at trial as opposed to pre-trial settlement
3 where co has additional stake in outcome
    - defeat particular plaintiff's lawyer
    - obtain precedent
    - to employ a particular defense counsel
4 if one party knows that the other values a particular outcome highly there is room to coerce the other party into bearing a larger fraction of expense than called for by insurance contract

Defense counsel is left to sort out disagreements

II. Sources of the Tripartite Relationship

Liability contract

- Only co and insured are parties to liability contract
- Tripartite relationship appears only when counsel enters retainer agreement with co
- Tripartite relationship requires liability contract and retainer agreement

Retainer agreement

- directly regulates defense counsel's relationship with co and insured
- fixes scope and content of those relationships

III. Relationship Between Liability Contract and Retainer Agreement

Liability contract should "bleed" into retainer agreement

1. Retainer agreement must require defense counsel to serve the insured as fully as the liability contract
2. To protect its financial stake in claim asserted against insured, the co should structure the retainer agreement allowing it to exercise all rights and powers it holds under the liability contract

Defense counsel need not consult liability contract; the retainer agreement is a complete agreement that exists apart from liability contract and that can be looked at directly

IV. Does Defense Counsel Represent the Company or the Insured?

- Majority view - Defense counsel represents the co and the insured
- Minority view - Defense counsel represents only the insured
  - ⇒ this view gaining support through the Restatement of The Law Governing Lawyers
- Because attorney-client relationships arise consensually, whether defense counsel has one client or two defends upon the agreement counsel enters into when retained
- Decision to become a client is a company's to make, and in certain cases a co may prefer to be a third-party payor
- As a third-party payor, the co may:
  - ⇒ receive reports from defense counsel
  - ⇒ limit scope of attorney's activities on behalf of the insured
  - ⇒ discharge the lawyer
  - ⇒ exercise other administrative powers
- Attorney called "independent counsel" where he represents only the insured, because defense counsel is not the company's agent
- Where attorney represents the co only, attorney is called "company counsel" or "monitoring counsel" - not defense counsel
  - ⇒ no contractual or fiduciary duties owed insured
- In full coverage cases, the co that hires counsel for itself usually hires a second lawyer who represents both co and insured
- Co prefers to be a client as opposed to third-party payor because
  - ⇒ can instruct lawyer on matters within scope of representation
  - ⇒ beneficiary of fiduciary duty
  - ⇒ can sue lawyer for malpractice
  - ⇒ can gain benefit of evidentiary privileges for its communications
- Co names the insured as a co-client for several reasons
  1. existence of attorney-client relationship between defense counsel and insured
  2. secures protection of evidentiary privileges for communications
  3. limits opposing parties' access to the insured
  4. to meet company's contractual duty to defend insured

- It is up to the lawyer and the co that retains the lawyer to decide whether lawyer represents only co , only insured, or both
  - ⇒ The retainer agreement determines this
- Rule announced in cases like *Atlanta International Insurance Co v Bell* stating only insured can have direct malpractice claim is rejected by the authors
  - ⇒ by agreement, lawyer can serve two masters
  - ⇒ lawyer owes standard of care to both
  - ⇒ thus both clients are entitled to sue

V. When Does Defense Counsel's Representation of the Company and the Insured Begin?

- Attorney acquires co as client when co solicits legal services from attorney and attorney agrees to provide them
- Insured becomes client when the co retains the lawyer at the insured's request
- An insured who demands a defense consents both to representation by company-selected counsel and to joint representation because
  - ⇒ co entitled to control defense
  - ⇒ co can defend liability suit effectively only if it is a co-client
  - ⇒ insured has no right of control nor a reasonable expectation of asserting control in a full coverage case
- An insured who authorizes co to control defense is not that company's principal because
  1. co does not owe insured a fiduciary duty nor is it subject to insured's control
  2. inappropriate to hold co to fiduciary duty or duty of obedience when controlling the defense
- Ins co acts as a non-agent, independent contractor when performing defense functions

VI. The Scope of Defense Counsel's Representation of the Company and the Insured

A. The Retainer Agreement Defines the Scope of the Representations

- Lawyers and clients free to define the cope and objectives of a representation
- Three background points to note
  1. Better to speak of scope agreements or definitions than of scope limitations or restrictions
  2. When representing two clients on the same matter, the scope of each client can differ absent a fatal conflict of interest
  3. When it's unclear whether or not a client was due a particular service from a lawyer, a court usually gives the client the benefit of the doubt

B. The Scope of Defense Counsel's Representation of the Insurance Company

- The co and the lawyer decide the scope of the lawyer's representation
- Whether defense counsel will handle settlement issues is up to the co and the lawyer to decide
- Defense counsel can handle some settlement responsibilities without handling all

- Reasons for dividing settlement responsibilities
    1. co can avoid risk that defense counsel's duties to insured may dilute the company's contractual right to decide whether, when, and at what price settlement shall occur
    2. saves the co administrative expense by leaving insured out of the loop
    3. co can take advantage of the skills of different lawyers
    4. defense counsel may not want responsibility for settlement since many malpractice claims concern settlement-related conduct
- Defense counsel usually represents the co on all matters relating to the investigation, defense, and settlement of the liability suit

C. *The Scope of Defense Counsel's Representation of the Insured*

- Reasons for excluding settlement from the scope of defense counsel's representation of the insured:
    1. counsel's only duty owed the insured would be to defend the insured in the liability case
    2. interests of the co and the insured in settlement can diverge
    3. it is no longer defense counsel's job to tell insured how insured may be affected by settlement developments or by settlement on particular terms
    4. co can fully realize its right to make settlement decisions
    5. co can reduce likelihood that defense counsel will have to withdraw due to settlement disputes
    6. reduces defense counsel's malpractice exposure
- Both insurance law and law of professional responsibility permit the use of retainer agreements excluding settlement from scope of insured's representation
- Would not be improper, but is recommended that settlement responsibilities be excluded from scope of representation of insured but not excluded from representation of co

VIII. Defense Counsel's Duties to the Company and the Insured

A. *Understanding Defense Counsel's Duties in General*

- Deciding where the retainer agreement governs defense counsel's obligations and where some other body of law applies:
    1. Only retainer agreement governs lawyer's conduct because no other body of law generates an obligation
    2. A separate body of law requires attorney to act in ways that are consistent but not required by retainer agreement
    3. A separate body of law ordinarily requires attorney to act counter to retainer agreement, but he lawyer can act under the retainer agreement with insured's consent
    4. A separate body of law requires attorney to act counter to retainer agreement, the separate body of law cannot or has not been changed, so attorney cannot act as retainer agreement requires

B. Lawyer's Duties Arising Under Agency Law Are Mutable

- Agency law permits a principal and an agent to alter, amend, or waive virtually every duty an agent ordinarily incurs by default, including the duty of loyalty
- Agency law permits the co to retain the lawyer on terms that further the purposes the liability contract exists to serve

C. Lawyers Duties Arising Under the Law of Professional Responsibility May Be Mutable or Immutable

- Law of professional responsibility differs from agency law:
  - ⇒ only some duties of professional responsibility can be altered, amended or waived with client's consent, while others cannot
    - ⇒ confidentiality = mutable duty
    - ⇒ concurrently representing opposing parties to same litigation = immutable duty
- Lawyer must respect an immutable duty, no matter what retainer agreement says

D. The Impact of Mutable and Immutable Duties on the Structure of the Tripartite Relationship

- A retainer agreement can provide that all mutable lawyerly duties are to be as a liability contract requires
- Retainer agreements require the insured to refrain from instructing the lawyer on the defense or settlement of the liability claim
- Many lawyerly duties are mutable and liability contracts bleed into retainer agreements
- Because immutable duties cannot be changed, they may prevent a party from exercising a right or power it holds under the liability contract
- Retainer agreement should provide that all mutable duties arising under agency law or law of professional responsibility have the content required by the liability contract

VIII. The Duty of Loyalty

- Duty of loyalty is fully mutable under agency law and mutable within limits under professional responsibility law
- Duty of loyalty works well until co directs lawyer to act contrary to interests of insured Lawyer must then decide:
  1. whether to confer with insured before acting
  2. how to advise insured with respect to instructions
  3. what to do if insured resists instruction

A. A Prologue on Litigation Against Former and Current Clients

- No jurisdiction permits a lawyer to sue a past client on a substantially related matter without the client's consent
- No jurisdiction except one permits lawyer to sue a current client without client's consent
- Rules limit defense counsel's freedom to represent clients who are adverse to insurance companies and insureds

B. Why is it Wrong to Impeach the Insured?

- Courts' rationales for not allowing defense counsel to impeach the insured:
  1. Bad civic practice because it confuses the jury to argue that the defendant is colluding with the plaintiff.
  2. Agency law prohibits a lawyer from impeaching an insured who does not wish to be impeached.
  3. When the co calls for the impeachment of the insured, their interests are too adverse to share the same lawyer and professional responsibility law require defense counsel to withdraw from joint representation.
- Jury confusion rationale is deemed farfetched by authors because:
  - ⇒ people can understand collusion between parties sharing a bond
  - ⇒ evidence law permits impeachment of a party-witness whom lawyer represents
  - ⇒ lawyers often attack client's credibility with their clients' consent
- Agency and professional responsibility law
  - ⇒ attorney may not act contrary to client's instruction
  - ⇒ however, by issuing such instruction, the insured breeches the retainer agreement
  - ⇒ an agent has no duty to act contrary to terms of employment contract or agreement
  - ⇒ insured's conduct terminates retention and frees lawyer from duty to act, allowing lawyer to withdraw
- When insured breeches retainer agreement the tripartite relationship ends.
- If court does not allow defense counsel to withdraw, a new attorney-client relationship arises between defense counsel and insured
- Attorney fees handled contractually in this situation
- Ins companies may act as third-party payor.

C. A Strategy for Handling Potential Conflicts: Confer with the Insured

- Where insured attempts to control the defense, counsel should
  - ⇒ confer with insured
  - ⇒ inform insured of likely consequences
  - ⇒ withdraw at last resort
- Where there is a potential conflict of interests the course of action could help the co while harming the insured
  - ⇒ Rule 1.7(b) of Model Rules of Professional Conduct applies
    - Question 1 - Could counsel's responsibilities to the co materially limit the representation of the insured? If yes, then Question 2.
    - Question 2 - Could insured reasonably consent? If yes, then obtain actual consent. If no, defense counsel must withdraw
- Standard to which discussions with insured must conform: reasonably well-informed or adequately informed
  1. explain nature of potential conflict
  2. defense counsel's obligation to co
  3. defense counsel's obligation to insured
  4. explain joint representation can continue despite conflict

5 explain costs and benefits to insured of waiving conflict
6 defense counsel may have to withdraw
7 insured may retain independent counsel

D. The Duty to Investigate Potential Conflicts. Make Inquiries Upon Encountering "Conflict Clues"

- No routine duty to investigate potential conflicts of interest should be imposed
- Only after a client expresses a concern would defense counsel be required to explore a possible conflict further
- Conflict clues include:
  1 expression by co or insured of a special interest in the conduct of the defense
  2 coverage questions
  3 excess liability problems
  4 special bond between insureds and claimants
  5 insureds who are defendant's in criminal prosecutions
  6 insureds alleged to have committed acts of intentional, willful, or malicious wrongdoing
  7 insureds from whom punitive damages are sought
  8 insureds who have reputational or other interests at stake

E. Handling Actual Conflicts. Obtain an Informed Waiver From the Insured or Withdraw

- Governed by Rule 1 7(a) of Model Rules of Professional Conduct: lawyer shall not represent a client if representation will be adverse to another client, unless (1) lawyer reasonably believes representation will not adversely affect relationship with other client, and (2) each client consents after consultation.
- Conditions (1) and (2) can usually be met in full coverage cases
- When there is unwaivable actual conflict, which client should defense counsel represent?
  1 Minority view - PCR (Primary Client Rule) requires counsel to continue representing the insured
  2 Majority view - NSR (No Subordination Rule) forbids lawyers from subordinating one client's interests to those of another without consent of both
- Reason for opposing PCR: it allocates authority within the tripartite relationship in a manner that is at odds with the allocation provided for in the liability contract

IX. The Duty to Give Information and the Duty of Confidentiality

A. The Duty to Inform the Company and the Duty of Confidentiality to the Insured

- Recap of allocation of authority in liability contract
  ⇒ insurance co controls defense and settlement of claims
  ⇒ insured has duty to assist the co in the performance of the investigation, defense, and settlement
  ⇒ retainer agreement should assign defense counsel responsibility for investigation the liability suit, and allow counsel to disclose to co all relevant info received

- Majority view = no duty of confidentiality within tripartite relationship applies to relevant info received from the insured in a full coverage case
- Express consent of insured not needed because defense lawyers have implied authority to give co all relevant info

B. The Duty to Inform the Insured and the Duty of Confidentiality to the Company

- The liability insurance contract contains no provisions that directly bear on any right the insured may have either to receive info or to have relevant info withheld from the co
- Cost of communications intended solely to inform the insured is too small to justify specific contractual provisions because
    1 Defense counsel must educate insured in order to obtain info and assistance from the insured
    2 Insureds unlikely to want more info than necessary because they have limited interests at stake
- In full coverage cases, defense counsel's only duty to communicate is to keep insured informed of major developments in the representation and of any actions required of the insured
- The heightened duty to communicate should apply only when there are "clues" alerting an attorney to possibility that insured has special interests or needs
- Defense counsel has no duty to keep relevant information secret from either the company or the insured
- Neither client has a right to ask defense counsel to withhold relevant info from the other (Majority view)
- When requested, defense counsel must reveal contents of all correspondence between defense counsel and the co
- Duty to disclose turns on whether the insured can understand the investigation and defense of liability suit sufficiently well without it
- Defense counsel should explain up front that as a general matter there can be no secrets within the tripartite relationship
    ⇒ this may inhibit flow of info from client to defense counsel
    ⇒ co could change retainer agreement to provide that relevant info be kept secret unless consent of communicating client to disclose is given
- Where a client reveals relevant info and directs it not be disclosed:
    3 remind client there are no secrets in tripartite relationship
    4 explore possible implications of disclosure for the client
    5 explain consequences of nondisclosure
        - try to convince communicating client to consent to disclosure
        - possibility of counsel's withdrawal from case

BIBLIOGRAPHY

Atlanta International Insurance Co v Bell 438 Mich 512, 475 N W 2d 294 (1991)

Barker. *The Insurance Defense Community and The Restatement of the Law Governing Lawyers*, Occurences, Fall 1996, at 5

Restatement (Third) of the Law Governing Lawyers § 215 (1996)

Silver and Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L J 255 (1995)

Woodard, *Defense Counsel and the Tripartite Relationship A Dialogue*, For The Defense, Feb 1997, at 12

stant sewage-treatment issue while in state government, he worked on others and knew agency's general policies); In re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981), aff'd by equally divided court sub nom. Greitzer & Locke v. Johns-Manville Corp., 710 F.2d 127 (4th Cir. 1982) (lawyer who had been special litigation counsel in Department of Justice defending asbestos claims brought against government held not barred not only in cases he had defended but also in others because he might know general government information useful to defense); Taxpayers, Homeowners & Tenants Protective Ass'n v. Haber, 634 F.2d 182 (5th Cir. 1981) (former city attorney who had been involved with general redevelopment project prohibited from representing plaintiffs charging improper acts committed under program); Traylor v. City of Amarillo, 335 F. Supp. 423 (N.D. Tex. 1971) (former city attorney who represented city in amending ordinances and defending their validity disqualified from representing plaintiffs challenging acts taken under color of the ordinances).

Comment f. Possession of confidential information. See ABA Model Rule 1.11(b). No decision has been found that rests entirely on the separate requirement of Rule 1.11(b). Compare, e.g., United States v. Brothers, 856 F. Supp. 370 (M.D. Tenn. 1992) (former federal prosecutor disqualified under both former-government-lawyer rule and former-client rule due to access to highly confidential information about same matter).

Comment g. Screening former government lawyer. See § 204, Comment *e*, Reporter's Note.

TOPIC 5.
LAWYER'S OBLIGATION TO THIRD PERSON

Introductory Note

Section

Introductory Note:

This Topic examines the effect on current clients of a lawyer's obligations to third persons that might affect the representation. The issue of a lawyer's responsibilities to other clients, both past and present, is considered in Topics 3 and 4.

Section 215 considers payment of compensation to a lawyer by a third person, including another client, whether pursuant to a contract between the client and the third person or because the third person is otherwise interested in the outcome of the proceeding. The Section also considers the extent to which a lawyer may enter into a relationship in which a third person will exercise the client's prerogative to direct the lawyer's provision of legal services for a client. Section 216 examines the effect of other non-client obligations of the lawyer, including service as a trustee, corporate director, or public official, on representation of the lawyer's clients.

§ 215. Compensation or Direction by Third Person

(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 202, with knowledge of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202.

Comment:

a. Scope and cross-references. This Section applies the general conflicts prohibition of § 201 to situations in which a third person pays a lawyer's fee for representing a client or directs a lawyer's work for a client. The third person might otherwise be a stranger to the matter, or be interested because of indemnification or similar obligations, such as a liability insurance company, or interested directly in the matter because a co-client, such as a corporation sued along with one or more of its employees (see § 212, Comment *e*). The risk of adverse effect on representation of the client is inherent in any such payment or direction. This Section accordingly requires informed consent of the client and imposes limitations on the control that a third person may exercise over the lawyer's work. With respect to liability insurance, see Comment *f*.

The prohibition imposed by this Section applies to all affiliated lawyers (see § 203). Sanctions and remedies listed in § 201, Comment *f*, can be imposed for violation of this Section. Where a violation of this Section has caused actionable harm to a client, the remedy of professional malpractice (see [Chapter 4]) is available.

Issues relating to payment of legal fees generally are considered in Chapter 3. Chapter 5 examines a lawyer's duty to protect confidential information of a client.

b. Initial client consent. Client consent pursuant to § 202 is a precondition to a lawyer's accepting either a third person's payment of the fee for a client or a third person's direction in a matter. In particular, the client must have knowledge of the circumstances and conditions under which the fee payment or direction is to be provided and any substantial risks to the client thereby created, such as risks of interference with the lawyer's independent judgment (see § 202, Comment *c*). When there is no significant risk to the client, as when a claim against a client will be fully covered by the insurance policy pursuant to which the lawyer is appointed and is to be paid, consent other than that implicit in the insurance agreement is not required.

c. Third-person fee payment. This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the person paying the lawyer's fee. The lawyer's duty of loyalty is to the client alone. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment *f* hereto). Lawyers paid by civil rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance.

d. Third-person direction of representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client generally requires that no third person control or direct a lawyer's professional judgment on behalf of a client. However, the third person may direct the lawyer's representation of the client in the circumstances stated in Subsection (2). The restrictions must allow for effective representation of the client, and the client must give informed consent to the restrictions. Such restrictions are reasonable in scope and character if, for example, they reasonably limit the cost of the lawyer's services by requiring the lawyer to adhere to a reasonable budget for the case. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as a designated agent of the client.

Illustration:

1. Resettle, a non-profit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is

legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make nonfrivolous contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 202, there are limits to the restrictions on scope of the representation permitted under this Section. In general, unless the third person who is paying the lawyer bears substantially all of the consequences of the result in litigation, the third person may not direct or restrict the lawyer's decisions except with the client's informed consent.

Illustration:

2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 33).

e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 114.

Illustration:

3. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of his actions. Without consent of Employee as provided in § 114, Lawyer may not give Employer that information.

f. Representing insured. A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The lawyer represents the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 26. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement are communications with an agent of the client within the meaning of § 120. Similarly, because and to the extent that the insurer is directly concerned in the matter financially, the insurer has standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer to the extent set forth in § [73] [Chapter 4].

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment *d* hereto. The consent of the insured to direction of the lawyer by the insurer may be provided by a clause to that effect in the policy.

Illustration:

4. Insurer, a liability insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed

against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the standard of care owed by Lawyer to Policyholder (see § [74] [Chapter 4]), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim in excess of policy limits is asserted against an insured with significantly exposed personal assets. If the lawyer knows or should be aware of such an excess claim, the lawyer may not prefer the interests of the insurer so as to put the insured at risk of excess liability. Similarly, when there is a question whether the claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 112) without explicit consent of the insured (see § 114). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 112, Comment *l* (confidentiality in representation of co-clients in general)). On discretionary disclosure to prevent substantial financial loss, see § 117A(2); on a lawyer's duty not to assist client fraud, see § [151(3)(a)] [Chapter 6] and Comment *c* thereto.

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the

lawyer's duty not to assist client fraud (see § [151] [Chapter 6A]) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 112, Comment *l*). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

REPORTER'S NOTE

Comment b. Rationale. The traditional rule on third-person fee payments is expressed in Rule 1.8(f) of the ABA Model Rules of Professional Conduct (1983):

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by [the requirements of confidentiality].

See also ABA Model Code of Professional Responsibility, DR 5-107(A) and (B) (1969) (similar).

Comment c. Initial client consent. See, e.g., Arrington v. Nat'l Broadcasting Co., 531 F. Supp. 498 (D. D.C. 1982) (union may pay costs of lawsuit on behalf of its members seeking overtime compensation where full disclosure and consent shown). On consent in policyholder-insured relationships, see Comment *f*, Reporter's Note.

Comment d. Third-person direction of representation. On cases involving insurer control of litigation, see Comment *f*, Reporter's

Note. Cases involving lawyers for public interest causes have proceeded on a different rationale, typically founded on the basic right of a public interest organization to provide legal services. In upholding that right, courts have implicitly sustained the right of the organizations to specify the legal issues to be tested. See, e.g., American Civil Liberties Union v. State of Tennessee, 496 F. Supp. 218 (M.D. Tenn. 1980) (state barratry statute, which forbade groups paying legal fees in public interest cases, ruled unconstitutional); In re Education Law Center, 429 A.2d 1051 (N.J. 1981) (general state rule against corporate practice of law held not to apply to not-for-profit corporation representing persons without charge on issues relating to equal educational opportunity). But cf. In re Primus, 436 U.S. 412, 447-448 (1978) (Rehnquist, J., dissenting) (overreaching of private client can occur even if organization has best of motives).

The risk of outside control by third-person payers in criminal cases has led to results consistent with Illustration 2. See, e.g., United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976) (appropriate to require separate counsel where individual defendants might have tried to place blame for crime on corporation alone while corporation might have tried to blame crime on them); In re Adams, 266 A.2d 275 (N.J. 1970) (lawyer reprimanded for accepting payment from illegal lottery organization to defend employees who might be charged with lottery violations). See also Wood v. Georgia, 450 U.S. 261 (1981) (when employer set up test case putting employees at risk and employees expected employers to pay fines as well, but they did not do so, case remanded for investigation of conflicts because of counsel's possible divided loyalties).

In some of the reported criminal cases, the government has succeeded in disqualifying a lawyer whose fee was being paid by someone else, asserting that the common payment scheme interfered with its investigation or with the rights of the defendants to turn state's evidence. See, e.g., Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975) (proper to disqualify single lawyer being paid by police fraternal order and representing all 12 policemen called before grand jury investigating police department corruption). But see, e.g., In re Special Grand Jury, 480 F. Supp. 174 (D. Wis. 1979) (when target company was paying for lawyer for its past and present employees, government could show no reason why employer should be denied counsel of choice). Cf. Polk County v. Dodson, 454 U.S. 312 (1981) (although state that prosecutes also pays public defender, defender represents only defendant and thus no improper conflict of interest).

A similar issue can arise in civil cases. E.g., Purdy v. Pacific Auto Ins. Co., 203 Cal. Rptr. 524 (Cal. Ct. App. 1984) (when conflict arises over settlement strategy, insurer must provide new counsel for insured at insurer's expense); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 131 N.Y.S.2d 393 (N.Y. Sup. Ct. 1954) (insurer seeking in settlement negotiations to shift greater portion of risk to parties other than insurer improperly put insured at higher risk of liability); see also Comment *f*, Reporter's Note.

Comment e. Preserving confidential client information. See Comment *f*, Reporter's Note.

Comment f. Representing insured. See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:700 (2d ed. 1990); C. Wolfram, Modern Legal Ethics §§ 8.4, 8.8 (1986). On conflicts of interest involved when a defense lawyer is designated for an insured by an insurer, compare, e.g., O'Malley, Ethics Principles for the Insurer, the Insured and Defense Counsel: the Eternal Triangle Reformed, 66 Tulane L. Rev. 511 (1991) (arguing for insured-as-sole-client position), with, e.g., Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev 1583 (1994) (arguing for dual-client view). On application of the attorney-client privilege to communications between an insured and an agent of the insurer, see § 120, Comment g, Reporter's Note. On the ability of the insurer to sue insurance defense counsel for malpractice in the absence of a conflict with the insured, see, e.g., Unigard Ins. Group v. O'Flaherty & Belgum, 45 Cal. Rptr.2d 565 (Cal. Ct. App. 1995); see generally § [73], Comment [g] [Chapter 4], Reporter's Note.

Courts routinely find policyholder consent to the role of the insurer through execution of an insurance contract containing a duty-of-cooperation clause. E.g., Crum v. Anchor Ins. Co., 119 N.W.2d 703 (Minn. 1963) (insurer obliged to defend where pleadings showed incident within terms of policy). Closer questions about the adequacy of consent arise when the complaint alleges conduct, some of which is not covered by the policy, or when the insurer defends under a reservation of rights. Typically in such cases, either the insurer must pay for separate counsel for the insured or the insured must specifically give informed consent to defense by a lawyer selected by the insurer. E.g., N.Y. State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984) (insurer may participate in selection of the insured's independent counsel); San Diego Federal Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494 (Cal. Ct.

App. 1984) (consent to insurer's choice of counsel deemed withdrawn when insured retained independent counsel); Nandorf, Inc. v. CNA Insurance Companies, 479 N.E.2d 988 (Ill. App. Ct. 1985) (insurer obliged to pay for separate counsel for insured).

Most of the case law on control of litigation strategy by the insurer turns on decisions whether to settle, particularly when the insured need not expect to bear the financial risk of loss. E.g., Buchanan v. Buchanan, 160 Cal. Rptr. 577 (Cal. Ct. App. 1979) (insurer may assert claim of non-liability in face of insured's wish to concede liability to victim-relative); Feliberty v. Damon, 527 N.E.2d 261 (N.Y. 1988) (malpractice insurer not liable to doctor for settlement within policy limits despite adverse publicity). But see Rogers v. Robson, Masters, Ryan, Brummund & Belom, 407 N.E.2d 47 (Ill. 1980) (lawyers designated by medical-malpractice insurer to defend doctor had duty to tell insured doctor of insurer's intent to settle claim within policy limits contrary to doctor's insistence against settlement).

The substantive law has resolved the settlement problem consistent with the rule in this Section in the case of an insurer's bad-faith refusal to settle within policy limits. The insurance company is typically held liable for any damages awarded in excess of the policy limits. See, e.g., Parsons v. Continental Nat'l American Group, 550 P.2d 94 (Ariz. 1976); Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967); Gibson v. Western Fire Ins. Co., 682 P.2d 725 (Mont. 1984). Where the lawyer behaves improperly in such cases, there is potential malpractice exposure to the insurer or the insured for any resulting loss. E.g., Lysick v. Walcom, 65 Cal. Rptr. 406 (Cal. Ct. App. 1968) (lawyer who failed to tell insurer of settlement offer within policy limits required to pay insurer amount by which eventual judgment exceeded settlement offer); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J. 1980) (in medical malpractice case settled after doctor had withdrawn consent, lawyer's duty was to insured, and malpractice case lies against lawyer for so settling). See also Betts v. Allstate Ins. Co., 201 Cal. Rptr. 528 (Cal. Ct. App. 1984) (in case involving bad-faith refusal to settle, judgment against lawyer upheld for negligent infliction of emotional distress on insured).

On the rule that a lawyer designated by the insurer may not use information against a client-insured that was obtained from that client, see, e.g., Parsons v. Continental Nat'l American Group, 550

P.2d 94 (Ariz. 1976) (when lawyer learned confidential medical information that child's assault had been intentional and thus not covered by the policy, lawyer was required to keep information confidential but should withdraw from representation; where lawyer used information to benefit insurance company, company was estopped to deny coverage); Employers Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973) (because insurer did not tell insured that it might deny coverage and even interviewed insured's employees without revealing that it was building case against liability, prejudice to insured shown, so insurer estopped to deny coverage).

§ 216. Lawyer with Fiduciary or Other Legal Obligation to Third Person

Unless the affected client consents to the representation under the limitations and conditions provided in § 202, a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's obligation.

Comment:

a. Scope and cross-references. This Section applies the general conflicts prohibition of § 201 to situations in which a lawyer has legal duties to persons or organizations in a capacity other than that of lawyer. The considerations in §§ 209-211 on representation of multiple clients are analogous to those in this Section, as are conflicts addressed in § 206 involving a lawyer's personal interests. Related issues can arise regarding a former-client conflict (see § 213, Comment *g(ii)*).

The prohibition of this Section can be waived by client consent as provided in § 202. Whether and on what terms the other beneficiaries or obligees of the lawyer may consent is beyond the scope of this Section (compare, e.g., Restatement, Second, Agency § 392 (acting for adverse party with principal's consent)). Where the fiduciary responsibility may not be waived by the beneficiary, the lawyer will have a conflict that

that could be prosecuted under the common-law offense of misconduct in office.[6] I would find defendant's alleged conduct analogous to acts that have been prosecuted as misconduct in office. For example, in *Commonwealth v. Miller*, 94 Pa.Super. 499 (1928), the Pennsylvania Superior Court found that a state trooper was a public officer subject to prosecution for malfeasance in office for wrongfully causing the withdrawal of an information against a person accused of driving while intoxicated. In *Robbins v. Commonwealth*, 232 Ky. 115, 22 S.W.2d 440 (1929), the court affirmed the conviction of "malfeasance in office" where a county judge was found guilty of issuing a warrant without a proper affidavit and without foundation. In affirming the conviction, the court commented, "We can conceive of no greater abuse of the power vested in an officer than issue warrants of arrest." *Id.*, p. 119, 22 W.2d 440. A similar abuse is evidenced by the falsification of a police report by a police officer. Instead of upholding the rule of law as required by duty, the defendant [1,2]sought to subvert that rule by his alleged corrupt act.

I concur in affirmance of the Court of Appeals because the information charging defendant with violation of M.C.L. § 750.505; M.S.A. § 28.773 described the offense as "obstruction of justice," and, as the majority concludes, defendant's conduct does not constitute common-law obstruction of justice. However, defendant may still be properly charged with violation of M.C.L. § 750.505; M.S.A. § 28.773 on the basis of his commission of acts constituting the common-law offense of malfeasance in office.[7]

Conclusion

I agree that the existence of the statutory misdemeanor of failure to uphold the law, M.C.L. § 752.11; M.S.A. § 28.746(101), did not preclude charging defendant under M.C.L. § 750.505; M.S.A. § 28.773, because defendant's conduct involved affirmative acts. I further concur in the conclusion that defendant's acts do not constitute common-law obstruction of justice. However, I would conclude that defendant's conduct constitutes an offense indictable at common law, and that defendant could properly be charged with violation of M.C.L. § 750.505; M.S.A. § 28.773.

RILEY, J., concurs.

6. A defendant cannot be convicted of misconduct in office absent a "corrupt intent." Perkins & Boyce, *supra*, p. 542. A corrupt intent is not necessarily an intent to profit oneself; "[t]he word 'corruption' as an element of misconduct in office, is used in the sense of depravity, perversion or taint." *Id.*

7. Informations may be freely amended, and any amendment not prejudicial to the defendant may be allowed. M.C.L. § 767.76; M.S.A. § 28.1016; *People v. Watson*, 307 Mich. 596, 601–602, 12 N.W.2d 476 (1943).

438 Mich. 512

[1,2]ATLANTA INTERNATIONAL INSURANCE COMPANY, a New York Corporation, Plaintiff-Appellant,

v.

John W. BELL, David C. Hertler, Bell & Hertler, P.C., and Bell, Hertler & Winiemko, P.C., jointly and severally, Defendants-Appellees.

Docket No. 87914.
Calendar No. 6, Jan. Term, 1991.

Supreme Court of Michigan.

Argued Jan. 9, 1991.
Decided Sept. 18, 1991.

Insurer brought legal malpractice action against attorneys which it had hired to defend its insured. The Wayne Circuit Court, Henry J. Szymanski, J., granted summary judgment in favor of attorneys and appeal was taken. The Court of Appeals, 181 Mich.App. 272, 448 N.W.2d 804, affirmed. On appeal, the Supreme Court, Brickley, J., held that: (1) attorney-client relationship did not exist between insurer and attorneys, and (2) insurer could maintain action under doctrine of equitable subrogation.

Affirmed in part and reversed in part.

Boyle, J., filed concurring opinion.

Michael F. Cavanagh, C.J., filed dissenting opinion in which Mallett and Levin, JJ., joined.

1. Attorney and Client ⇐26

Generally, only person in special privity of attorney-client relationship may sue attorney for malpractice.

2. Attorney and Client ⇐64

Attorney-client relationship does not exist between insurer and attorney which insurer hired to defend its insured.

3. Subrogation ⇐1

"Equitable subrogation" is legal fiction that permits one party to stand in shoes of another.

See publication Words and Phrases for other judicial constructions and definitions.

4. Attorney and Client ⇐26

Doctrine of equitable subrogation permits malpractice action by insurer against counsel insurer hired to defend insured.

[1,3]Dise, Gurewitz & Irving, P.C. by John H. Dise, Jr., Detroit, for plaintiff-appellant.

Plunkett & Cooney, P.C. by John P. Jacobs, Patrick M. Barrett, Christine[5,1,5] M. Oldani, Detroit, for defendants-appellees.

Kerr, Russell and Weber by C. Kenneth Perry, Jr., Edward C. Cutlip, Jr., Janice A. Furioso, Detroit, for amicus curiae.

Constantine N. Kallas, Kallas, Lower, Henk & Treado, P.C., Bloomfield Hills, for amicus curiae, Michigan Ass'n of Ins. Companies' and American Ins. Association's in support of plaintiff-appellant.

Garan, Lucow, Miller, Seward, Cooper & Becker, P.C. by James G. Gross, Detroit, for amici curiae.

Collins, Einhorn & Farrell, P.C. by Noreen L. Slank, Southfield, for amicus curiae MDTC.

OPINION

BRICKLEY, Justice.

This case presents an issue of first impression: whether defense counsel retained by an insurance company to defend its insured can be held answerable to the insurer for professional malpractice. The Court of Appeals held that defense counsel may not be sued by the insurer for malpractice.

We agree with the analysis of the dissent articulated in section (I)(B) that principles of common-law negligence do not generally require imposition of third-party liability in the malpractice context. We also agree with the dissent that something less than a plenary attorney-client relationship exists between a defense counsel and an insurer. However, we would reverse the decision of the Court of Appeals and would hold that in this case the doctrine of equitable subrogation permits a malpractice action against defense counsel under the facts presented.[1]

[1,5]This opinion contains three sections. Section I recites the facts and the procedural history of the case. Section II demonstrates the inadequacy of denying liability purely because the relationship between the insurer and retained counsel for the insured comprises a mere contractual relationship rather than an attorney-client relationship. Section III outlines the doctrine of equitable subrogation and explains why equitable subrogation particularly applies for policy reasons under these facts.

I

On August 31, 1977, Herbert H. Harvey went to work as a tilesetter at a construction site, now Lakeside Mall in Sterling

1. We pause here to stress that the application of equitable subrogation should and must proceed on the case-by-case analysis characteristic of equity jurisprudence. As we noted in *Solo v. Chrysler Corp. (On Rehearing)*, 408 Mich. 345, 353, 292 N.W.2d 438 (1980): "Whether a given case falls within equity jurisdiction is a question different from whether the case is one in which the relief peculiar to that jurisdiction should be granted."

Heights. At the construction site, Security Services, Inc., was employed to safeguard the premises. As Mr. Harvey entered the premises, he passed two departing Security Services' employees, and, approximately 120 feet into the construction site, fell into a 20 × 20 foot hole. Mr. Harvey died from his injuries.

In September of 1980, the administrator of Mr. Harvey's estate brought an action against numerous parties, including Security Services. The plaintiff, Atlanta International Insurance Company, insured Security Services. As part of Atlanta's contractual obligation, Atlanta retained John W. Bell, David H. Hertler, and Bell & Hertler, P.C. (hereinafter defendants) to represent Security Services in the suit. Defendants answered the complaint, but failed to raise comparative negligence [517]as a defense.[2] A judgment was subsequently entered against Security Services, which Atlanta, as Security Services' primary insurer, was required to satisfy.

Atlanta then filed this suit, alleging that these defendants committed legal malpractice by failing to raise comparative negligence as a defense. After discovery, Atlanta filed a motion for partial summary disposition on the issue whether an attorney-client relationship existed between Atlanta and the defendants. Atlanta also filed a motion to amend its original complaint to add a breach of contract claim. The defendants countered with a motion for summary disposition, alleging that no attorney-client relationship existed between Atlanta and the defendants. The circuit court denied Atlanta's motions and granted the defendants' motion for summary disposition. Atlanta sought reversal in the Court of Appeals.

The Court of Appeals affirmed, stating: "No attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured.... Rather, an attorney's sole loyalty and duty is owed to the client alone, the client being the insured, not the insurance company." 181 Mich.App. 272, 274, 448 N.W.2d 804 (1989). The Court of Appeals also affirmed the denial of Atlanta's motion to amend its complaint.

[518]II

[1] The general rule of law implicated in this case dictates that "an attorney will be held liable for ... negligence only to his client, and cannot, in the absence of special circumstances, be held liable to anyone else."[3] This Court flatly refused to extend malpractice liability against opposing counsel by a party-opponent in *Friedman v. Dozorc*, 412 Mich. 1, 24–25, 312 N.W.2d 585 (1981).

Friedman held:

> The creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client. Not only would the adversary's interest interfere with the client's interest, the attorney's justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship.

Traditional legal doctrine thus mandates that only a person in the special privity of the attorney-client relationship may sue an attorney for malpractice. This rule exists to ensure the inviolability of the attorney's duty of loyalty to the client. Allowing third-party liability generally would detract from the attorney's duty to represent the client diligently and without reservation. The essential purpose of the general rule against malpractice liability from third-parties is thus to prevent conflicts from derailing the attorney's unswerving duty of loyalty of representation to the client.

2. In defendant Bell's deposition he stated:

> *Q.* Based on your experience as an attorney since 1949, do you believe that you met the standard of care required of a practicing attorney in the Metropolitan Detroit area in failing in the motion to plead comparative negligence prior to the motion in May of 1984?
>
> *A.* I would have to admit that I did not conform to the standard of care that I should have.

3. 7 Am.Jur.2d, Attorneys at Law, § 232, p. 274.

However, the relationship between the insurer and the retained defense counsel, while less than a client-attorney relationship, unquestionably differs [519]from the relationship between a defense counsel and a party-opponent. The relationship differs because "[l]iability insurance policies typically include provisions that both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense ...[;] the insurer has both a 'duty' and a 'right' in regard to the defense of the insured...." [4] It has been appropriately recognized that "[defense counsel] occupies a fiduciary relationship to the insured, as well as to the insurance company ... [and] implicitly, if not explicitly, represents to the insured the ability to exercise professional competence and skill in conducting the insured's defense." [5] Furthermore, because the insurance company, not the client, is required to satisfy a judgment arriving from a defense counsel's malpractice, the client has no real incentive to sue defense counsel.

At the same time, courts and commentators recognize universally that the tripartite relationship between insured, insurer, and defense counsel contains rife possibility of conflict.[6] The interest of the insured and the insurer frequently differ. Accordingly, courts have consistently held that the defense attorney's primary duty of loyalty lies with the insured, and not the insurer.

[2] The entire structure of the relationship between the insurance company, the insured, and the attorney rests on the twin pillars of duty of loyalty to the insured by defense counsel and conflict of [520]interest prevention. The case at bar reveals the inadequacy of predicating the analysis of malpractice liability solely on the lack of an attorney-client relationship between the insurer and defense counsel. The instant case does not present a conflict between the interests of the insurer and the public policy of ensuring undiluted loyalty by counsel to the insured. The nature of the insurer-defense counsel relationship thus presents the special circumstances alluded to by the dissent that removes this case from the general rule against the imposition of third-party liability.[7] For these reasons, the case is most efficiently and justly resolved by the principle of equitable subrogation.

The issue whether an attorney hired by an insurer to defend its insured *may be liable* for professional malpractice to the insurer cannot be adequately resolved without determining whether defense counsel *should* be held liable to the insurer and without vindicating public policy rationale that undergirds the attorney-client relationship in the insurance defense context.[8]

To hold that an attorney-client relationship exists between insurer and defense counsel could indeed work mischief, yet to hold that a mere commercial relationship exists would work obfuscation and injustice. The gap is best bridged by resort to the doctrine of equitable subrogation to allow recovery by the insurer. Equitable subrogation best vindicates the attorney-client relationship and the interests of the insured, properly imposing the social costs of malpractice where [521]they belong. Allowing the insurer to stand in the shoes of the insured under the doctrine of equitable subrogation best serves the public policy underlying the attorney-client relationship.

4. Keeton & Widiss, Insurance Law, p. 822.

5. *Id.* at 835–836.

6. See, e.g., Mallen & Levit, Legal Malpractice, § 263, pp. 356–357, recognizing that "[t]here is great temptation [for defense counsel] to favor [the insurance company] who pays the bills and will send further business, and where long-standing personal relations may exist...." Keeton & Widiss, *supra* at 829–830: "An attorney employed by an insurer to represent an insured may be confronted with serious conflicts of interest issues almost from the very outset of the relationship."

7. P. 302, citing *Savings Bank v. Ward*, 100 U.S. 195, 200, 25 L.Ed. 621 (1879).

8. *Friedman* vindicated the public policy of maintaining "a vigorous adversary system [which] outweighs the asserted advantages of finding a duty of care to an attorney's legal opponent." 412 Mich. at 25, 312 N.W.2d 585. Obviously, the unique tripartite insurance con-

III

Subrogation, simply defined, involves "the substitution of one person in the place of another with reference to a lawful claim or right." [9] Subrogation has been described by courts as flexible and elastic equitable doctrine, and hence "the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability." [10] Two types of subrogation exist in the insurance context: "conventional [subrogation, the] product of an agreement by the parties [and legal subrogation,] the creation of the law (or more accurately of equity.)" [11]

[3] Equitable subrogation has been described as a "legal fiction" that permits one party to stand in the shoes of another.[12] The doctrine is eminently applicable under the facts of this case. A rule of law expanding the parameters of the attorney-client relationship in the defense counsel-insurer [522] context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting. Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances.[13]

The defense counsel-insurer relationship is unique. The insurer typically hires, pays, and consults with defense counsel. The possibility of conflict unquestionably runs against the insured, considering that defense counsel and the insurer frequently have a longstanding, if not collegial, relationship.

In a malpractice action against a defense counsel, however, the interests of the insurer and the insured generally merge. The client and the insurer both have an interest in not having the case dismissed because of attorney malpractice. Allowing recovery for the insurer on the basis of the failure of defense counsel to adhere to basic norms of duty of care thus would not "substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured." [523] (Dissent, pp. 303–304) The best interests of both insurer and insured converge in expectations of competent representation.[14]

Defense counsel is not being held accountable to the insurer for malpractice over perceived errors of trial strategy in which a different situation would be presented.[15] However, this alleged conduct, if true, comprised serious professional malpractice. In such cases the attorney-client relationship, the interests of the client, the interest of the insurer, and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from exposure to suit. The dissent erroneously asserts that no clear persuasive public policy reasons exist to support the right of subrogation for the insurer.[16]

[4] For the foregoing reasons, we approve the remedy of equitable subrogation—a less sweeping, less rigid solution than creation of an attorney-client relationship between the insurer and defense counsel, but a more flexible, more equitable solution than absolution from liability for professional malpractice.[17]

[524] ROBERT P. GRIFFIN and RILEY, JJ., concur.

BOYLE, Justice (concurring).

For the reasons set forth in Chief Justice Cavanagh's dissent, I would unequivocally decline to recognize a direct cause of action by the insurer for legal malpractice. I would go beyond the majority's observation that "something less than a plenary attorney-client relationship exists between a defense counsel and an insurer," and clearly state that no attorney-client relationship exists between a defense counsel and an insurer. The attorney-client relationship is with the insured only.

I concur in Justice Brickley's reasoning and conclusion that the doctrine of equitable subrogation is appropriately applied to the circumstances of this case. On this record, I perceive no divergence between the interests of the insurer and those of the insured. Nor is there any evident threat to the interests protected by the attorney-client relationship. However, because the trial court record indicates that the parties did not focus on equitable subrogation, we can only speculate regarding the effect of the privilege and the extent to which a court, in recognition of the privilege, may sustain an objection to testimony or evidence, that would effectively preclude the case from going forward. MCR 2.116(C)(8), (10); MCR 2.504(B)(2); MCR 2.515.

Thus, while I agree on this record with the abstract proposition that the action in equitable subrogation may go forward, this conclusion is subject to reexamination when the record in this case or another more fully presents the basis for a claim that public policy in support of the interests protected by the attorney-client relationship requires barring such a cause of action.

[525] MICHAEL F. CAVANAGH, Chief Justice (dissenting).

We accept the majority's statement of facts and limit our analysis to the three arguments of Atlanta.[1] Since the majority permits Atlanta to proceed under a theory of equitable subrogation, we dissent.

I

Atlanta's first argument is that there is an attorney-client relationship between the insurer and the attorney for the insured when the interest of the insurer and the insured do not conflict. Atlanta's second argument is that even if there is not an attorney-client relationship, this Court should extend legal malpractice liability to

text presents an analytically different public policy.

9. 73 Am.Jur.2d, Subrogation, § 1, p. 598.

10. *Id.*, p. 602. Thus, the reality that no case has applied the doctrine under dissimilar facts does not bar its application under these particular facts.

11. Kimball & Davis, *The extension of insurance subrogation*, 60 Mich.L.R. 841 (1962).

12. *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 117, 393 N.W.2d 479 (1986). It has been noted that "[a] legal fiction may be benign in one context, and dangerous and brutal in another." Harmon, *Falling off the vine: Legal fictions and the doctrine of substituted judgment*, 100 Yale L.J. 1, 61 (1990). In this case, the application of equitable subrogation is not only benign, but clearly beneficial compared to the mechanical application of the governing legal rule prohibiting liability absent a formal attorney-client relationship.

13. See, e.g., Keeton & Widiss, n. 4 *supra*, pp. 220–221:

> "Courts also tend to favor subrogation if it appears that a third party tortfeasor would likely escape financial responsibility if the insurer were not accorded a subrogation right. Thus, subrogation often is appropriately viewed as an important technique for serving the ends of justice by placing the economic responsibility for injuries on the party whose fault caused the loss...."

14. See Mallen & Levit, n. 6 *supra* at 356–357: "The duty of the attorney is to defend the insured. A successful defense is the common goal of all and is consonant with the interests of [all] parties."

15. Here courts must certainly recognize that "in some circumstances the conflicting interest [between insurance companies and defense counsel regarding tactical decisions] are so intense that no accommodation is possible between the views as to which of the possible tactics should be employed." Keeton & Widiss, *supra* at 820–821. This case in no way presents such a circumstance.

16. The law of professional malpractice itself provides an inherent limitation on unwarranted lawsuits brought by an insurer to the extent that a showing of malpractice essentially requires a showing that but for the attorney's error, the plaintiff would have prevailed in the action.

17. The application of equitable subrogation here thus represents the most principled use of the legal fiction: "[N]o fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law." 3 Blackstone, Commentaries, ch. 4, p. 43.

1. For purposes of convenience, all arguments, whether made by Atlanta or supporting amici curiae, will be referred to as having been made by "Atlanta."

all foreseeable parties. Atlanta's third argument is that this Court should find the defendants liable under a theory of equitable subrogation. We will address Atlanta's arguments seriatim.

A

Atlanta asserts that when an attorney is hired by the insurance company to represent its insured an attorney-client relationship exists with both the insured and the insurer. Atlanta recognizes that conflicts between the insurer and the insured can arise involving reservation of rights, defense of alternative claims, coverage, policy limits, and defense of multiple clients. If a conflict arises, the primary obligation of the attorney is to the insured. In this case, however, no conflict of interest arose. According to Atlanta, the interests of the insured and the insurer throughout the entire underlying lawsuit were exactly the same—to limit their exposure as much as possible. Since there was no conflict of interest between the insured and the insurer, a concurrent attorney-client relationship existed between the attorney and the insured and the insurer.

Atlanta relies on the model code promulgated by the American Bar Association and the Michigan Rules of Professional Responsibility.[2] Specifically, the American Bar Association Formal Opinion No. 282, issued in 1950, p 622, provides:

> "From an analysis of their respective undertakings it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations. The company and the insured are virtually one in their common interest."

Plaintiff also cites Ethical Consideration EC 5-17 of the American Bar Association Model Code[3] and Michigan Rule of Professional Responsibility, DR 5-105(C).[4] According to Atlanta, these rules contemplate the existence of an attorney-client relationship between the attorney and the insured and the insurer, contrary to the decision of the Court of Appeals.[5]

2. We note that the Code of Professional Responsibility, adopted by this Court on October 4, 1971, was superseded by the Michigan Rules of Professional Conduct on October 1, 1988. The Code of Professional Responsibility, however, governs conduct occurring before October 1, 1988.

3. EC 5-17 provides:

> "Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case."

4. DR 5-105(C) provides:

> "In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

5. See also Informal Ethics Opinion CI-1146 which provides:

> "It is of social value and ethically permissible for an attorney employed by an insurance company to also represent the insured, provided that the interests of the insurer and the insured do not conflict. If improper influences are exerted by the employer-insurer, which interfere with the independent judgment of the employee-attorney which, if complied with, would result in an attorney having to violate the Code of Professional Responsibility, the attorney must withdraw as counsel for the insured."
>
> In addition, MRPC 1.7, which was adopted after this suit was initiated, provides:
>
> "Conflict of Interest: General Rule
>
> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> "(2) each client consents after consultation.
>
> "(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> "(1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> "(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

We agree that a special relationship exists between the attorney and the insured and the insurer. The relationship, however, does not exist by the unilateral acts of either the attorney or the insurer. The special relationship results from the consent of the insured. When the insured enters into a contract for insurance, the insured by consent waives certain rights normally provided by the Rules of Professional Responsibility. For instance, the attorney for the insured is required to disclose to the insurer offers of settlement. Normally, disclosure of an offer of settlement by the attorney to a third party would be a violation of the attorney's duty of confidentiality to the client.[6] The reason, however, for allowing the attorney to make disclosures to the insurance carrier is not that there is an attorney-client relationship between the insurer and the attorney, but that the client waives this confidentiality with regard to the insurance carrier and agrees to cooperate in the defense of a claim upon signing the contract of insurance.[7] Thus, it is the insurance contract that creates a special relationship between the attorney, the insured, and the insurer. This unique relationship, however, does not rise to the status of an attorney-client relationship. We agree with the Court of Appeals when it stated:

> "Indeed, the insurance company's relationship is, in reality, with its insured; that is, the insurance company is obligated to pay the attorney fee incurred by its insured in defending litigation covered by an applicable insurance policy. The fact that an insurance company may directly pay the attorney fee rather than merely reimbursing its insured does not affect the nature of the attorney-client relationship nor does it change the fact that the attorney represents the insured client and only owes a duty to that insured client." *Id.*, 181 Mich.App. pp. 274-275, 448 N.W.2d 804.[8]

B

This Court is next urged to extend malpractice liability to all foreseeable parties. Relying on *Moning v. Alfono*, 400 Mich. 425, 254 N.W.2d 759 (1977), Atlanta argues

6. Canon 4, DR 4-101 of the Michigan Rules of Professional Responsibility (now MRPC 1.6) provided:

> "(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> "(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> "(1) Reveal a confidence or secret of a client.
>
> "(2) Use a confidence or secret of his client to the disadvantage of the client.
>
> "(3) Use a confidence or secret of a client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> "(C) A lawyer may reveal:
>
> "(1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.
>
> "(2) Confidences or secrets when permitted or required under Disciplinary Rules or required by law or court order.
>
> "(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> "(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
>
> "(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee."

7. Under this policy, Atlanta and the insured agreed as follows:

> "[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient . . ."

8. See *Continental Casualty v. Pullman*, 929 F.2d 103 (CA 2, 1991).

> "Even though trial counsel is selected by and looks to an insurer for compensation, and although he keeps the insurer informed about the progress of the case, we do not find those factors to be conclusive. 'An attorney's allegiance is to his client, not to the person who happens to be paying for his services.'" *Pullman* at 108 (citations omitted).

that a cause of action should arise for every injured person in the class of persons likely to be injured and states:

"In this circumstance, it can hardly be argued that the insurance carrier who will have to pay any judgment is not within the foreseeable class of persons who will be harmed by the negligent acts of counsel in defense of the insured. Clearly, the entity most likely to be harmed in this circumstance is the insurance carrier. While it is true that the insured also is a person who may be harmed by the malpractice, in this case, and in most other similar cases, it is the insurance company who will suffer the most if not all of the harm."

In *Moning*, 400 Mich. at 438–439, 254 N.W.2d 759, this Court stated that "[d]uty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." The relationship that gives rise to the duty in a legal malpractice case is the attorney-client relationship. This general requirement of an attorney-client relationship in a legal malpractice claim was articulated over one hundred years ago in *Savings Bank v. Ward*, 100 U.S. 195, 200, 25 L.Ed. 621 (1879).

"Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.... An attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of the deed."

This Court addressed an attorney's duty to a third party in *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981), holding that an attorney owed no legal duty to an adversary.[9] Atlanta attempts to distinguish this case from *Friedman* on the ground that in this case the insurer and the insured were not adversaries, and in fact had identical interests in disposing of the case.[10] We find, however, that this is a distinction without a difference.

Conflicts of interest are matters of degree.[11] In every case where an attorney is hired by an insurer to represent the insured, the attorney embarks down a road

9. We recognize that in *Rosenberg v. Cyrowski*, 227 Mich. 508, 513, 198 N.W. 905 (1924), this Court held that "'[a]n attorney's liability does not end with being answerable to his client. He is also liable to third persons who have suffered injury or loss in consequence of fraudulent or tortious conduct on his part.'" Citing 1 Thorton, Attorneys at Law, § 295, p. 523. We distinguish *Rosenberg* on the ground that in *Rosenberg* the plaintiffs were alleging that the attorney's conduct amounted to fraud. In this case, however, it is undisputed that the attorney's action amounted to no more than mere negligence.

10. See also *American Employers' Ins. Co. v. Medical Protective Co.*, 165 Mich.App. 657, 660, 419 N.W.2d 447 (1988), in which the Court stated:

"Although the plaintiff excess insurer may be characterized as an equitable subrogee of the insured physician, it may not sue the insured's defense attorney for legal malpractice. To hold otherwise would in our judgment acknowledge a direct duty owed by the insured's attorney to the excess insurer and would be tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone. Such a holding would contradict the personal nature of the attorney-client relationship, which permits a legal malpractice action to accrue only to the attorney's client."

11. We stated in *Friedman*, 412 Mich. at p. 24, n. 10, 312 N.W.2d 585:

"'Most if not all questions of conflict of interest are questions of degree. As noted above, minor and inevitable conflicts inherent in client-lawyer relationships necessarily must be tolerated. On the other hand, a conflict of interest may be so sharp as to preclude the lawyer from representing a particular client. For example, under no circumstances could a lawyer properly represent both the plaintiff and the defendant in a contested litigation, or represent parties to a negotiation whose interests are fundamentally antagonistic to each other. When it is plain that prejudice to the client's interest is likely to result, the lawyer should not undertake the representation even with the consent of the client. A client's consent does not legitimate a lawyer's abuse of professional office.'"

laden with potential conflict.[12] According to Canon 5, a lawyer is required to "exercise independent professional judgment on behalf of a client." To recognize a separate duty to the insurer might significantly interfere with the attorney's ability to choose the most appropriate course of action for the insured.[13] We, therefore, decline to extend an attorney's duty to the insurer.

C

Atlanta's third argument, and the crossroad between the majority and this dissent, is that it should be allowed to recover under a theory of equitable subrogation. Relying on *Smith v. Sprague*, 244 Mich. 577, 222 N.W. 207 (1928), Atlanta argues that "[t]he doctrine of equitable subrogation is properly applied where no legal [principles] exist upon which to grant Plaintiff relief, but justice requires that some form of recovery be permitted."[14] In essence, Atlanta claims that as a matter of equity, since Security Services has chosen not to sue the defendants, it should be allowed to stand in Security Services' shoes to prosecute this malpractice claim. Agreeing with Atlanta, the majority reasons that "the attorney-client relationship, the interests of the client, the interests of the insurer, and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from exposure to suit." P. 297. We disagree that it is in the best interest of the attorney-client relationship to expose the attorney to liability to the insurer, and, simply stated, we believe that the "shoes" of Security Services do not fit Atlanta.

As stated by the majority, subrogation has two forms: conventional (arising out of contract), and legal (arising out of equity). See *Machined Parts Corp. v. Schneider*, 289 Mich. 567, 574, 286 N.W. 831 (1939).[15]

Applying equitable subrogation requires this Court to balance the public policy concerns associated with the attorney-client relationship against the liability of the attorney to an insurer for negligence. Balancing the policy concerns, we disagree with the majority and would find that the policy reasons in favor of the former outweigh the latter. In so finding, we agree with the majority that the cornerstone of

12. MRPC 5.4(c) provides:

"A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

13. We note that the State Bar of Michigan has twice addressed this issue in informal ethics opinions CI–866 and CI–876.

Informal Ethics Opinion CI–866 provides:

"The obligation of the attorney runs to the insured party rather than the insurer in such case as the attorney has appeared for and represents the insured in pending litigation, notwithstanding that the insurer is paying for such representation.

"If the interest of the insurer and the insured in such case are in conflict, the attorney must advocate and represent the interest of the insured in accordance with the Code of Professional Responsibility or withdraw. Canon 7 of the Code of Professional Responsibility; DR 5–105; Informal Ethics Opinion CI–309; and Ethical Consideration, EC–17. (2–10–83.)"

In addition, Informal Ethics Opinion CI–876 states:

"An attorney retained by an insurance company to defend a legal claim under a policy of insurance has an attorney-client relationship with the insured, and is ethically obligated to promptly communicate any significant settlement offer to the insured and otherwise keep the client reasonably informed concerning the progress of the matter. (6–9–83)"

14. See *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 117, 393 N.W.2d 479 (1986), where we stated:

"Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a 'mere volunteer.'" Citing to *Foremost Life Ins. Co. v. Waters*, 88 Mich.App. 599, 603, 278 N.W.2d 688 (1979), rev'd on other grounds 415 Mich. 303, 329 N.W.2d 688 (1982); *Smith v. Sprague*, *supra*, 244 Mich. at pp. 579–580, 222 N.W. 207.

15. Conventional subrogation, or what otherwise might be termed an assignment of a cause of action (in this case a legal malpractice claim), although never addressed by this Court, has been found to be against public policy by the Court of Appeals. See *Joos v. Drillock*, 127 Mich.App. 99, 104, 338 N.W.2d 736 (1983). See also *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976).

the attorney-client relationship is an attorney's duty of loyalty to the client. At 296. The majority, however, meddles in this relationship by allowing the insurer to indirectly recover a contractual debt. Although the majority attempts to limit its holding to the facts of this case, we dissent from this view because we believe that a prophylactic rule is required to guide the attorney down a road ladened with potential conflicts. To hold an attorney, whose sole loyalty runs to the client, liable to the insurer either directly, on the basis of negligence, or indirectly, on the basis of equitable subrogation, could substantially impair an attorney's ability to make decisions that require a choice between the best interests of the insurer and the best interests of the insured.

[1535]II

Although this case involves the unique relationship between an insurer, an insured, and an attorney hired to represent the insured, a standard principle applies: Those to whom the negligent party owes a duty may maintain a cause of action. In the context of this case, unlike the majority, we find that the cause of action rests with the insured and not the insurer. For all the above reasons, we dissent.

MALLETT and LEVIN, JJ., concur.

438 Mich. 536

[1536]**Joe SWICKARD, Plaintiff–Appellee,**

v.

WAYNE COUNTY MEDICAL EXAMINER, Defendant–Appellant.

Docket No. 89602.

Calendar No. 6, March Term, 1991.

Supreme Court of Michigan.

Argued March 6, 1991.

Decided Sept. 19, 1991.

Newspaper reporter brought action under the Freedom of Information Act to compel the county medical examiner to disclose autopsy report and toxicology test results regarding deceased district court judge. The Wayne Circuit Court, Roland L. Olzark, J., ordered disclosure and appeal was taken. The Court of Appeals, 184 Mich.App. 662, 459 N.W.2d 92, affirmed and appeal was taken. The Supreme Court, Riley, J., held that: (1) disclosure of information would not amount to a "clearly unwarranted invasion of privacy" of the deceased or his family; (2) physician-patient privilege does not attach to situation where doctor, in performance of autopsy, acquires information about the deceased; and (3) there was no need for evidentiary hearing in trial court.

Affirmed.

Levin, J., filed separate opinion.

Mallett, J., filed dissenting opinion.

1. Records ⇐65

When public body refuses to disclose document request under the Freedom of Information Act, and the requester sues to compel disclosure, the public agency bears the burden of proving that the refusal was justified. M.C.L.A. §§ 15.231(2), 15.233(1), 15.240(1), 15.243.

2. Records ⇐53

Freedom of Information Act is intended primarily as pro disclosure statute and exemptions to disclosure are to be narrowly construed. M.C.L.A. §§ 15.231(2), 15.233(1), 15.240(1), 15.243.

3. Records ⇐51

County coroner's office is a "public body" under the Freedom of Information Act. M.C.L.A. § 15.232(b)(iii).

See publication Words and Phrases for other judicial constructions and definitions.

4. Records ⇐54

Autopsy report and toxicology test results prepared by the county medical examiner's office were prepared "in the performance of an official function" and were "public records" for purpose of Freedom of Information Act. M.C.L.A. § 15.232(b)(iii).

See publication Words and Phrases for other judicial constructions and definitions.

5. Records ⇐58

In determining whether disclosure under Freedom of Information Act would violate any privacy rights, court will look to common law and constitutional law and will also consider the customs, mores, or ordinary views of the community. M.C.L.A. § 15.243(1)(a).

6. Torts ⇐20

Except for appropriation of one's name or likeness, action for invasion of privacy can be maintained only by living person whose privacy is invaded; in absence of statute, action for invasion of privacy cannot be maintained after death of person whose privacy is invaded.

7. Torts ⇐8.5(7)

Disclosure of autopsy report and toxicology test results pursuant to freedom of information request would not violate any statutory or common-law privacy right of the decedent. M.C.L.A. § 15.243(1)(a).

8. Torts ⇐8.5(7)

Obtaining disclosure of autopsy report and toxicology test results pursuant to letter request of newspaper reporter to medical examiner would not constitute intrusive means of obtaining information objectionable to the reasonable person. M.C.L.A. § 15.243(1)(a).

9. Torts ⇐20

Relatives of deceased persons who are objects of publicity may not maintain actions for invasion of privacy unless their own privacy is violated.

10. Constitutional Law ⇐82(7)

Constitutional rights of privacy are personal and cannot be asserted by a deceased person's next of kin. U.S.C.A. Const.Amends. 4, 14; M.C.L.A. Const. Art. 1, § 1.

11. Records ⇐58

Medical examiner failed to establish that autopsy report and toxicology test results performed on district court judge constituted "information of a personal nature," and medical examiner was not justified under Freedom of Information Act in withholding the information out of concern for privacy rights of judge's family members. M.C.L.A. § 15.243(1)(a).

12. Records ⇐54

Circumstances surrounding alleged suicide of public figure are matters of legitimate public concern for purpose of determining whether autopsy report and toxicology test results may be withheld under the Freedom of Information Act. M.C.L.A. § 15.243(1)(a).

13. Witnesses ⇐212

Physician-patient privilege does not attach to situation where doctor, in performance of autopsy, requires information about the deceased. M.C.L.A. §§ 15.243(1)(d, i), 600.2157.

14. Witnesses ⇐208(1)

Purposes of physician-patient privilege is to protect doctor-patient relationship and insure that communications between the two are confidential. M.C.L.A. §§ 15.243(1)(d, i), 600.2157.

15. Records ⇐63

Evidentiary hearing was not required prior to ordering medical examiner to disclose records under Freedom of Information Act where parties stipulated with regard to substance of medical examiner's proposed testimony and on basis of the undisputed facts the trial judge could ascertain no factual development which would satisfy examiner's burden of proof. M.C.L.A. § 15.243(1)(a).

16. Appeal and Error ⇐169

Issues not decided by trial court were not preserved for appeal.

[1540]Honigman Miller Schwartz & Cohn, Herschel P. Fink, Sandra L. Jasinski, Kenneth R. Chadwell, Detroit, for plaintiff-appellee.

EMERGING LIABILITY ISSUES IN MANAGED HEALTH CARE

By L. W. Rosebrook

I.

INTRODUCTION: WHAT IS AN MCO AND WHY DO WE CARE.

II.

GENERAL STATUS OF MCO LITIGATION

III.

ERISA PREEMPTION AS LAST BASTION TO AVALANCHE OF MCO CASES

Dukes v. U.S. Healthcare, 57 F.3d 350 (3rd Cir. 1995)

Hoyt v. Edge, 1997 WL 356324 (E.D. Pa.)

IV.

DIRECT EXPOSURE CASES

A. Failure or refusal to authorize recommended or requested treatment or provide for medically necessary care

Turner v. Fallon Comm. Health Plan, 953 F Supp 419, (D. Mass. 1997)

Garvey v. Rush Prudential HMO, 1996 WL 648720 (N.D. Ill.)

B. Unreasonable delay in authorizing or approving requested care or treatment.

Cannon v. Group Health Insurance, 77 F.3d 1270 (10th Cir. 1996)

Thomas-Wilson v. Keystone Health, 1997 WL 27097 (E.D. Pa.)

C. Premature discharge or termination of care or treatment (constructive abandonment?)

Quellette v. Christ Hospital, 942 F.Supp. 1160 (S.D. Ohio, 1996)

D. Negligent selection and oversight of unqualified participating physicians, hospitals and other providers.

Lancaster v. Kaiser, 958 F.Supp. 1137 (E.D. Va. 1997)

Hoyt v. Edge, supra

E. Miscellaneous:

1) Breach of contract

2) Fraud, misrepresentation, collusion or conspiracy

Craig v. Larson, (Ca. unreported)

3) Patient -adverse cost containment policies and procedures:

a) Financial incentives or disincentives that tend to influence care decisions adversely for patients.

Lancaster, supra

Shea v. Estensen, 107 F.3d 625 (8th Cir. 1997)

b) Utilizing unqualified or non-medically trained people to make or review medical decisions or recommendations.

c) Funneling care where its cheaper rather than where it is better, i.e. putting the member at higher risk to achieve cost savings.

Pappas v. U.S. Healthcare, (unreported)

V.

VICARIOUS LIABILITY CASES

A. Apparent or ostensible agency

Schachter v. Pacificare, 923 F.Supp. 1448 (N.D. Okla. 1995)

Hoyt, supra.

B. Respondent superior

VI.

CONCLUSION

R

ENVIRONMENTAL DECISIONS IN IOWA©

by Lawrence P. McLellan
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727

For the defense attorney, as in any other case, it is important to be aware of the recent trends or decisions in the environmental arena. This paper will summarize some of the Iowa decisions which defense attorneys should be aware of in order to successfully defend any environmental matter that may come your way.

Before we begin our discussion of where we are today, it is appropriate to review the basis of liability in this area. As you are aware Congress and the states adopted legislation in the late 1970s and early 1980s which provided statutory liability for polluting our environment. The most notable legislation is what is referred to as CERCLA or RCRA. These statutes provided the federal government with the tools it needed to prosecute criminally and civilly those individuals or companies that polluted the environment. Iowa also adopted legislation to protect its environment. Most of this legislation can be found in Iowa Code chapter 455B. Subsequent legislation involving underground storage tanks, found at chapter 455G, was enacted to take care of one of Iowa' largest pollution problems. Both statutes provided a statutory basis to hold polluters accountable for their actions. Not only did they provide the governmental agencies with the teeth needed to fight polluters they also have provisions enabling private citizens to bring actions against polluters.

Common law causes of action have also been utilized to correct problems caused by contamination. Actions have been premised on the theories of nuisance, trespass, negligence and waste, among others.

The proliferation of litigation over who caused the pollution and how is it to be corrected is expensive not only because of the costs of litigation but also the damages can be very significant because of the expense to clean up these problems. As a result litigation over who is to pay for these problems abounds.

While Iowa is not the leader in establishing trends in this area of the practice, we are beginning to see decisions which the defense attorney should be aware of if he/she is to successfully defend a case in this area.

Causation

Obviously, the most important question asked when a new matter comes to the defense attorney is whether there is any basis to the allegation that the client caused the damages. In other words is there proof that the client's actions were the proximate cause of the damages sought by the plaintiff. In the environmental context it is not always clear from the surface of the pleadings whether that can be proved. The problem lies under the surface, so to speak. Since most contamination deals with matters that are underground it is not always clear from where the contamination emanated or because of the length of time this problem can percolate, who caused the problem. A recent case from the Iowa Supreme Court illustrates this dilemma for the plaintiff and every defense attorney should be aware of the Court's pronouncement on this issue.

In Gerst v. Marshall, 549 N.W 2d 810 (Iowa 1996) the court was faced with an action, brought by the present landowners, against former landowners and suppliers of petroleum products. Here the Court affirmed summary judgment for the defendants.

In this case the Marshalls operated a gas service station on the property involved from 1985 to 1988. Reif Oil, one of the defendants supplied petroleum products to the Marshalls, during the same time period. The record showed that the Marshalls installed two new underground storage tanks on the property in October 1987. When the new tanks were installed the soil in the area did not have a petroleum odor and was not discolored, however, a soil sample revealed gasoline byproducts in the soil but not above IDNR acceptable levels. Sniffer wells were installed around these tanks and were checked regularly by the Marshalls showing no contamination. In the spring of 1988 the Marshalls removed two old USTs on another part of the property and placed four monitoring wells around this old tank pit. Marshall indicated he smelled petroleum when the concrete was first removed and during the drilling but the soil was not discolored. No further investigation was conducted with regard to this portion of the property and the reported smell was never reported to the IDNR. The monitoring wells were checked regularly by Marshall thereafter and no contamination was discovered. The Marshalls sold the property to the Gersts in 1988 and gave them a warranty deed and a groundwater hazard statement which indicated that there was no known hazardous wastes on the property.

S

The Gersts were not diligent in checking the monitoring wells and were cited in 1990 by the IDNR for failure to do so. Thereafter the Gersts, did check the wells but apparently some of the reported checks were never done. During the time the Gersts owned the station several releases of product occurred. On occasion, customers would pull away from the pumps with the nozzle still in he car and spill gasoline. In May 1990 a diaphragm in the gas dispenser broke and caused a release of gasoline. A repairman testified that the soil under the dispenser was wet with gasoline and the gasoline smells were real bad. In the summer of 1990 the Gersts found contamination on the property. Testing showed contamination in the area of the new tanks and the old pit. The highest concentration was at the dispenser island.

The Gersts filed suit against the Marshalls and Reif Oil on the theories of negligence, strict liability and res ipsa loquitor. They also brought claims for fraudulent misrepresentation and a citizen suit under Iowa Code section 455B.111. Tests of the system after the suit was filed showed that the lines and tanks were not leaking.

The experts testified that there was no evidence that the system was installed or maintained improperly. The contaminant identified was gasoline and that the source was the tanks and associated equipment. The precise location within the system from which the leak emanated could not be stated precisely. They merely stated that there were several potential causes, including system leaks, customer overfills and accidents at the island. The experts could not pinpoint when the contamination occurred.

The first issue addressed by the court established a distinction between Iowa law and federal law. The Gersts argued under section 455B.111 that causation was not an element necessary to prove in order to recover. Their position was premised upon other courts' analysis of CERCLA. Under CERCLA a plaintiff is not required to establish a causal connection between the release of the defendant's hazardous substance and the plaintiff's cleanup costs. Id. at 814. However, the court dismissed this claim for two reasons, one was an analysis of the language found in section 455B.111 and the second was a finding that CERCLA was specifically drafted to eliminate the causal connection. Id. The court found that in order to bring a claim under section 455B.111, the plaintiff must show that they have standing. "To show standing as defined in section 455B.111(3), they must establish that the Marshall's violation of chapter 455B caused harm to the Gersts." As a result, causation is an element of recovery in a 455B.111 action.

The court then examined whether a factual issue had been generated on the issue of causation. First, the court undertook an extensive discussion of what legal standard of causation applied in this situation. After this lengthy discussion, the court determined that the Gersts could not meet the elemental but-for test and limited its decision to that test.

The court found that since the Gersts could not identify how or when the release of gasoline occurred there was no evidence to establish that a release of gasoline occurred prior to their purchase of the property. In addition, they could not prove that the

contamination existed prior to their purchase. Gersts argued that since their experts testified that there was a possibility the defendants' caused the contamination, coupled with other evidence they had generated a jury question on the issue citing Becker v. D & E Distributing Co., 247 N W.2d 727 (Iowa 1976) and Winter v. Honeggers' & Co., 215 N.W.2d 316 (Iowa 1974) Here the court stated that the rule from Becker and Winter was that "an expert's opinion on the possibility of a causal connection between an incident and a condition was sufficient if there was other testimony establishing the condition did not exist before the incident claimed to be the cause of the condition." Here the Gersts could not establish that the condition existed prior to their purchase. This decision is interesting in light of the finding that soil samples showed that some contamination did exist albeit not above IDNR action levels.

The Gersts attempted another argument to save their case. That argument was premised upon the inability of science to pinpoint the exact cause or time of the release which caused the contamination. Presently, it is difficult for science to establish when a release occurred because it is underground, it cannot be seen and there is no way to properly age date the release. However, the court rejected this argument on the basis that there was no reason to abandon the basic requirement that the defendant *in fact* caused the plaintiff's injury. Id. at 818

The court did note in a footnote that the causation analysis would be slightly different under the fraudulent misrepresentation claim, however, that analysis would also

require plaintiff to show that the property was contaminated before it was purchased and plaintiff cannot do so.

There are limits as to what the experts can prove in a case of contamination. The time of the actual release, unless it is seen, is one as is evident in Gerst. Experts also have difficulty distinguishing between the owner of similar contaminants, i.e., contamination caused by more than one source of gasoline. This case demonstrates the importance of conducting a thorough environmental audit of property which you intend to purchase if the property has been used in the past with hazardous substances. At least an audit will identify contamination and provide a baseline for that contamination if conducted properly. This may cause plaintiffs to prove the negative, particularly in those instances where contamination has migrated to property that was never used for hazardous substances.

Damages

A second major issue that all attorneys confronted with an environmental case is the issue of damages. What damages are you entitled to. Generally, this litigation is brought as a result of damage to property, however, cases in other parts of the country involve toxic exposure to humans and the resulting injuries. In Iowa, there has not been a proliferation of litigation involving personnel injury damages as a result of exposure to contamination which was located a long period of time in the ground or groundwater. Consequently, there are no cases on the issue. However, there has been litigation as to the proper measure of damages for property damage which has been contaminated. A

number of years ago the court entered a decision, entitled Mel Foster Co. Properties, Inc. v. American Oil Co., 427 N.W.2d 171 (1988) which should again be reviewed.

In Mel Foster a developer discovered its property was contaminated as the result of a leaking underground storage tank from a U-Haul facility and a leaking underground pipe from an Amoco service station. Mel Foster filed suit against the defendants on theories of negligence, strict liability, trespass and nuisance. At trial, the petition was amended to assert only the claim for nuisance. The jury found there was a nuisance and awarded $188,000 for reasonable loss of rental value. The district court prior to trial ruled that the nuisance was a temporary nuisance thus allowing Mel Foster to file additional suits for loss of rental value. The primary dispute on appeal was whether Mel Foster was limited to a one time award of the dimunition in value of the property or the loss of reasonable rental value

The Court found that the contamination of the property was permanent. As a result the Court held that the proper measure of damages was not the reasonable loss of rental value but rather the diminution in value of the property before the contamination and after. Id. at 175. The Court, in reaching this conclusion, recognized that contamination of this nature could be either permanent or temporary. Id. at 174-75. However, it seems the Court was assisted in reaching its decision because of the obvious burdens a finding of a temporary nuisance may place on the judicial system.

> The award of permanent damages based on the reduction of market value provides that the plaintiff's remedies stemming from this particular incident will be addressed in one legal action. Successive actions to

> recover temporary damages stemming from one incident, such as the action currently filed by Foster, are contrary to the goal of efficient legal remedies.

Id. at 175. At the time of the appeal, Mel Foster had a subsequent action pending against the defendants which was filed five days after the jury verdict. Id. at 173 n.2.

The Court's decision in Mel Foster was followed recently in Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996). Here the Court found that odors from a hog confinement's water basin constituted a permanent nuisance overturning the district court's conclusion that it was temporary. Here the Court found that the court should have awarded the plaintiffs damages based upon the dimunition in the value of their property as a result of the nuisance. Id. at 466. The Court also affirmed the district court's entry of special damages to the plaintiffs on the basis that even when a nuisance is permanent a plaintiff may recover other special damages they can prove. Id. at 465.

> "[D]amages for personal inconvenience, annoyance, and discomfort caused by the existence of a nuisance are separately and independently recoverable in a nuisance action in addition to, or separate from, damages suffered in respect of the market value of the premises, or injuries to or destruction of buildings and crops resulting from a permanent nuisance. . . ."

Id. at 465 (*citing* 58 Am.Jur.2d *Nuisances* § 296 (1989)).

The interesting issue in Weinhold was the Court's pronouncement that the district court could enter an award for dimunition of value based upon the record presented at the trial court. Id. at 466. Justices Andreasen, Neuman and Ternus dissented from this portion of the decision on the basis that the plaintiff had failed to prove "their dimunition of market value damages" and cited Boekeloo v. Board of Review, 529 N.W.2d 275, 278-79 (Iowa 1995). Weinhold, 555 N.W.2d at 468. In Weinhold the only evidence

presented with regard to the present value of the Weinholds' property was the testimony of Dennis Weinhold. When asked about this, on cross-examination, he simply testified that he believed the property had a zero value. Id. at 467-68.

In Boekeloo the Court was faced with a property tax assessment protest. Here the Boekeloos owned property which housed a tavern for approximately twenty years. In 1988 the bank restructured a business loan and as a result required that an environmental audit be conducted. At that time it was discovered that the property was contaminated by hydrocarbons. The Boekeloos had listed the property for sale before the contamination was discovered. The property was on the market for six months but did not sell. In 1992, the property was subject to a tax sale because of the Boekeloos failure to pay property taxes. At the sale it was announced the property was contaminated and no one bid on the property. After trial of the tax protest, the real estate agent for the Boekeloos presented a potential buyer who declined interest after he learned the property was contaminated. In 1992 the Clinton County assessor assessed the value of the property at $235,000 but was unaware the property was contaminated when he valued it. The Court found that the county assessor should have considered the contamination when assessing the property but found the Boekeloos did not meet their burden to prove the amount of the reduction in value which was caused by contamination. Id. at 276.

The Court determined that, although the Boekeloos employed two real estate agents who testified that the value of the property was zero, their testimony was not competent because their valuation method did not comply with Iowa Code section

441.21(3). Competence under this statue means that "the disinterested witnesses must comply with the statutory scheme for property valuation for tax assessment purposes." Id. at 279. In particular the Court found that the real estate agents were not competent because they relied on only one factor, the unavailability of a willing buyer. Although this is a factor to be considered it cannot be relied upon alone. Id. at 280. Second, value under the willing seller/willing buyer method could not be used because of no comparable sales but rather because the Boekeloos decided not to employ anyone to determine what the cleanup costs would be. One of the realtors testified that a buyer might be found if the cleanup costs were known. Finally, the realtors had not examined the property for valuation under the cost method or income method, even though one realtor testified that the "simplest way to value the property would be to determine the replacement cost and then deduct cleanup costs." Id. at 280. Since the burden of proof lies with the tax protester the court affirmed the valuation placed upon the property by the county assessor since the Boekeloos failed to meet their burden of proof. Id.

Although the decision in Weinhold appears completely contrary on this issue, it must be remembered that the issue in Boekeloo was the protest of a property tax valuation where specific procedures must be followed to successfully challenge such an assessment. Further under Iowa law, laypersons are entitled to express opinions about the value of their property when they are seeking damages for injury to their property. Ruth v. O'Neill, 245 Iowa 1158, 1174, 66 N.W.2d 44, 53 (1954). In light of the latter Weinhold is probably not contrary to Boekeloo.

Private Citizen Suits and Damages

A recent decision from the United States District Court for the Southern District of Iowa is required reading for any attorney practicing in this area. This case is entitled Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997). A number of issues were addressed by the court and gives Iowa practitioners a view of at least what this court determined on a number of issues. Although this case was recently decided it has been appealed.

An important issue and constituting much of the court's analysis was whether conducting an investigation and remediation of the site constituted commencement of an action under section 309(g) of the Clean Water Act thus precluding Bayer from proceeding with its citizen suits under the Clean Water Act and Iowa Code section 455B.111. Under both the Clean Water Act and Iowa Code section 455B 111 a citizen may bring a private citizen suit against a party it believes is polluting the environment if the governmental agency charged with such enforcement does not act to stop the polluting activities. In this case the court had to determine whether Williams actions in investigating its site and then conducting remediation activities precluded Bayer from bringing the private citizen suit. The court determined, that since Williams cooperated with the DNR in conducting the activities requested by the DNR when the contamination was discovered, that the DNR was diligently prosecuting an action to enforce the standards set forth by the Clean Water Act under the laws of the State of Iowa. The court held that:

> Affording the state some latitude in selecting the specific mechanism of its enforcement program, the Court holds that a citizens suit may be barred even absent formal administrative proceedings where, as discussed below, the state has the authority to issue orders and assess penalties for violations but chooses instead to order compliance and settle informally with the violator; the interests of third parties are protected by notice and hearing procedures; and the violator is subject to further penalties for failure to comply with the remediation plan

Id. at 1322. The court found that DNR's issuance of "directives and reaching an informal settlement that involved a remediation plan, an NPDES permit, monitoring, status reports, and site investigations" was the commencement of an action for purposes of the Clean Water Act. Id. at 1323. This determination precluded Bayer's citizen suit claims under both the Clean Water Act and section 455B.111 even though the court found that Williams violated the Clean Water Act. Id. at 1320, 1324-25. As the court indicated in its opinion this appears to be the first case to construe the "commencement of an action" language in section 309. Id. at 1320.

In reaching its decision on this issue the court also determined that the state determines what enforcement and remediation program will be put into effect. Here Bayer did not believe the state's actions were rigorous enough to adequately cleanup its site. The case started when Williams sought access to the Bayer property to conduct an air sparging operation to assist in the cleanup of both sites. Bayer disputed that Williams proposal would adequately cleanup its site and refused entry. Williams brought the present action to gain access to the site. The testimony by Bayer's experts indicated that additional work, several million dollars more than Williams proposed, would be needed

to cleanup Bayer's property. The court did not believe it was equitable to make Williams incur these costs.

The court also addressed the issue of the proper measure of damages in an environmental property damage case. Here Bayer sought as damages the cost of remediation to a level as if it had never been contaminated, the cost of the lost sale of the property, the value of the lost use of the funds from the lost sale and the cost of investigation of the contamination Bayer already experienced. Id. at 1331. The court found that the contamination of Bayer's property constituted a permanent nuisance. Accordingly, the court held that the proper measure of damages was the diminution in value of the property as set forth in Mel Foster. The court recognized that the damaged landowner could also recover special damages, including injuries to buildings, inconvenience, annoyance, and discomfort, and that the court could order injunctive relief. Id. at 1332.

Here the court determined that the dimunition of value of the property was the only damages which should be awarded and found for Bayer in the amount of $275,000, the amount Williams' expert determined was the lost value of the property. Id. It is not clear from the decision the amount sought by Bayer for this damage award, although the decision indicated that in 1993 the land and buildings were offered for sale at a price of $3.25 million. The buyer declined to purchase the land, stock and buildings and instead paid $1.25 million for the stock of the seller and entered into a long term lease for the facilities for $150,000 per year.

The court refused to award any special damages. On Bayer's attempt to obtain the costs of the investigation it had incurred the court refused to enter an award because Bayer failed to provide any evidence showing the cost of the investigation of the contamination. The court refused to consider any of the other damages sought by Bayer because the court felt that the dimunition in market value award was sufficient.

Further the court refused to provide injunctive relief against Williams. Bayer had sought an injunction in which Williams would have to insure that no further contamination flowed from Williams' property to Bayer's. Id. To implement this relief Bayer argued that Williams be required to build a slurry wall between the properties at a cost of $1.7 to 3 million. The court found that although the present Williams' system was not perfect it attempted to remediate and abate the nuisance. The court refused to order the injunctive relief sought by Bayer finding the cost to Williams to build the slurry wall to "impractical and unreasonably expensive," and that the dimunition in value of market value damages was an adequate remedy. Id.

After the case was submitted to the court Bayer moved to re-open discovery to learn more about a 1,250,000 alleged spill of petroleum on the Williams property. The court refused to re-open discovery because the court found that the nuisance was permanent and thus the issue of further contamination of Bayer's property was moot. Id. at 1334-35. In addition, the evidence sought pertained to Bayer's negligence claim and since the court found that there was a nuisance the court did not need to address the negligence claim because any additional award would only be a duplicate recovery. Id.

As to Williams attempt to obtain a declaratory ruling ordering Bayer to provide access to its property so Williams could implement its plan of remediation, the court held that the declaratory judgment rested upon Bayer's Clean Water Act claims. Since the court ruled it did not have jurisdiction over the Clean Water Act claims because of the DNR was commencing an action it could not enter a declaratory judgment. The court went on to state that if it had jurisdiction over the CWA claims it still could not enter declaratory judgment because Williams had not exhausted it administrative remedies.

Williams concern here was that the DNR would initiate remediation activities at the Bayer site and then sue Williams for the costs. Id. at 1333. The court stated that "[I]f and when DNR orders, Williams to pay cleanup costs, Williams can appeal for administrative review under Iowa Code § 455B.392(1)(d). Until then, Williams has not exhausted its administrative remedies and is precluded from seeking relief in federal court." Id. at 1334.

Apportionment of Liability and Comparative Fault

Another case all defense counsel must be aware is Blue Chip Enterprises v. Dept. of Nat. Res., 528 N.W.2d 619 (Iowa 1995). Issues which are important in this case are that a polluter's liability for cleanup costs is limited to the extent of the contamination caused by it. Id. at 624. Environmental contamination may be apportioned, and that contamination is not such a harm that it cannot be apportioned. Id. Liability may be apportioned even though all of the polluters may not be parties to the action. The basis for this is statutory and does not involve the concepts of comparative fault. Id. at 625.

Only those polluters in the chain of title who are shown to have actively polluted a site may be held to assist in the cleanup of a site. However, present owners, although not active polluters will be held to share in the cost of investigation, evaluation and development of a remedial plan for the abatement of the contamination. The court held in this manner because the court found that present owners benefit from the inspection, evaluation and cleanup sanctions imposed by the statue. Id. at 627.

INSURANCE COVERAGE

Environmental cases create a number of coverage issues. Depending upon the issue you have you can find cases that will support your position. Unfortunately, not many cases have been decided by the Iowa Supreme Court. Although, there have been decisions in this area and others are pending. A brief discussion of those cases that the Supreme Court has addressed are important.

The first environmental insurance case faced by the court was Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990). Here the court was asked to determine the meaning of the sudden and accidental pollution exclusion. The court determined first that hog manure was waste material as that term was set forth in the exclusion. Id. at 285. However, it may not be in all instances, "but when it is spilled on the road it unambiguously constitutes waste." Id. The court refused to determine the meaning of "sudden" under the exclusion because it was their determination that the spillage of manure on the road was not accidental. Id. at 287. The court determined that accidental meant an "unexpected and unintended event." Id. "Expected" meant that the actor "knew

or should have known that there was a substantial probability that certain consequences will result from his actions." Id. (quoting City of Carter Lake v. Aetna Cas. & Surety Co., 604 F.2d 1052, 1058-59 (8th Cir. 1979)). "Substantial probability" is met when the "indications [are] strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but . . . the indications [are] . . . sufficient to forewarn him that the results are highly likely to occur." Id. Here the court determined that the Webers knew or should have known that manure was going to spill on the road while it was being transported. Id. The discharge of waste on the road was not accidental.

The court was also required to review the definition of occurrence in an umbrella policy where there was no pollution exclusion. Occurrence was defined in the policy as "an accident, including continuous or repeated exposure to conditions or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." Id. at 288. The court determined that the several years of disposal of hog manure on the road fell within that portion of the definition of "continuance or repeated exposure to conditions." Id. The court's analysis on this issue was not whether the discharge or spillage was unexpected and unintended but whether the property damage was expected and intended. Id. The court did not believe that the evidence established that the Webers intended the property damage nor did it support a conclusion that the Webers knew or should have known that the sweet corn would be polluted by the manure spillage. Id.

Several years later the federal court was asked to define the sudden and accidental pollution exclusion. A.Y. McDonald Industries, Inc. v. Insurance Co. of N. Am., 842 F. Supp. 1166 (N.D. Iowa 1993). Here the court also refused to define sudden and attempt to end the debate of whether this term has a temporal meaning or meant unexpected and unintended. Instead, the court found, citing Weber, that the dumping of foundry sand over many years was not accidental. The court described how courts should decide whether the pollution exclusion precludes coverage or whether coverage is excluded because it does not meet the definition of occurrence. The court stated that "[i]f the discharge was either expected or intended , the discharge could not be accidental, and the pollution exclusion would preclude coverage." Id. at 1174. Conversely, to determine whether an occurrence has occurred the courts should ask "was the resultant damage caused by the discharge expected or intended." Id.

The court's analysis is correct but under West Bend Mut. Ins. Co. v. Iowa Iron Works, 503 N.W.2d 596 (Iowa 1993) the Supreme Court clarified its pronouncement in Weber that in order for their not to be an occurrence there cannot be an accident and the insured must intend and expect the property damage. West Bend, 503 N.W.2d at 600-01. Here the court determined that the insurer had a duty to defend the insured under a policy containing the absolute pollution exclusion because although the dumping of spent foundry sand was intentional there was no allegation that Iowa Iron works intended property damage. Id. at 601. Further, the court determined that the definition of "waste" under the Iowa's solid waste law was broader than the definition found in the pollution

exclusion The violation asserted against the insured by the DNR was based upon a statute with a broad prohibition against the depositing of solid waste and such a violation was not necessarily based upon contaminants and irritants. Id. at 600. Accordingly, the court held that the absolute pollution exclusion did not necessarily preclude coverage.

The most recent pronouncement from the court was in Fireman's Fund Ins. V. ACC Chemical Co., 538 N.W.2d 259 (Iowa 1995). Here the Court found that as a matter of law the insured's notice to its carriers of environmental claims asserted against it was late and prejudicial. The significance of this case was not so much in the court's pronouncement concerning late notice, but the effect of the court's ruling. The issue of late notice was submitted to the jury and the jury determined that issue in favor of the insured. The jury verdict awarded the insured almost $20 million in coverage, not to mention the many excess policies that could be triggered as a result of the jury's findings. Chemplex argued that it had spent $55 million at the time of trial in remediating the site. The key to ACC Chemical is insured's must give prompt and immediate notice when they are faced with claims for pollution costs.

Another important environmental insurance coverage decision is A.Y. McDonald Industries, Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607 (Iowa 1991). Here the court addressed a number of fundamental coverage issues which have been litigated extensively throughout the country.

The Court determined that government mandated response costs under CERCLA were damages under a commercial general liability policy. Id. at 621. The court further

held that "any injury to the environment resulting from contamination by hazardous waste constitutes 'property damage' within the meaning of the CGL policies." Id. at 624. There is coverage for such damages whether the property is owned by the insured, the state, the federal government or a third party. Id. In addition, the Court found that response costs for preventative measures employed after pollution is also covered under the CGL policy. Id. But costs incurred to pay for preventative measures taken in advance of any contamination are not covered. Id. The Court decided, conversely, that civil penalties were not damages and therefore not covered under the CGL policy. Id. at 626. Finally, the Court determined that "suit" includes "any attempt to gain an end by legal process." Id. at 628. If the actions of the government or a private citizen constitute an attempt to gain an end by legal process the provisions of the CGL are triggered and the insurer cannot deny coverage on the basis that no lawsuit has been filed.

:A:\1997 Iowa Defense Counsel Speech.doc

FAMILY AND MEDICAL LEAVE ISSUES AND DEFENSES

Patricia J. Martin
Associate Counsel
Maytag Corporation
9/26/97

Family Medical Leave Act of 1993 (effective date August 5, 1993) effective date for collective bargaining agreement February 5, 1997

PURPOSE OF FMLA

The stated purpose is "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity " 29USC §2601 (b); 29CFR §825 101(a) To this end the FMLA provides eligible employees with the right to an unpaid leave of absence to care for a new child, to care for a family member with serious health conditions, or to obtain treatment and otherwise recover from an employee's own serious health condition Employees taking FMLA leave are entitled to continued health insurance coverage and a guarantee, in most cases of reinstatement to the same or equivalent position

Following passage of the FMLA the Department of Labor spent almost 2 years drafting regulations implementing the FMLA The regulations became effective in April 1995; they are quite detailed and voluminous making the day to day application of the FMLA confusing and burdensome for employees For example the initial statute passed by Congress was only a few pages long but the regulations and amended regulations total several hundred

COVERED EMPLOYER

Employers with 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or proceeding calendar year

A covered employer can be a single employer or a single individual or a corporation

ELIGIBLE EMPLOYEES

Eligible employees must be employed at least 12 months and have worked at least 1250 hours during the previous 12 month period They must be employed at work sites where there are 50 or more employees within a 75 mile radius

PERSONS EXCLUDED

Employees of employers with less than 50 employees, employees at work sites with less than 50 employees, employees at work sites where there are fewer than 50 employees with a 75 mile radius (even if the employer is covered by the FMLA in other parts of the country)

QUALIFYING REASONS FOR TAKING LEAVE

-Birth of a child
-Placement or adoption of a child
-To care for a spouse, child, or parent with a serious health condition
-To care for the employee's own serious health condition

WHAT IS THE MAXIMUM ACCEPTABLE DURATION OF THE LEAVE

-Twelve workweeks of leave
-During a twelve month period
-**Note:** Spouses who work for the same employer have an aggregate leave to which they are entitled which is limited to 12 work weeks in any 12 month period If the leave is taken due to the birth or placement of a child with the employee or to care for a parent with a serious health condition If the leave is taken for any other reason, each spouse is entitled to the full 12 work weeks of leave.

GENERAL TYPES OF LEAVE AVAILABLE

-Continuous twelve weeks of leave
-Intermittent leave
-Taking a separate block of time which may include a leave of an hour or more to several weeks
Example: Intermittent leave includes leaves taken on an occasional basis over a period of six months to undergo chemotherapy treatments or for pre-natal treatments or severe morning sickness 29CFR §825 203(c)(1)

REDUCED LEAVE SCHEDULE BASED UPON HOURS PER DAY OR HOURS PER WORK WEEK

Note: Leave due to the serious health condition of an employee or family member may be taken intermittently or on a reduced schedule when "medically necessary" 29CFR §825.203(c). However leave due to the birth or placement of a child with an employee may not be taken intermittently or on a reduced schedule unless the employee and the employer agree to such a schedule 29CFR §825.203(b).

ISSUES CONCERNING BIRTH, ADOPTION, OR PLACEMENT OF A CHILD

-Leave may begin prior to birth, adoption or placement
-Entitlement "expires" at the end of 12 months after birth or adoption unless the state requires a longer leave period or employer agrees to a longer leave period

ISSUES CONCERNING SERIOUS HEALTH CONDITIONS IN GENERAL

-Leaves may be taken for mental or physical conditions
-Inpatient care (i e overnight stays)
-Continuing treatments from two or more health care providers (including therapy)
-Illness requiring more than three days absence
-Illness, chronic or long-term usually, requiring more than three days absence if left untreated
-Pregnancy complications or prenatal care

ISSUES SPECIFIC TO THE SERIOUS HEALTH CONDITION OF THE EMPLOYEE

-The employee must be unable to work
-If the employee is unable to perform the essential functions of the job
-The employee must be absent to receive treatments
-The employer may provide the health care provider with statement of job's essential functions

ISSUES REGARDING THE SERIOUS HEALTH CONDITION OF THE EMPLOYEE'S FAMILY MEMBER

-Inability to care for their medical, hygienic, or nutritional needs or safety
-Inability to transport themselves to a health care provider
-Psychological care and comfort
-Time to fill in for other persons providing care
-Time to make changes in arrangements

HEALTH CARE PROVIDERS UNDER THE FMLA

-Doctors of medicine or osteopathy
-Podiatrists
-Dentists
-Clinical Psychologists
-Optometrists
-Chiropractors
-Nurse practitioners and midwives
-Some Christian Science practitioners

WHAT ARE EXAMPLES OF COVERED ILLNESSES

-Heart attacks
-Surgeries
-Cancers
-Strokes
-Severe respiratory conditions

-Spinal Injuries
-Serious back injuries
-Restorative dental surgery
-Appendicitis
-Pneumonia
-Emphysema
-Severe arthritis
-Severe nervous disorders
-Serious injuries on or off work
-Treatments for allergies or stress
-Prenatal care
-Postnatal care

MEDICAL CERTIFICATION REQUIREMENTS

-The employer may require a certificate from the employee
-Employer may require a second opinion (at the employer's request)
-The employer may require a third opinion, which will be binding (also at the employer's request)

EMPLOYER'S NOTIFICATION REQUIREMENTS

-Posting notice in form available from the Department of Labor regarding the statute
-To provide statement and employee handbook if one is provided to the employees
-Record-keeping administration requirements

EMPLOYEE'S NOTIFICATION REQUIREMENTS

-Advance notice of leave requirements
-Thirty days notice, where foreseeable, for birth or adoption of a child (or as soon as practicable)
-Thirty days notice, where foreseeable, for anticipated serious health condition (or as soon as practicable), and a reasonable effort to schedule treatments so that they do not unduly disrupt the employer's operation

WHAT NOTIFICATION FROM EMPLOYEE WILL SUFFICE?

-Oral notice
-Employee does not need to mention the FMLA specifically
-Employer may require written notice of an FMLA leave, but failure to follow those procedures may not prevent or delay the employee's leave, so long as she or he is provide timely oral notice
-Employer may delay the leave, at most 30 days, if timely notice is not given and there is no reasonable excuse for the delay
-For unforeseeable leaves, notice should be given one or two days after learning of the need, except for extraordinary circumstances

An employee is only obligated to provide enough information for the employer to be able to determine that the leave require the need qualifies as FMLA leave "As soon as practical" ordinarily means verbal or written notice within 2 business days of when the need for leave needs becomes known to the employee 29CFR §825.302(a)(b)

DESIGNATION OF LEAVE AND NOTICE TO EMPLOYEE

It is the employer's responsibility to designate leave, paid or unpaid, if FMLA - qualifying, and to give notice of the designation of the employee within 2 business days from the time the employee gives notice of the need for the leave or, where the employer does not initially have sufficient information to make a determination, notice must be given within 2 business day from the time the employer determines that the leave qualifies as FMLA leave 29CFR §825.208(b)(1)-(c)

Although oral notice by the employer is sufficient to comply with the 2 business day requirement, "it [must] be confirmed in writing no later than the following pay day (unless the pay day is less than 1 week after the oral notice, in which case the notice must be no later than the subsequent pay day) The written notice may be in any form, including a notation on the employee's pay stub 29CFR §825.208(b)(2)

The FMLA regulations state that "if the employer fails to advise the employee whether the employee is eligible [for FMLA leave] prior to the date the respective leave is to commence, the employee will be deemed eligible." 29CFR §825.110(d)

Also an employer must not only notify employees that they will be charged with FMLA leave, but the employer must also notify employees of their ineligibility for FMLA leave If such notice is not given, the employee will be deemed eligible for FMLA leave Thus, employers should notify all employees requesting leave whether they are eligible and would be charged with the FMLA leave within 2 business days.

COMPENSATION DURING LEAVE

The general rule is that FMLA is generally unpaid and there is no requirement that employers must provide pay However, an eligible employee may elect, or an employer may require, a substitution of any accrued paid vacation leave, personal leave, or family leave (if the employer provides paid family leave) for any part of the 12 week work week due to the birth or placement of a child or to care for a child's or an employer's child, spouse or parent who has a serious health condition 29USC §2612(d)(2)(A)

The paid leave and the FMLA leave can be charged concurrently An eligible employee may elect, or an employer may require, the substitution of any accrued paid vacation leave, personal leave or sick leave for any part of the 12 work week period of leave for a serious health condition of the employee or in order to care for the spouse, child, or parent of the employee who has a serious health condition, except that an employer is not required to provide paid leave in any

situation in which the employer would not normally provide paid leave. 29USC §2612(d)(2)(B)

An employee has the right to substitute paid sick leave to care for a family member only if the employer's policy allows the leave to be used for that purpose. 29CFR §825.207(c).

REINSTATEMENT

Reinstatement is required to the employee's previous or equivalent position. If the position no longer exists and no equivalent position would have been available had the employee had not been on leave, then the employee does not need to be reinstated.

KEY EMPLOYEE EXCEPTION

Key employees are entitled to FMLA leaves, but there is no guarantee of restoration to their former position. A key employee is a salaried employee who is among the highest paid 10% of the employees at the work site, or within the 75 mile radius. Further, restoration of the key employee must cause substantial and grievous harm to the employer's operation. If the employer considers the employee a key employee without an opportunity to reinstatement, the employer must inform the employee of its intent to deny reinstatement as soon as that decision is made.

ENFORCEMENT AND REMEDIES

FMLA is enforced by the Wage and Hour Division of the Department of Labor. Individuals may bring their own private actions against employers without any initial notice or administrative proceeding in the Department of Labor.

The statute of limitations is two years unless the alleged violation is willful, in which case the limitations period is three years.

Types of remedies include:

-lost compensation and benefits
-monetary losses
-interest
-liquidated damages
-reinstatement or promotion
-attorney's fees
-other appropriate relief

RECENT CASES

A federal judge in Georgia recently ruled that an employee has a right to a jury trial on its claims under the Family Medical Leave Act. Even though the legislation is "conspicuously silent" on

whether a jury trial is appropriate for FMLA claims, the judge found that the civil enforcement scheme mirrors the Fair Labor Standards Act which allows for jury trials The court however reserved decisions regarding reinstatement or promotion to be decided by a judge and not a jury Helmly v. Stone Container Corp., Daily Labor Report No 65, April 4, 1997 A-9 (Dist Ct Ga March 24, 1997)

Family and Medical Leave "Improvements" President Clinton has pledged his support for the passage of a Family-Friendly Work place Act which if approved would expand the coverage of the FMLA in two respects:

1. Expand FMLA's coverage to encompass all firms having 25 or more employees rather than the present FMLA threshold of 50 or more employees This would bring within the FMLA's coverage an additional thirteen million employees presently uncovered by the act

2. Permitting employees to take up to 24 additional hours per year in order to participate in school activities with children or accompany them or elderly relatives on routine appointments to the doctor or dentist

This legislation is pending in the House and Senate

Employees Risk Liquidated Damages for Failure to Act in Good Faith under FMLA

The Family and Medical Leave Act of 1993 (FMLA) provides that a plaintiff is entitled to recover actual damages and interest thereon plus an equal amount of liquidated damages An employer can avoid liquidated damages if it can demonstrate that it acted in "good faith" In determining what constitutes "good faith" a federal district court borrowed the definition under the Fair Labor Standards Act, which requires that the employer have both subjective good faith and an objective reasonable belief that its conduct did not violate the law

Applying this standard, the jury found that the employer had violated the FMLA by discharging an employee who requested leave because of emotional illness due to job stress The employee had provided a doctor's note directing her to take immediate medical leave The employer introduced no evidence of any reliance on agency regulations or that it sought legal advice prior to the discharge Awarding double damages, the court found the employer's actions unreasonable in assuming the doctor had not exercised professional judgment and not seeking any further clarification from the employee before discharging her Morris v. VCW, Inc., 1996 WL740544(WDMO)

DICKINSON, MACKAMAN, TYLER & HAGEN, P C.
ATTORNEYS AND COUNSELORS
1600 HUB TOWER • 699 WALNUT STREET
DES MOINES, IOWA 50309-3986
TELEPHONE (515) 244-2600
FAX (515) 246-4550
WWW.DICKINSONLAW.COM

DEFENDING AGAINST AGE DISCRIMINATION CLAIMS

BY

HELEN C. ADAMS

Many defense lawyers who practice in the employment area believe that age and disability discrimination claims are the most difficult type of employment claims to handle, especially if those claims are being tried to a jury. When asked upon what this belief is based, lawyers often point to the following factors: (1) plaintiffs in age and disability discrimination lawsuits often engender sympathy in jurors; (2) unlike other protected classes such as race and gender, the protected classes of age and disability are dynamic, i.e. jurors recognize that all people including themselves will fall within the protected age class and may become disabled at some point in their life; and (3) plaintiffs in age and disability discrimination lawsuits often have little chance of obtaining other employment opportunities. Additionally, jurors often come to the jury box with preconceived negative assumptions about corporate defendants, which are often seen as cold uncaring corporations rather than as individuals who form a workplace society. In essence, jurors can be said to be engaging in negative stereotyping, the very behavior of which the corporate defendant is often accused. These preconceived assumptions can be reinforced by popular movies and fiction novels, such as The Dinosaur Club, which tend to glamorize the plaintiff/employee hero while criminalizing the actions and motives of the defendant/employer.

Given the risks frequently associated with defending an age or disability discrimination case which gets before a jury or other finder-of-fact, it is understandable

why defense counsel focus so much time and money on winning such cases before the Iowa Civil Rights Commission ("ICRC") or Equal Employment Opportunity Commission ("EEOC") and to knocking such cases out of the trial docket via summary judgment and other motion practice. Although the focus of this outline will be defending against age discrimination claims, many of the concepts or tips can be modified for use in disability and other discrimination lawsuits.

PREVENTATIVE LAW: SPOTTING RED FLAGS

As soon as a company becomes aware of the potential for an age discrimination lawsuit to be filed, an investigation should be commenced and damage control implemented, if necessary. This awareness may come in a variety of forms and at different stages of the litigation or pre-litigation process.

The best time to gain this awareness is at the time that a company is making an employment decision, such as a hiring, promotion or discharge decision. Corporate clients frequently, although not always, consult with their human resources department and possibly their employment lawyer before finalizing employment decisions which could become problematic. A helpful way to assist corporate clients in determining when to consult with counsel with regard to employment decisions is to create a checklist of red flags which the employer can review when analyzing employment decisions. The checklist could include such things as whether the impacted employee is in one or more protected classes, whether other employees who were similarly-situated have been treated consistently , whether another person will replace the impacted employee and the personal demographics of the replacement, whether the impacted employee has recently filed a discrimination complaint or engaged in other protected activity, the personal demographics of the decision-maker, whether the impacted employee has been a long-term employee with a satisfactory or better performance history, whether the available documentation supports the decision which has been made, etc. If the potential decision raises serious red flags, the employer may want to consider running the decision-making process by legal counsel.

IMPORTANT CASE UPDATE: Spotting potential red flags at the time the employment decision is being made may be especially important and effective in reduction-in -force ("RIF") cases. RIFs may form the basis for both disparate treatment and disparate impact age discrimination cases. In a disparate treatment case, the plaintiff alleges that his employer intentionally treated him less favorably than others not in his protected class because of his age. In a disparate impact case, the plaintiff alleges that an employment decision or policy had a disproportionate impact on persons in a certain protected class, such as persons over 40. Although there is a split of authority over whether

disparate impact claims under the Age Discrimination in Employment Act ("ADEA") are cognizable, the Eighth Circuit has recognized the viability of such claims. *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-1470 (8th Cir. 1996); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994).[1]

In *Smith*, after confirming that disparate impact claims are cognizable under the ADEA, the Eighth Circuit determined that the City of Des Moines established that the challenged policy was job-related and a business necessity. Thus, the case was ultimately decided in favor of the employer. In reaching this decision, the Eighth Circuit left open a crucial issue regarding the business necessity defense. The Eighth Circuit did not decide the issue of whether the employer or employee bears the burden of persuasion on the issue of business necessity. Instead, the court simply assumed that the City of Des Moines bore the burden of persuasion on this issue in ruling in the employer's favor.

If the United States Supreme Court stays true to form, it should decide the ADEA business necessity burden of persuasion issue in favor of the employer. With regard to a similar issue as it pertained to Title VII claims, the Court placed the burden of persuasion on the issue of business necessity with the plaintiff/employee in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659 (1989). Congress reacted to the Court's decision by restoring pre-*Wards Cove* law in the Civil Rights Act of 1991.

PURCHASING PEACE OF MIND

The costs associated with defending age discrimination claims can be high. More importantly, those costs are more than just purely monetary. Damage to morale, and company down-time are just a few of the non-monetary factors that an employer must consider when conducting a cost-benefit analysis of fighting versus resolving age discrimination claims. Employers familiar with these potential costs are searching for alternate ways to avoid litigation of these claims. Those alternate ways may include: (1) requiring employees to submit all employment disputes, including discrimination claims to binding arbitration or other alternative dispute resolution mechanisms; (2) purchasing employment practices liability insurance; and (3) settling discrimination claims as part of a severance package or at an early stage of the complaint process.

---

[1]The Eighth Circuit has subtly raised the possibility that the *Houghton* case may have been wrongly decided but agrees that *Houghton* represents the law of the Circuit and must be followed unless it is overruled. *Smith v. City of Des Moines*, 99 F.3d 1466, 1470 (8th Cir. 1996).

ALTERNATE DISPUTE RESOLUTION TECHNIQUES

Proponents of ADR often emphasize that it can be less costly and faster than following a case through the litigation process. While there may be merit to this position, employers often feel that some lawsuits deserve to be vigorously defended. The reasons behind these feelings are as varied as the employers who espouse them, but include (1) the need to support the decisions made by its management team; (2) the need to let it be known that the employer is not an easy mark and will defend against non-meritorious claims; and (3) a need to make a public statement or clear its name before the public. Depending on the circumstances, however, ADR may be an appropriate alternative for an employer to consider.

IMPORTANT CASE UPDATE: The Eighth Circuit recently decided that an employer could require employees to submit all employment disputes, including discrimination claims, to an alternative dispute resolution forum, specifically arbitration. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837-38 (8th Cir. 1997). Plaintiff Patterson received a copy of Tenet's employee handbook on March 5, 1993. Patterson also signed an arbitration clause set forth on the last page of the handbook.

On July 26, 1993 and January 18, 1994, Patterson filed charges with the EEOC and Missouri Commission on Human Rights. On December 8, 1994, Patterson filed a grievance through Tenet's internal grievance process. Patterson's grievance was ultimately denied.

Patterson did not submit her claim to the final step of the grievance process, binding arbitration. Instead, she commenced suit in the district court. The district court determined that Patterson had agreed to arbitrate, the FAA governed Patterson's claims, and that Patterson's claims were arbitrable. Accordingly, the district court dismissed Patterson's complaint and the Eighth Circuit Court of Appeals affirmed the decision of the district court.

In affirming the district court, the Eighth Circuit relied on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, the U.S. Supreme Court held that arbitration of a stock broker's claim under the ADEA is not inconsistent with the ADEA's framework or purposes. 500 U.S. at 26. The Eighth Circuit concluded that *Gilmer* overruled an earlier Eighth Circuit decision in which it was held that an employee was not bound by an arbitration agreement with respect to her Title VII claims. That earlier decision was *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988).

EMPLOYMENT PRACTICES LIABILITY INSURANCE

The insurance industry has thrived on the desire of individuals to shift the risk associated with business and other ventures. Until recently, there was little, if any, insurance available to cover the risks attendant with employment decisions, including the costs associated with discrimination claims. Insurance companies have began to fill this coverage void by marketing a product known as employment practices liability insurance ("EPLI"). As is true of all insurance, a cautious employer should carefully review the policy language to insure the employer is actually getting the coverage sought and that there are no unknown terms, requirements or provisions contained within the policy. EPLI insurance may be too costly or otherwise not practical or necessary for many employers.

SEVERANCE OR OTHER SETTLEMENT PROPOSALS

Due to the frequency of discrimination litigation, employers often include a line in their annual budget for the costs associated with such lawsuits. This budgeted sum may be used to avoid lawsuits by offering potential plaintiffs a sum of money, often in the form of a severance package. In exchange for the monies, the employee executes a release of all claims. If the release is to include a valid waiver of ADEA claims, an employer must jump through certain hoops and certain language must be included in the release form.

An individual may not waive any right or claim under ADEA, as amended by OWBPA, unless the waiver is knowing and voluntary. Except as provided below, a waiver may not be considered knowing and voluntary unless at a minimum --

- **the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;**
- **the waiver specifically refers to rights or claim arising under ADEA;**
- **the individual does not waive rights or claims that may arise after the date the waiver is executed;**
- **the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;**

- the individual is advised in writing to consult with an attorney prior to executing the agreement;

- the individual is given a period of at least 21 days within which to consider the agreement; or

  if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

- the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

- if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the in employer (at the commencement of the period specified above) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to --

  (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program;

  (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under ADEA may not be considered knowing and voluntary unless at a minimum --

- the requirements set forth in the subparagraphs above have been met; and

- the individual is given a reasonable period of time within which to consider the settlement agreement.

IMPORTANT CASE UPDATE: The United States Supreme Court has agreed to hear a case concerning whether an employee ratified an otherwise invalid ADEA release by retaining the settlement monies. *Oubre v. Entergy Operations*, 65 U.S.L.W. 3708 (1997), *cert. granted* from 102 F.3d 551 (5th Cir. 1996). The Court's decision in this case should resolve a dispute that currently exists in the lower federal courts.

FIGHTING IN THE TRENCHES

Assuming that a company has been unable to avoid the litigation war, the company and its defense lawyer must now turn their energy and thoughts to winning the case in the judicial trenches. Victory may come in a variety of forms running the gamut from obtaining summary judgment to limiting the damage award which the plaintiff receives. Case law in this area has taught us that certain defenses are more likely to prove successful than other defenses which have been championed in age discrimination cases. This last section of the outline summarizes some lessons that can be learned from recent Eighth Circuit and other Circuit opinions in the age discrimination area.

REPLACEMENT ALSO IN PROTECTED AGE CLASS

In *O'Connor v. Consolidated Coin Caters Corp.*, 84 F.3d 718 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 608; on remand from the Supreme Court's decision last year that an employee need not point to a replacement outside the protected class, 116 S.Ct. 1307, the Fourth Circuit granted summary judgment to the employer. The court determined that O'Connor had not shown adequate job performance to meet the requirements of the *prima facie* case; he also could not show pretext. *See also, Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407, 1413 (Plaintiff unable to make *prima facie* showing because individual selected for the positions which plaintiff sought were all in the protected age class but not sufficiently younger than plaintiff.) Compare to *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996) (Fifty-two year old plaintiff who was replaced by a fifty-seven year old entitled to reach jury where evidence showed that eight top level executives had recently been replaced by younger persons, age-related remarks had been made and the older replacement was only a temporary replacement.)

DECISION-MAKER IN PROTECTED AGE CLASS: CLOSE IN AGE TO IMPACTED EMPLOYEE

In *Rothmeier v. Investment Advisers*, 85 F.3d 1328 (8th Cir. 1996), the Eighth Circuit upheld summary judgment for the employer. In *Rothmeier*, the same CEO hired plaintiff at age 43 and fired him at age 46; and the CEO was himself over 50.

PROXY FOR AGE ≠ AGE

There is a line of cases demonstrating that age, not just factors that correlate with age such as salary, must be a motivating factor behind the challenged decision. *See Rothmeier v. Investment Advisers*, 85 F.3d 1328 (8th Cir. 1996) (Plaintiff argued that the CEO wanted a younger employee who would be less aggressive on ethics issues, ethical sensitivity, being an attribute of age. The court rejected this argument as based on a dubious correlation and legally insufficient, since age itself, not a proxy, must be shown to have been a factor.); *Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407 (8th Cir. 1997) (Factors, such as salary and grade level, may be correlative with age, but are not prohibited factors.); *Cramer v. McDonnell Douglas Corp.*, ___ F.3d ___, 1997 WL 414602 (8th Cir. 1997) (Discharging an employee solely because of his status as a higher paid employee, does not alone permit an inference of age discrimination.) *But see, Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 562-63 (10th Cir. 1996) (Evidence of dismissal prior to vesting in an exclusively age-based plan, where other independent evidence of age-based animus is present, may be considered by the trier of fact under proper instructions.)

POSITION WHICH PLAINTIFF SOUGHT NEVER FILLED

The Eighth Circuit has held that a plaintiff cannot make out a prima facie case for a job that was never filled. *Schiltz v. Burlington Northern R.R.*, 115 F.3d at 1413. This raises an interesting point in some cases — whether someone has assumed the duties of the position regardless of whether that person is an incumbent employee who has been assigned additional duties or a true replacement. RIF cases often involve such issues.

SAME HIRED - SAME FIRED

The Eighth Circuit has held that a plaintiff who was hired by the same person who terminated him, who was employed for a short time, and who was in the protected age class at the time he was hired, failed to establish a claim of age discrimination. *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 175 (8th Cir. 1992). *See also, Grossman v. Dillard Department Stores, Inc.*, 109 F.3d 457, 459 (8th Cir. 1997) (A jury could not reasonably infer that an employer who hired the plaintiff when

he was forty-eight, fired him when he was fifty-two and hired four operations managers over forty the following year fired the plaintiff because of his age.) This doctrine which has become known as the "Same Hired — Same Fired" doctrine may not apply in cases where plaintiff has presented evidence of overt discrimination, such as age-based comments. *Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1253 (8th Cir. 1997).

REDUCTION-IN-FORCE

If the termination was part of a legitimate reduction-in-force ("RIF"), plaintiff carries a heavier burden. In addition to showing that he (1) is within the protected age group; (2) was performing his job at a level that met the employer's legitimate expectations; and (3) was discharged, a plaintiff in a RIF case must make "some additional showing" that age was a factor in his termination to get to a jury. *Cramer v. McDonnell Douglas Corp.* ____ F.3d ___, 1997 WL 414602 (8th Cir. 1997).

This "additional showing" can take many forms. Such showing could be made by statistical evidence (as, for example, where a pattern of forced early retirement or failure to promote older employees can be shown) or by circumstantial evidence (such as a demonstration of a preference for younger employees in the business organization). *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161 (8th Cir. 1985).

STRAY COMMENTS

Often, age discrimination plaintiffs will attempt to offer comments which they categorize as age-based into evidence at trial. Statements may constitute evidence of impermissible motive only when they are made by decision-makers in the termination process and reflect a discriminatory animus such that a jury could infer age was a motivating factor. *Herrero v. St. Louis Univ. Hosp.*, 109 F.3d 481, 484 (8th Cir. 1997). The line between which comments may constitute evidence of impermissible motive is not as clear as some people might think as evidenced by the cases discussed below:

Krumwielde v. Mercer County Ambulance Service, Inc., 116 F.3d 361, 363 (8th Cir. 1997) (Co-worker's comments, including reference to employee as "granny", were insufficient to show that age was a factor in terminating employee during reduction in force, where co-worker had no decision-making authority and there was no evidence that employer was aware of those comments.); *Buckholz v. Rockwell International Corporation*, 120 F.3d 146, 149 (8th Cir. 1997) (Supervisor's comment, when plaintiff inquired as to why he was not hired, that "young kids" he hired "sure were sharp" did not show specific link between discriminatory animus and supervisor's decision not to hire applicant, but was innocuous comment on abilities of new hires. Supervisor was

62 years of age.); *Hill v. St. Louis University*, 1997 WL 538918 (8th Cir. 1997) (A week after plaintiff resigned, her supervisor noted that he wanted to hire someone new to bring "fresh blood" to the position. The court labeled this statement as an obtuse comment which was insufficient to give rise to an inference of age discrimination.) *But see, Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1253 (8th Cir. 1997) (Derogatory statements by non-decision-making Carlson relevant to age discrimination claim. A jury could conclude that Carlson was the decision-makers, Parker, primary source of information regarding plaintiffs. Furthermore, Carlson recommended that Parker fire the plaintiffs. Carlson's age-based comments included: "you old fuckers made good salesmen because most of the garage owners are old and you relate well together," "old fart" and "geriatric set".); *Ryther v. KARE II*, 108 F.3d 832, 843 (8th Cir. 1997) (en banc) (Co-employees' statements that Ryther was "old fart", "old man" and "too old to be on the air", with other evidence, raised inference of age discrimination. The non-decision-makers responsible for the discriminatory comments frequently discussed Ryther's abilities with the decision-maker and she was responsive to their demand to take away some of Ryther's responsibilities.)

AFTER-ACQUIRED EVIDENCE

The Eighth Circuit has determined that after-acquired evidence of employee misrepresentation bars recovery for an unlawful discharge, if the employer establishes that it would not have hired the employee had it known of the misrepresentation. *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403, 1405 (8th Cir. 1994). The employer bears a substantial burden of establishing that it had such a policy which pre-dated both the hiring and firing of the employee in question and that its policy constitutes more than mere contract or employment application boilerplate. *Welch*, 23 F.3d at 1406.

The Iowa Supreme Court has not embraced the after-acquired evidence doctrine as wholeheartedly as the Eighth Circuit. Under Iowa law, the after-acquired evidence doctrine does not bar an employee's wrongful termination claim but may limit the amount of damages that an employee can recover. *Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 711 (Iowa 1995). When an employer seeks to rely on after-acquired evidence of an employee's wrong-doing, the employer must first establish that the wrong-doing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known about it at the time of the discharge. *Id.* at 711. Once the employer has met its burden, an employee's recovery will be limited to back pay calculated from the date of the unlawful discharge to the date that the after-acquired evidence was discovered. *Id.* at 711.

BUSINESS JUDGMENT RULE

The Eighth Circuit adheres to the proposition that the ADEA is not meant to transform "at-will" employment into perpetual employment where equal treatment is guaranteed to all employees and termination is legal only "for cause". *Hill v. St. Louis University*, 1997 WL 538918 (8th Cir. 1997). Nor does the ADEA entitle courts to "sit as super-personnel departments," second-guessing the wisdom of businesses personnel decisions. Id.; *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995). The ADEA does not prohibit employment decisions based upon poor job performance, erroneous evaluations, personal conflicts between employees, or even unsound business practices. *Hill*, 1997 WL 538918.

The above proposition has become known as the "business judgment rule." This rule has been long recognized and respected by the Eighth Circuit. *E.g. Bell v. Gas Serv. Co.*, 778 F.2d 512, 515 (8th Cir. 1985); *Neufeld v. Searle Lab*, 884 F.2d 335, 340 (8th Cir. 1989); *Walker v. AT&T Technologies*, 995 F.2d 846, 847 (8th Cir. 1993) (reversible error for the district court in an ADEA case to fail to give a "business judgment" instruction.)

For further discussion of the business judgment rule, the stray comments doctrine and the same hired-same fired doctrine, Judge Bennett has written several opinions discussing and interpreting these topics. *See, e.g., Holmes v. Marriott Corp.*, 831 F.Supp. 691 (S.D. IA 1993).

INDEX

Iowa Defense Counsel Association

1965 through 1996 Annual Meetings

This Index is supplied as a service to the members of the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
c/o Mr. James Pugh
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

DISCOVERY

Artful Discovery, 1978

Defending Products Liability Cases Under OSHA and CPSA; Obtaining Information From Government Agencies, 1976

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Deposition of Expert Witnesses, 1977

Discovery and Pretrial Procedures - Uses and Abuses, 1977

Discovery in the Business Interruption Case, 1989

Discovery As A Weapon And A Response - Part I, 1991

Discovery As A Weapon And A Response - Part II, 1991

The Failure To Let The Plaintiff Discover: Legal and Ethical Consequences, 1991

Pre-Trial and Courtroom Ethics - Conflicts of Interests and the Motion to Disqualify, Ethical Concerns Regarding Discovery and Trial Practice, 1988

Pretrial Motion Practice, 1991

Reminders and Suggestions on the Use and Nonuse of Depositions Under the Iowa Rules, 1989

Rule 125, Iowa Rules of Civil Procedure and Discovery Sanctions, 1989

Use of Request for Admissions in the No Liability Case, 1982

What is Work Product, 1982

DISCRIMINATION

Statistical Proof of Discrimination: An Overview, 1995

DRUNK DRIVING

Iowa's Drunk Driving Law, 1983

Iowa O.M.V.U.I. Law, 1986

EXPERTS

Chiropractor

Cross-Examination of the Chiropractor, 1984

Economist

Preparing for the Plaintiff's Economist in a Death Case, 1968

General

Defense Challenges to Expert Testimony, 1987

Deposition of Expert Witnesses, 1977

Effective Use Of Your Own Staff, Wordsmiths And Forensic Psychologists, 1991

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1995

Handling the Expert Witness, 1981

The Problem of Unreliable Expert Witness Testimony, 1989

The Selection, Care and Feeding Of Experts And Their Dismemberment, 1991

Thermography - Is It On The Way Out?, 1990

A Trial: A Trial Problem re Expert Proof or Physical Facts, 1967

Human Factors

Human Factors Experts, 1986

Medical

Defending The Traumatic Brain Injury Claim, 1996

Independent Medical Experts, 1978

Use of Experts: Preparation of Medical Witnesses; Medical Malpractice, Cross Examination - Experts, 1976

History Of IDCA, 1991

Proposed Rule 122, with Advertising and Report on the Activities of the Iowa State Bar Association, 1992

Resources, 1979

The Role of the American Lawyer - Today, 1969

Women as Defense Counsel Fact & Fiction Relating to Gender bias in the Profession, 1995

IMMUNITIES

Immunities in Iowa, 1987

INDEMNITY (See CONTRIBUTION/INDEMNITY)

INSTRUCTIONS

Civil Jury Instructions - An Update, 1992

Iowa Jury Instructions - An Update, 1993

Instructions - Comparative Negligence, 1983

Overview of the Iowa Defense Counsel Task Force Report, 1990

INSURANCE

Arson

Arson Investigation and Prosecution from the Insurance Company's Perspective, 1990

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Investigation and Adjustment of Arson Claims, 1987

Investigation and Adjustment of Arson Claims, 1990

Bad Faith

Bad Faith and Excess Problems: Caveat to the Defense Attorney, 1977

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Dealing with Bad Faith Claims, 1986

Ethical and Bad-Faith Considerations Regarding Cost Containment in Insurance Defense, 1994

First Party Claims, 1983

First and Third Party Bad Faith Theory and Issues, 1993

Coverage

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

"Claims Made" Policies, 1986

Controlling Defense Costs When Possible Policy Defenses are Available, 1987

Coverage and Liability of Architects, Engineers, and Accountants and Comments on New Comprehensive Policy, 1966

Insurance Coverage Issues in Sexual Abuse, Failure to Supervise or Prevent, Sex Discrimination, and Sexually Transmitted Diseases, 1993

"Intentional Acts" vs. "Accidents", 1979

The Intentional Acts Exclusion of Personal Liability Insurance Policies. Is it Still Viable?, 1992

A Practicing Lawyer's Approach to Automobile Coverage Problems, 1966

Excess Liability/Extra Contractual Damages

Avoiding Insurers' Excess Liability, 1982

Bad Faith and Excess Problems: Caveat to the Defense Attorney, 1977

Extra Contractual Damages - Iowa Eases the Burden, 1989

Extra Contractual Liability, 1986

General

Attorney Liability - Excess Limits Case - Insurance Attorney vs. No Attorney for Insured - Conflicts - Errors & Omissions - Client Security, 1976

Bankruptcy Automatic Stay and Insurance: Selected Problems, 1992

Client Relations: Imminent Pressure Points and the Resulting Ethical Problems, 1995

Conflicts of Interest - Inside Counsel's Perspective, 1990

Defending the Agent/Broker: Serving Two Masters, 1990

Ethical and Bad-Faith Considerations Regarding Cost Containment in Insurance Defense, 1994

Expanding Liability, The Claim Executive; Defense Counsel, 1976

Guidelines for Insurer-Defense Counsel Relations, 1994

Insurers Supervision, Rehabilitation and Liquidation Act, Chapter 507.C, 1987

The Labyrinth of Conflicts Between Primary and Excess Insurers, 1990

Navigating The Rapids In Communicating With The Insurance Carrier, 1996

The Past vs. Present vs. Future for the Insurance Defense Lawyer, 1981

Primary/Excess Carriers -- What Are Their Rights and Duties?, 1981

Recent Developments in Iowa Insurance Law, 1993

Relations with Outside Counsel, 1990

Reservation of Rights and Tenders of Defense, 1977

Retaining and Working with Outside Counsel, 1993

Rock and a Hard Place, Defense Counsel's Duty to Insured and Insurer, 1990

The Settlement Alternative - Some Peculiar Problems: What Happens When Your Carrier Will Not Accept Your Advice or

JUDGES

The Iowa Judicial Selection Law -- How It Works, 1965

LAW OFFICE MANAGEMENT

Closing the Communications Gaps, 1985

Economics of Defense Practice, 1982

Effective Use Of Your Own Staff, Wordsmiths And Forensic Psychologists, 1991

LEGISLATION

(Legislative Updates had been provided in meetings of 1979, 1981, 1982, 1983, 1984, 1985, 1988, 1990, 1993, 1994, 1995, and 1996)

Analysis of House File 196 - The New Medical Privilege Act, 1967

Civil Rico Overview & Developments, 1995

The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation, 1995

Legislative Changes and Products Liability, 1980

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

Proposed Uniform Product Liability Law 1, 1979

The Question of Contributory Negligence Resulting From Recent Iowa Legislative Changes, 1965

The Question of Damages Resulting From Recent Iowa Legislative Changes, 1965

Selected Problems Created by Passage of the Americans with Disabilities Act, 1992

MALPRACTICE (See PROFESSIONAL LIABILITY)

Lawyer Malpractice - Iowa Grievance Commission, 1985

Legal Malpractice, 1978

Medical Malpractice Update, 1992

Medical Malpractice Update, 1994

Proposed and Pending Legislative Changes in Medical Malpractice and Products Liability, 1977

PROFESSIONAL RESPONSIBILITY

Attorney Advertising, 1995

Client Relations: Imminent Pressure Points and the Resulting Ethical Problems, 1995

Conflicts of Interest, 1980

Defense Practice Under ABA Model, 1984

Deposition Dilemmas and the Ethics of Effective Objections, 1995

Ethics, 1991

Ethics and Alternative Billing, 1995

Ethics Problems from the Perspective of the Defense Attorney, 1993

Ethics Update: The Prosecutor's View, 1996

Ethics: What is a Conflict (Differing Interests), 1978

The Failure To Let The Plaintiff Discover: Legal and Ethical Consequences, 1991

Important Ethical Issues for Trial Lawyers, 1993

Judicial Ethics, Federal Rule 11 and Iowa Rule 80, 1990

Jury Selection, Method And Ethics, 1991

Lawyer Advertising in Telephone Directories, 1990

Legal Liability for Violation of Code of Professional Responsibility, 1990

Officers of the Court: Compulsory Ethics?, 1989

Evidence

Defensive Use of Federal Rules - Selected Exceptions to Hearsay Rule, 1984

Expert Testimony in the Eighth Circuit After Daubert v. Merrell Dow Pharmaceuticals, Inc., 1994

Expert Testimony in Iowa State Courts after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1995

The Iowa Rules of Evidence, 1983

Observations on the Proposed Rules of Evidence for the U.S. District Courts and Magistrates, 1969

Rules of Evidence - Federal and Iowa Update, 1985

Federal Rules of Civil Procedure

Changes to the Federal Rules of Civil Procedure, 1993

Defense Attorney Perspective of Proposed Amendments to the Federal Rules of Civil Procedure, 1993

Federal Rules of Civil Procedure - Amended Rules - The Court's Requirements, 1984

Federal Rules Review and New Developments, 1983

Recent Changes in Federal Rules of Civil Procedure and Local Rules of the Northern and Southern Districts of Iowa, 1994

Rule 16(b) - A Defense Perspective, 1984

Working with the Federal Rules, 1971

Iowa Rules of Civil Procedure

Amendments to Rules of Civil Procedure - Defense Alert, 1984

Application of the Iowa Rules, 1971

Iowa's New Class Action Law, 1980

Pretrial Motion Practice, 1991

Recent Amendments & Changes to Iowa Rules of Civil Procedure, 1976

TORTS

Defending Municipal or State Highway Torts, 1988

Defending Truckers, 1992

Defense of Toxic Tort Cases, 1989

Modern Trends in Tort Responsibility, 1971

Municipal Tort Liability in Iowa, 1981

Perceptions of Toxic Hazards: The View from the Expert Witness Stand, 1980

Premises/Interloper Liability: The Duty of a Possessor of Land to Control or Protect Third Persons, 1994

The Proposed Restatement (Third) and its Impact Upon Litigation Involving Prescription Drugs and Medical Devices, 1994

The Restatement (Third) of Torts Process, 1994

Road Hazards -- Tort Liability & Responsibilities, 1976

Tortious Interference: Elements and Defenses, 1995

Traumatic Neurosis - The Zone of Danger, 1980

TORT CLAIMS ACT

Operation of the Iowa Tort Claims Act, 1968

TRADE PRACTICES

Iowa Competition Law, 1978

TRIAL TECHNIQUE AND PRACTICE

The Art of Summation, 1991

Back to Basics, 1979

The Burning Question - A Practical Demonstration of the Examination and Cross-Examination of the Insurance Company's Attorney in a First-Party Bad Faith/Arson Case, 1990

Case Concept Development - "The Jury: Is What You Say What

They Hear?", 1990

Comments From the Other Side of the Counsel Table, 1988

Communication In Litigation - Intentions & $4 Will Get You A Microbrew, But It Won't Get You Understood, 1996

Coping with Multiple Defendants and Products Liability Cases, 1982

Cross-Examination of the Chiropractor, 1984

Defending Against the Emotional Distress Claim, 1994

Defending Punitive Damage Claims - Closing Argument, 1988

Defending The Traumatic Brain Injury Claim, 1996

Defending Truckers, 1992

Defense Techniques under Iowa's Comparative Fault Act, 1984

Demonstrative Aids in the Courtroom, 1984

Effective Courtroom Tactics with Computer Animation, 1992

Effective Opening Statement, 1986

A Fresh Look at Voir Dire, 1989

God, Red Light Districts and Changing the Defense Posture to Where the Sun Does Shine, 1992

Handling of Complex Litigation as Viewed From the Bench, 1981

How to Try a Case When You Are Unprepared, 1990

Individual and Group Defense of Complex Litigation, 1981

Joint Trial Advocacy College Schedule, 1995

Jury Communication and Selection, 1984

Jury Selection, Method And Ethics, 1991

Law of Closing Argument, 1987

New Court Room Technique & Aids -- New Drake Court Room, 1976

Opening Statement, 1991

UNIFORM COMMERCIAL CODE

VOIR DIRE

A Fresh Look at Voir Dire, 1989

Jury Communication and Selection, 1984

Jury Selection, Method And Ethics, 1991

Post Trial Jury Visits, 1978

A Psychologist's Voir Dire, 1983

The Psychology of Selecting a Defense Jury, 1988

The Value of Effective Voir Dire, 1994

Voir Dire - Opening and Closing Arguments, 1985

WORKERS COMPENSATION

The Interrelationship between the Americans With Disabilities Act, The Family and Medical Leave Act, and Workers' Compensation, 1995

Selected Problems Involving Workers' Compensation Liens and Subrogation Rights Affecting Personal Injury Litigation, 1992

Settlements and Commutations, 1978

Use of Rehabilitation - In Theory and In Practice, 1978

Vocational Disability Evaluations, 1984

(Workers Compensation Updates and Reviews were presented in 1976, 1977, 1979, 1981 through 1994 and 1996)