

defense UPDATE

The Iowa Defense Counsel Association Newsletter

Summer 2005 Vol. XIV, No. 2

CHECKLIST FOR INITIAL REVIEW OF A LAWSUIT

By Phil Wilson, Council Bluffs, Iowa

Checklists must be used in order to practice law with competence. The following checklist is designed for a systematic initial review of a Petition or Complaint. It does not attempt to provide a comprehensive list of affirmative defenses applicable to causes of action that are included within the claims.

REMOVAL

1.0 Removal to Federal Court

JURISDICTION OF PERSON

1.1 No personal jurisdiction

1.2 Delay in service of process

1.3 Lack of minimum contacts

1.3A Immunity from Service of Process

1.3B Incapacity to be a party

SUBJECT MATTER JURISDICTION

1.4 Lack of subject matter jurisdiction

1.5 Lack of equitable jurisdiction

1.6 Pre-emption by statute - primary jurisdiction elsewhere

1.7 Failure exhaust administrative remedies - lack of ripeness

1.8 Abstention

VENUE

1.8A Change of venue

1.8B Forum non conveniens

LIMITATIONS

1.9 Statute of limitations/repose

1.9A Laches

PARTY STATUS

1.10 Lack of corporate authority in Iowa

1.11 Lack of license

1.11A Not the real party in interest

1.12 Lack of standing of plaintiff claims relating to minors, decedents, waiver of immunity

1.12A Election of remedy

continued on page 6

Inside This Issue

CHECKLIST FOR INITIAL REVIEW OF A LAWSUIT

By Phil Wilson, Council Bluffs, Iowa Page 1

MESSAGE FROM THE PRESIDENT Page 2

THE UNCERTAINTY OF OFFSET OF CRIMINAL RESTITUTION IN CIVIL ACTIONS

By Bruce L. Walker, John E. Beasley, and Pope S. Yamada Page 3

McELROY v. ISU – ANOTHER EXAMPLE OF THE IOWA SUPREME COURT'S WILLINGNESS TO REEXAMINE SETTLED LAW

By Thomas D. Waterman, Davenport, Iowa Page 4

INSTRUCTING PUNITIVE DAMAGES: LIMITED CONSEQUENCES OF RECENT PUNITIVE DAMAGE JURY INSTRUCTION REVISIONS

By Benjamin Parrott Page 5

ANNUAL MEETING & SEMINAR AGENDA Page 17

ANNUAL MEETING & SEMINAR REGISTRATION FORM Page 19

EDITORIAL Page 20

MESSAGE FROM THE PRESIDENT



Sharon Greer

Dear Friends:

Sadly, I write my last note to you as President of the Iowa Defense Counsel. It has been such an honor to serve all of you and this impressive organization. As I interact with different members of IDCA, I am always so proud of how each of you operate in your practices and in the various volunteer roles you all tackle. The IDCA truly has as members some of my favorite people and friends!

IDCA work should be one of those accomplishments to add to your list. The Iowa Supreme Court now requires you to serve 50 hours each year of pro bono volunteer work and participating on the committees or board of this organization helps satisfy that requirement. So, sign up now for a committee of IDCA. Not only would it help with your bar requirements, you also benefit from interacting with other lawyers in your specialized areas of practice. Taking an active role on a substantive law committee highlights your enhanced knowledge about an area, such as writing an article for the Update, and would provide a referral source to all those receiving the publication.

This year we added to the Annual Meeting program a section of time for all the Committees of the organization to meet and develop objectives for the coming year. The Committees will meet from 4:30 - 5:00 p.m. on Thursday, September 22, 2005. You can then go on to the reception and banquet. We hope that you will show an interest in a certain committee, attend the meeting and become involved. That involvement, which I have discussed in other notes to you, could involve a seminar, writing articles or simply putting together a specialized expert data base.

Happily, the organization is in good hands for several years to come. Michael Thrall will serve as the next president. I have great confidence that Michael Thrall will move IDCA ahead with a firm resolve and continue the momentum we have gained from so many previous great presidents before me. I must also thank Michael for the tremendous Annual Meeting program he organized. Providing members an opportunity to learn from speakers outside our state is such a benefit. Michael has done that with gusto! The program should be one of the best we have ever had.

I cannot emphasize enough how important it is for each of you to report to IDCA your jury verdicts. You are now able to go to the web site and use our form to alert us about the verdict, good or bad. You can also mail the form into the organization. A comprehensive list of the verdicts in Iowa is an excellent tool for both your education about what cases are worth and to use in settlement discussions. We hope to have some law student interns in place this fall to handle the collection of this data. Do not be surprised if one of them calls to interview you about a recent trial.

Finally, many may not know Julie Garrison, our Associate Director, or know all that she accomplishes for our group. Bob Kreamer is a wonderful Lobbyist and Executive Director for IDCA. When the Board, decided to go the Executive Director route, Bob stepped up and correctly determined Julie Garrison would be essential to our operations. Kreamer's selection has led IDCA to become even stronger than ever. Julie provided great technical assistance to me this last year with all that I wanted to accomplish. I thank her ever so much, and thank Bob for all he has done for our group for so many years!

Again, I appreciate the honor of serving such a wonderful group of friends. It is daunting to take on such a task. As Aristotle said, "Dignity does not consist of possessing honors, but in deserving them." I hope as I leave this post, I have left with some dignity!

Thank you all.

Very truly yours,

A handwritten signature in cursive script that reads "Sharon Soorholtz Greer".

Sharon Soorholtz Greer

THE UNCERTAINTY OF OFFSET OF CRIMINAL RESTITUTION IN CIVIL ACTIONS

By Bruce L. Walker, John E. Beasley, and Pope S. Yamada

Have you ever been requested to defend a driver who was charged with vehicular homicide, but later pleads guilty to manslaughter? In addition to incarceration, your client will be ordered to pay \$150,000 restitution to the decedent's estate plus the costs of medical and funeral expenses. A civil action has been or will probably be filed against the driver by the decedent's family. You believe that it is likely that the jury will find in favor of the plaintiff's decedent and probably award punitive damages, medical expenses, loss of accumulation and/or loss of support, pain and suffering, loss of consortium, and interest of the funeral expenses from the date of the occurrence to the date the decedent statistically would have died. You will later be placed in the position of asking the Court to reduce the civil damages by the criminal restitution to prevent a double recovery by the decedent's estate. The Court probably will accept the concept of an offset, but you and decedent's counsel may not agree how to compute this offset given the differences in damages recoverable in a civil verdict and that ordered in a criminal case. You will argue that medical and funeral expenses have already been paid by criminal restitution and the \$150,000 should be offset against the jury's award of loss of accumulation and/or loss of support, pain and suffering, and loss of consortium. Plaintiff's attorney disagrees. What damages does a restitution order represent and how is it to be applied to offset civil damages?

The Iowa Code requires Iowa criminal defendants who plead guilty or who

are found guilty of a crime that results in the death of another person to pay restitution to the victims of the crime. See I.C.A. § 910.1, 910.2, 910.3B (2005). Such restitution includes pecuniary damages, pursuant to Iowa Code Sections 910.1 and 910.2, and at least \$150,000 in restitution to the estate of the victim under Iowa Code Section 910.3B.

Iowa Code Section 910.3B(1) provides:

In all criminal cases in which the offender is convicted of a felony in which the act or acts committed by the offender caused the death of another person, in addition to the amount determined to be payable and ordered to be paid to a victim for pecuniary damages, as defined under section 910.1, and determined under section 910.3, the court shall also order the offender to pay at least one hundred fifty thousand dollars in restitution to the victim's estate....

This criminal restitution provision has withstood constitutional attacks as an excessive fine, a violation of double jeopardy, or in contravention of due process. *State v. Izzolena*, 609 N.W.2d 541, 549-53 (Iowa 2000); *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000); *State v. Rohm*, 609 N.W.2d 504, 514 (Iowa 2000).

An award made pursuant to section 910.3B does not "preclude or supersede the right of the victim's estate...to bring a civil action against the offender for damages arising out of the same facts or events." I.C.A. § 910.3B(2)(2005). Part of the purpose of such restitution is to protect the public by compensating victims of criminal harm, *Izzolena*, 609 N.W.2d at 548 (the purpose of restitution is to protect the public by compensating victims for criminal activities but it also serves to rehabilitate the defendant); *but see also State v. Bonstetter*, 637 N.W.2d 161, 167 (Iowa 2001) (the purpose of restitution is to compensate the victim for losses caused by the defendant's criminal activity and not to address civil claims), it is possible that there could be a double-recovery for plaintiffs seeking wrongful death damages. However, there is an offset requirement for criminal restitution under Iowa Code Section 910.8, which provides, in part, "any restitution payment by the offender to a victim shall be set off against any judgment in favor of the victim in a civil action arising out of the same facts or event." I.C.A. § 910.8 (2005).

Despite the language of this provision, numerous questions arise regarding the actual application of the offset requirement between criminal and civil cases. For example, in a civil action for wrongful death, evidence relating to the entry of the judgment against the offender and the amount of the award ordered pursuant to Section 910.3 is not permitted to be introduced into evidence. I.C.A. § 910.3B(2)(2005).

continued on page 9

McELROY v. ISU – ANOTHER EXAMPLE OF THE IOWA SUPREME COURT'S WILLINGNESS TO REEXAMINE SETTLED LAW

By Thomas D. Waterman, Davenport, Iowa

On June 17, 2005 the Iowa Supreme Court in *McElroy v. State of Iowa*, ___ N.W.2d ___, 2005 WL 1413150 (Iowa 2005), held that parties seeking money damages are entitled to trial by jury under the Iowa Civil Rights Act (ICRA), overruling *Smith v. ADM Feed Corp.*, 456 N.W.2d 378 (Iowa 1990). Plaintiff was an Iowa State University student and employee (research assistant) whose Professor/supervisor came on to her on a University-sponsored trip to Moscow. *Id.* at 1 (describing facts as "salacious").¹ *McElroy* is authored by Justice Streit, who as the trial judge in *Smith v. ADM* had reached the opposite conclusion 15 years ago -- denying a right to trial by jury under the ICRA -- affirmed then by

the Supreme Court 5-4 with a vigorous dissent that included two Justices still with the high court today: Justice Carter (who authored the *Smith* dissent) and Chief Justice Lavarato. All justices concurred in *McElroy*, except Justice Wiggins who took no part.

The *McElroy* Court explained that *Smith* should be overruled because: 1) it viewed *Smith* as wrongly decided based on flawed reasoning; 2) the *Smith* Court was "sharply divided" (only Justice Larson from the *Smith* majority remains on the high court); and 3) after *Smith*, Congress amended Title VII to allow jury trials and the Eighth Circuit allowed juries to decide ICRA claims

with Title VII claims (creating an anomaly where state litigants could not get a jury for ICRA claims but federal litigants could). *McElroy* at 6-7. The *McElroy* Court rejected the argument that the Iowa legislature's 15-year silence tacitly approved the *Smith* majority's denial of a right to trial by jury under the ICRA, *id.* at 8, even though the Court historically has relied on legislative inaction as a reason not to alter judicial interpretations of statutes.² The Court, of course, has adhered to *stare decisis* when not presented with persuasive reasons to overrule precedent.³ The *McElroy* Court's departure from *stare decisis* was well-reasoned and un-

continued on page 11

¹ The *McElroy* Court explores the interplay between Title VII (employment discrimination) and Title IX (discrimination in education) in footnote 4.

² See, e.g., *Trinity Lutheran Church of Des Moines v. Browner*, 121 N.W.2d 131, 134 (Iowa 1963) ("By legislative silence the construction has been approved. It is not for us to now change what has been accepted as the legislative intent for so many years."); *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400, 405 (Iowa 1995) ("When the legislature leaves a statute unchanged after the supreme court has interpreted it, we presume the legislature has acquiesced in our interpretation."); *Drahaus v. State*, 584 N.W.2d 270, 276 (Iowa 1998) ("We consider the legislature's inaction as tacit approval of our decision ..."); *Iowa Dept. of Transp. v. Soward*, 650 N.W.2d 569, 574 (Iowa 2002) ("The legislature's failure to 'correct' this court's decision in *Taylor* is entitled to considerable weight ... [Any] change should come from that body."); See also *City of Sioux City v. Iowa Dept. of Revenue & Finance*, 666 N.W.2d 587, 592 (Iowa 2003) ("We consider the legislature's inaction as a tacit approval of the department's action [in adopting administrative rule definition]"); but see *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 305 (Iowa 2000) (overruling 16-year old precedent construing statute despite legislative inaction). As Justice Cady recognized:

Our history is replete with examples, like *Hernandez*, of the legislative response to judicial interpretation of statutes. Outside a constitutional challenge, the legislative branch is not required to live with a judicial interpretation of its statute. If the legislature disagrees with our interpretation of law it enacted, it has the prerogative to change or rewrite the law to conform to its intention. Consequently, we recognize that judicial construction given to a statute which is left undisturbed by the legislature over a period of years gives rise to the inference that the legislative branch has accepted our judicial interpretation.

Westfield, 606 N.W.2d at 308 (Cady, J., dissenting).

³ See, e.g., *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835 (Iowa 2001). In *Channon*, the Court declined to overrule its precedent holding that the ICRA provides exclusive remedies because it viewed the precedent as correctly decided. *Id.* at 858. Chief Justice Lavarato authored *Channon*, and stated:

We agree with UPS that under the doctrine of *stare decisis* there is a preference for upholding prior decisions of this court. See *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 306 (Iowa 2000). However, "*stare decisis* does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when error is manifest, including error in the interpretation of statutory enactments." *Id.*

Channon, 629 N.W.2d at 857-58.

INSTRUCTING PUNITIVE DAMAGES: LIMITED CONSEQUENCES OF RECENT PUNITIVE DAMAGE JURY INSTRUCTION REVISIONS

By Benjamin Parrott

Drake Law School, Juris Doctor Candidate, 2006; Law Clerk, Morain & Pugh.

Recent changes by the Iowa State Bar Association (ISBA) to the Iowa Civil Jury Instructions¹ have generated speculation that large punitive damage awards will now more easily withstand judicial scrutiny.² Specifically, it has been argued the revised instructions delegate the due process analysis to the jury, and as a result render an award of punitive damages reviewable only as a finding of fact.³ In reality, the changes

to the model punitive damage instructions ensure the jury considers only relevant conduct of the defendant, while in no way affecting post-trial and appellate review.

Instruction No. 210.1 was amended to reflect the U.S. Supreme Court's holding in *State Farm Mutual Automobile Insurance Co. v. Campbell*.⁴ In *Campbell*, the Court applied the three guideposts first articulated in

*BMW of North America v. Gore*⁵ and struck a \$145 million punitive damage award.⁶

In considering the reprehensibility of the defendant's conduct under the first guidepost, the Court was convinced "State Farm was being condemned for its nationwide policies rather than for the conduct directed to-

continued on page 14

¹ Iowa Civil Jury Instruction No. 210.1 provides (underlined text added, strikethrough text deleted):

Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future. You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries.

There is no exact rule to determine the amount of punitive damages, if any, you should award. You may consider the following factors:

1. The nature of the defendant's conduct that harmed the plaintiff.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant ~~in view of [his] [her] [its] financial condition.~~ You may consider the defendant's financial condition or ability to pay. You may not, however, award punitive damages solely because of the defendant's wealth or ability to pay.
3. The plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff.
4. The existence and frequency of prior similar conduct. If applicable add: You may not, however, award punitive damages to punish the defendant for out-of-state conduct that was lawful where it occurred, or any conduct by the defendant that is not similar to the conduct which caused the harm to the plaintiff in this case.

² See James G. Sawtelle, *Developments in Punitive Damage Verdicts; Will Jury Instructions Changes Mean Relatively Large Punitive Damage Awards May Stand?*, IOWA LAWYER, June 2005, at 14-15.

³ *Id.*

⁴ 538 U.S. 408 (2003). The three guideposts were designed to ensure a person receive fair notice of what conduct will subject him to liability and of the severity of punishment possible. Courts reviewing punitive damages are to consider "(1) the degree of reprehensibility of the defendant's conduct (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

⁵ 517 U.S. 559, 574-85 (1996).

⁶ *Campbell*, 538 U.S. at 429.

CHECKLIST FOR INITIAL REVIEW OF A LAWSUIT . . . *continued from page 1*

	DISCHARGE				
1.12B	Former adjudication - bar by judgment, issue, claim preclusion or former dismissal. Res judicata	1.16B	Motion for change of forum		of law to the Iowa Supreme Court
		1.16C	Motion to separate Petition into counts or recast		
		1.16D	Motion to Dismiss for failure to state a claim		AUTHORITIES ___IP___ refers to Volume number and Section number of West's Iowa Practice Series
1.12C	Termination by death, bankruptcy, arbitration, release, contract; satisfaction; tender; or payment	1.16E	Misjoinder of claims or parties	1.0	Removal to Federal Court. See 8IP Chap. 49
	IMMUNITY/PRIVILEGE	1.16F	Motion for judgment on pleadings	1.1	8IP3.5, 3.22; 11IP Chap. 6; 8IP3.20; 9IP12.27, 12.31
1.12D	Immunity	1.16G	Stay or dismissal on grounds of abstention or comity because of pending state action	1.2	Delay in service of process, 9IP11.29
1.12E	Privilege	1.17	Election of remedies	1.3	Lack of minimum contacts, 9IP12.28; 8IP43.26; 9IP12.30
	a. Absolute	1.18	Equitable estoppel	1.3A	In the state as litigant or witness or by fraud. 11IP6.26
	b. Conditional	1.19	Abatement: action pending, claim previously assigned, corporation dissolved, premature action	1.3B	Not a legal entity, etc. 9IP12.32; 11IP8.05-.16
	c. Created by consent		FEDERAL	1.4	8IP3.19, 3.21. Lack of subject matter jurisdiction, 9IP11.25, e.g., workers' compensation exclusive remedy; no jurisdiction over property in dispute, 9IP12.25
	OTHER	1.20	No diversity	1.5	Lack of equitable jurisdiction/adequate remedy at law, 9IP12.24
1.12F	Equitable estoppel	1.21	No federal question	1.6	Pre-emption - Primary jurisdiction. [Age Discrimination Employment Act, 29 U.S.C. §621, et seq.;
1.13	Statute relied upon does not create a private cause of action or intrudes on exclusive federal government or state administrative agency	1.22	Transfer to cure want of jurisdiction		
1.14	Statute relied upon is unconstitutional	1.23	Lack of jurisdictional amount		
1.15	Public policy - the claim relies in whole or in part on an illegal or immoral act	1.24	Improper venue (raised by motion). FRCP Rule 19		
1.16	Indispensable party omitted	1.25	Certification of questions		
1.16A	Motion for cost bond where plaintiff is a non-resident or corporation				

CHECKLIST FOR INITIAL REVIEW OF A LAWSUIT . . . continued from page 6

<p>the Employee Retirement Income Security Act, 29 U.S.C. §1001a, et seq.; Bricker, 450d 839; The Iowa Civil Rights Act, §216, et seq.; Iowa Code Chapter 85 Worker's Comp. For cases on pre-emption see: 57 Def. Counsel Journal Oct. 1990, pp. 434-445; <i>Brown v. Garman</i>, 364 N.W.2d 566 (Iowa 1985); <i>Davis v. Ottumwa YMCA</i>, 438 N.W.2d 10 (Iowa 1989); <i>Rice v. Santa Fe Elevator Corp.</i>, 331 U.S. 218, 239, 91 L.Ed. 1447, 67 S.Ct. 1146; <i>Schneidewind v. ANR Pipeline Co.</i>, 485 U.S. 293, 300, 99 L.Ed.2d 316, 108 S.Ct. 1145; <i>Raverby v. United Airlines, Inc.</i>, 293 N.W.2d 260, 262, 263 (Iowa 1980), in which the Iowa Court refers to "primary jurisdiction." See also 90 A.L.R. Fed.2d 723; 1991 Summer Seminar G, pp. 58-63.]</p>	<p>1.8</p>	<p>Abstention - discretionary, e.g., wait for administrative decision. <i>Reedy</i>, 503 N.W.2d 601; Bankruptcy Law 28 U.S.C. §1334(c)(1)</p>	<p>1.12</p>	<p>9IP11.24; 9IP12.26</p>
			<p>1.12A</p>	<p>9IP11.38</p>
			<p>1.12B</p>	<p>9IP11.41-11.44; re former dismissal <i>see</i> IRCP Rule 1.493</p>
	<p>1.8A</p>	<p>For proper venue see 8IP Chap. 4; 11IP4.01; 4.02 and 4.03; 9IP5.35-5.40 and 12.2. Improper venue must be raised by motion before answer; 11IP4.04-4.06. For change of venue from proper venue see 8IP4.5, 11IP4. 04-4.07, and 9IP12.3-12.9.</p>	<p>1.12C</p>	<p>9IP11.39, 11.54, 11.56-11.66; 8IP2.7, 2.8</p>
			<p>1.12D</p>	<p>Most are based on status, but some consider also the actions involved. The concept is similar to no duty. <i>See</i> Dobbs Law of Torts, Chapter 12. There are too many to list. Re government, see 11IP15.84-15.92 re comparative fault, see 11IP15.78; false imprisonment, 10IP77.8; products, 10IP74.4, 74.21; state, 10IP41.4; municipality, 10IP42.3, 42.4; schools, 10IP43.2</p>
		<p>1.8B</p>		
		<p>Forum non conveniens. 11IP4.08-4.10; <i>Hoth</i>, 539 N.W.2d 137, <i>Kimura</i>, 471 N.W.2d 869; Federal Procedure Forms 1:121-1:126; 18 U.S.C. §1404(a).</p>		
	<p>1.9</p>	<p>Limitations. 9IP11.45-11.50. See, also, 11IP Chap. 5; re products and property improvements statute of repose, see 8IP2.20, 2.21; re death of plaintiff or defendant, see 8IP2.7, 2.8.</p>	<p>1.12E</p>	<p>Re defamation; see 10IP79.7-79.9</p>
<p>1.7</p>				<p>a. Absolute. <i>See, Restatement Torts (Second)</i> §890 for general discussion; 585-589 re judicial proceedings; 590-1 re legislators, 656 re prosecutors, and 592 re statements between spouses; 10IP64.4 re interference with economic advantage; re privacy see 10IP78.4</p>
	<p>1.9A</p>	<p>Laches. 9IP11.51</p>		
	<p>1.10</p>	<p>Lack of corporate authority in Iowa. <i>See</i>, 9IP11.52, but cf 9IP31.2 re exception</p>		
	<p>1.11</p>	<p>Lack of license; <i>See</i> 9IP11.77</p>		
	<p>1.11A</p>	<p>9IP11.21; Only the personal representative can sue for wrongful death. <i>Voss</i>, 553 N.W.2d 878. <i>See, also, City of Dubuque</i>, 519 N.W.2d 786</p>		

continued on page 8

CHECKLIST FOR INITIAL REVIEW OF A LAWSUIT . . . *continued from page 7*

	b.	<i>See Restatement Torts (Second)</i> §§63-76 re defense of self or another, 77087 re defense of possession of land, 88-111 re recapture of land or chattels, 112-139 re arrest by officer or private person, 140-144 re prevention of crime, and 147-155 re discipline of child		Rule 19; Iowa Rule 1.234(3) form at 9IP5.31	1.20	8IP3.6-3.11
			1.16A	9IP12.16, 12.17	1.21	IP3.8-3.17
			1.16B	Motion for change of forum; equity to law or law to equity, or to probate. 9IP12.10-12.14	1.22	28 U.S.C. §1631
			1.16C	9IP12.18-12.21	1.23	8IP3.9, 19.33
			1.16D	9IP12.23, 12.33	1.24	FRCP Rule 19
	c.	Consent. 10IP79.9; <i>Restatement</i> §890 comm. (B)	1.16E	9IP12.37, .38	1.25	Certification of question of law to Iowa Supreme Court. [Iowa Code Chapter 684A; Fed. Proc. L.Ed. §§1:619-1:623.] ■
1.12F		9IP11.40	1.16F	I.R.C.P. 1.954; 9IP 12.33, .34		
1.13		<i>See Marcus</i> , 538 N.W.2d 285	1.16G	9IP12.50; <i>Exxon Mobil Corp. v. Saudi Basic Industries Corp.</i> , 125 S.Ct. 1517 (2005)		
1.14		<i>See</i> 9IP11.23	1.17	Election of Remedies. 9IP11.38; <i>Gottschalk</i> , 422d181, <i>Reid</i> , 440d59		
1.15		<i>See Tate</i> , 510 N.W.2d 815; <i>Anderson</i> , 559 N.W.2d 29	1.18	Equitable estoppel. IPF9-11.39		
1.16		Need to follow up with a motion for federal venue issues, <i>See</i> Federal Procedural Form §1:101-1:108; FRCP	1.19	9IP11.17-11.20		

**Visit us
 on the web at:
www.iowadefensecounsel.org**

THE UNCERTAINTY OF OFFSET OF CRIMINAL RESTITUTION IN CIVIL ACTIONS . . . continued from page 3

Therefore, in wrongful death cases, there is an evidentiary collateral source rule regarding any restitution made under section 910.3B in criminal proceedings. Despite the fact that the amount of criminal restitution ordered or paid cannot be introduced into evidence in a civil trial, the offender who is ordered to pay such restitution is “precluded from denying the elements of the felony offense which resulted in the order for payment in any subsequent legal action for damages arising out of the same facts or event.” I.C.A. § 910.3B(3). The question remains as to how the court or jury is to deduct restitution from civil damages if evidence of such restitution is not admitted into evidence in the civil action? Presumably, the court will deduct the restitution from civil damages, in a non-jury proceeding before the court enters judgment.

In addition, pecuniary damages, defined as “all damages to the extent not paid by an insurer, which a victim could recover against an offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium,” are offset as well. *State v. Paxton*, 674 N.W.2d 106, 108-10 (when calculating restitution, any damages recoverable in a civil action would be subject to reduction to the extent payments are made to the victim for the same damages). The amount of restitution is determined in the same fashion as in a civil case. I.C.A. § 190.3; *Paxton*, 674 N.W.2d at 108-09; *State v. Watts*, 587 N.W.2d 750, 751-52 (Iowa 1998). In wrongful death cases, damages are awarded for loss of future earnings, loss of

accumulation/loss of support, pain and suffering, and expenses such as medical and funeral expenses or interest on funeral expenses. How is the \$150,000 minimum restitution under Section 910.3B to be used to offset these different categories of damages? Does restitution cover pecuniary damages or something different? If 910.3B restitution represents something other than damages for pain, suffering, mental anguish, and loss of consortium, what damages in a civil action are to be offset?

The offset requirement is best illustrated in *State v. Klawonn*, when a defendant was convicted of involuntary manslaughter due to a motor vehicle accident and was ordered to pay restitution in the amount of \$150,000 pursuant to section 910.3B. Following settlement in a civil action regarding the same auto accident, the Court held that settlement obtained in a civil action, like any civil judgment, would be applied to reduce restitution. *Klawonn*, 688 N.W.2d at 275-76. The Court noted that in “cases where the offender has the means to pay the \$150,000 of restitution ordered by the court under section 910.3B prior to the entry of a civil judgment arising out of the same facts or event as the criminal prosecution, a subsequently obtained civil judgment will be reduced by the \$150,000 restitution payment made by the offender.” The purpose of this offset requirement is to coordinate restitution with civil damage awards in order to prevent a victim from receiving a windfall of criminal restitution in addition to the damages recoverable by a civil judgment. *Id.* at 275. However, the Court

provided little guidance as to how the restitution damages should be applied to offset a civil judgment. Presumably there is a lump sum credit given for restitution paid. However, if the category of damages in the two proceedings do not match (e.g. in the criminal case the victim is awarded \$150,000 in restitution but no pecuniary damages and in the civil case is just awarded pecuniary damages), the plaintiff might be under reimbursed by an offset. The Court in *Klawonn* did not mention any offset or credit requirement for the pecuniary damages or Crime Victim Compensation Program paid by the criminal defendant. However, such offsets are provided for by statute. See I.C.A. § 910.1(4) (2005) (pecuniary damages and amounts paid to public agencies or victim reimbursement programs are part of restitution); see also I.C.A. § 910.8.

Appellate decisions and the language of Section 910.8 of the Iowa Code imply that the offset reduces the amount of restitution owed, not the civil judgment or settlement amount. However, the Court in *Teggatz v. Ringleb*, 610 N.W.2d 527 (Iowa 2000), noted that the set off provision in Iowa Code Section 910.8 disposed of any concern that a victim will receive double recovery in a civil claim for damages sustained as a result of a defendant’s criminal conduct. The Court went on to note that this “does not mean that the plaintiff-victim will be entitled to damages in every later civil action. Damages may be denied...because of duplicate recovery...” There is no established method to determine how such an offset should be applied (i.e. to

continued on page 10

THE UNCERTAINTY OF OFFSET OF CRIMINAL RESTITUTION IN CIVIL ACTIONS . . . continued from page 9

criminal restitution or civil judgment). It appears that damages established later in time receive the offset if payment has been made for either the criminal restitution or civil recovery.

To further complicate matters, third-party payments are also subject to the offset requirement. For example, in *State v. Paxton*, 674 N.W.2d 106 (Iowa 2004), the Court held that the amount of restitution owed by a criminal defendant was credited by the amount paid to the victims by defendant's employer. *Paxton*, 674 N.W.2d at 109. The Court in *Paxton* held that the pro tanto credit rule *applied*, despite the fact that the pro tanto credit rule does not typically apply to comparative fault cases, because "there was no separate fault that could be subject to or give rise to a proportionate credit under chapter 688." *Id.* Under the pro tanto credit rule, a dollar-for-dollar reduction in the verdict for sums received in settlement from other tortfeasors based on the principles of joint-and-several liability, a defendant is not entitled to a credit for any settlement amount unless it is shown that without such credit, the plaintiff would receive more than full compensation for his or her injuries. *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 773 (Iowa 1999). It follows, then, that "the pro tanto credit rule would apply and any payment made by [defendant's employer] or [the defendant] would serve to reduce their joint liability to [the plaintiff] to the extent of the payment made." *Paxton*, 674 N.W.2d at 109. The Court went on to reason that:

Because the pro tanto rule would apply in any civil suit

brought by [plaintiff] against [defendant], [plaintiff's] recovery would be reduced by the \$40,000 already paid by [defendant's] employer as partial satisfaction of [defendant's] joint liability to [plaintiff]. Since the victim's pecuniary damages under section 910.1(3) are measured by the amount of the victim's potential civil recovery and because any civil judgment obtained by [plaintiff] would be subject to a credit for the amount already paid by [defendant's] employer, we conclude [defendant's] obligation for victim restitution under chapter 910 would also be subject to the same credit. *Id.* at 109-110.

When a lump sum settlement offer is made without specifying what damages are being resolved, there is no exact break down of damages to assist in deciding how to apply the offset. This could create problems when offset of criminal restitution is made. For example, did the third-party's settlement offer include pain and suffering and, if so, should there be any offset for the criminal restitution that does not take these damages into account?

The uncertainty of how to apply the offset of criminal restitution under Section 910.8 to civil actions—or vice-versa—creates several potential issues. Such points of contention may become impediments to settlement or trials and pitfalls for the practitioner. However, with further guidance by the Court

and/or legislature, the mechanics of offset should become clearer. If so, crediting could become a mathematical calculation. This would help not only civil and criminal attorneys to better advise their clients, but would also assist the courts with the efficient computation of damages, the entry of criminal restitution sentences, and making civil damage awards more precise and certain. Such precision and certainty may, in turn, help cut down on unnecessary issues in civil cases when criminal restitution has already been paid. Until then, please consider this article as a starting point in your research to properly guide your clients through this process. ■

IDCA SCHEDULE OF EVENTS

2005 Meeting Dates

SEPTEMBER 21, 2005

Iowa Defense Counsel Association
Board Meeting

Hotel Fort Des Moines
Des Moines, IA
11:00 A.M.

SEPTEMBER 21-23, 2005

Iowa Defense Counsel
Annual Meeting & Seminar

Hotel Fort Des Moines
Des Moines, IA

OCTOBER 19-23, 2005

Defense Research Institute (DRI)
Annual Meeting

Sheraton Chicago Hotel and Towers
Chicago, IL

McELROY v. ISU – ANOTHER EXAMPLE OF THE IOWA SUPREME COURT'S WILLINGNESS TO REEXAMINE SETTLED LAW . . . continued from page 4

derstandable, yet presents another recent example of the Iowa Supreme Court's willingness to reconsider settled Iowa law,⁴ which diminishes the predictability of *stare decisis* while opening opportunities for creative advocacy. Moreover, this year the Iowa Supreme

Court has reversed a remarkable number of decisions of the Court of Appeals on applications for further review.⁵ This trend encourages litigants to seek further review, thereby increasing appellate litigation and our high court's opportunity to shape Iowa law.

A practical ramification of *McElroy* is that more Iowa employment cases will be litigated to conclusion in state court. Plaintiffs' counsel have usually pleaded federal statutory claims along with ICRA claims in order to obtain tri-

continued on page 12

⁴ See also, *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004) (eliminating "physical injury" requirement for negligent hiring, supervision or retention claim against employer, overruling the Court's own two-year-old precedent that had unanimously adopted physical injury rule); *Barreca v. Nicholas*, 683 N.W.2d 111, 121-23 (Iowa 2004) (abrogating recent as well as longstanding precedent to change definition of "actual malice" required to defeat qualified privilege defense to defamation); *State v. Liddel*, 672 N.W.2d 805, 812-13 (Iowa 2003) (overruling decade-old precedent to require in-court colloquy to waive jury in felony cases); *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 305-06 (Iowa 2000) (overruling 16-year-old precedent construing uninsured motorist coverage statute despite intervening legislative silence and concern "that the insurance industry and public may have relied on [the prior] decision in considering their insurance sales and purchases.") (Ternus, J.). A few years earlier Justice Ternus eloquently defended *stare decisis*:

As a court, we must "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598, 610 (1986). Our decisions should "furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise." *Moragne v. States Marine Liners, Inc.*, 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339, 358 (1970). Our decisions should further "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." *Id.* Such decisions maintain "public faith in the judiciary as a source of impersonal and reasoned judgment." *Id.*

In re Marriage of Gallagher, 539 N.W.2d 479, 483 (Iowa 1995) (Ternus, J., dissenting). Similarly, Justice Cady has observed:

It nearly goes without saying that the doctrine of *stare decisis* is one of the bedrock principles on which this court is built. It is an important restraint on judicial authority and provides needed stability in and respect for the law. . . . While we would abdicate our role as a court of last resort if we failed to occasionally reexamine our prior decisions, we must undertake this weighty task only for the most cogent reasons and with the greatest caution.

Kiesau, 686 N.W.2d at 180 (Cady, J., dissenting).

In *Foley v. Argosy Gaming Co.*, 688 N.W.2d 244 (Iowa 2004), the Court declined to change settled Iowa law when it answered questions certified by the federal district court, but implicitly invited requests to abandon the "special-injury rule" for common law malicious prosecution claims through a regular appeal, stating:

In our judicial system, of course, one may always question whether a precedent is controlling by asking whether it *remains* the law; it is manifest that we are free to overrule precedents when circumstances warrant. We do not "atavistically cling . . . to distinctions which can have no practical significance but to interpose ancient formalities in the path of justice." (Court's emphasis)

Foley, 688 N.W.2d at 247 (quoting Judge Learned Hand) (citations omitted). Justice Wiggins specially concurred to state that he "would not rule out re-examining the special-injury rule after reviewing a fully developed record of a case decided by a lower court." *Id.* at 250.

⁵ The Iowa Supreme Court reversed the Court of Appeals in the following cases the first six months of 2005 alone: *Galbraith v. Allied Mut. Ins. Co.*, ___ N.W.2d ___, 2005 WL 1490006 (Iowa June 24, 2005) (UIM bad faith); *In Re A.S.P.-C.* ___ N.W.2d ___, 2005 WL 1413184 (Iowa June 17, 2005) (CHI-NA proceeding); *Clinkscales v. Nelson Securities, Inc.*, ___ N.W.2d ___, 2005 WL 1366440 (Iowa June 10, 2005) (premises liability); *In Re Marriage Grantham*, ___ N.W.2d ___, 2005 WL 1310423 (Iowa June 3, 2005) (child custody modification); *State v. Philo*, ___ N.W.2d ___, 2005 WL 1310642 (Iowa June 3, 2005) (postconviction relief); *Nathan Lane Associates L.L.P. v. Merchants Wholesale of Iowa, Inc.*, ___ N.W.2d ___, 2005 WL 1185812 (Iowa May 20, 2005) (commercial lease dispute); *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596 (Iowa 2005) (work comp); *State v. Henderson*, 696 N.W.2d 5 (Iowa 2005) (criminal evidentiary issue); *State v. Carter*, 696 N.W.2d 31 (Iowa 2005) (criminal evidentiary issue); *In Re Marriage of Schriener*, 695 N.W.2d 493 (Iowa 2005) (marital dissolution issues); *State ex rel Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005) (consumer fraud act); *State v. Moorehead*, ___ N.W.2d ___, 2005 WL 736227 (Iowa 2005) (OWI); *In Re Marriage of Anliker*, 694 N.W.2d 535 (Iowa 2005) (marriage dissolution; reversed in part); *Anderson v. State*, 692 N.W.2d 360 (Iowa 2005) (premises liability); *State v. Winters*, 690 N.W.2d 903, (Iowa 2005) (criminal speedy-trial issue); *City of Fairfield v Harper Drilling Co.*, 692 N.W.2d 681 (Iowa 2005) (municipal bidder's bond dispute).

***McELROY v. ISU* – ANOTHER EXAMPLE OF THE IOWA SUPREME COURT'S WILLINGNESS TO REEXAMINE SETTLED LAW . . . continued from page 11**

al by jury. Cases filed in state court are usually removed to federal court by the employer's defense counsel because federal judges in Iowa are generally viewed as more likely to grant summary judgment.⁶ After *McElroy*, plaintiffs' counsel are more likely to forego pleading federal statutory claims (which include certain caps on the amount of recovery), and simply file nonremovable ICRA claims in state court with a jury demand. Plaintiffs won't be giving up much. Attorneys fees are available to prevailing plaintiffs under the ICRA which lacks statutory caps on the amount of damages recoverable.

The *McElroy* Court also held that it is error in employment cases to instruct the jury that awards are subject to income tax. *Id.* at 6. The reason given -- juror confusion and conjecture -- arguably applies in any Iowa jury trial where loss of income claims are submitted.

Finally, offering some good news for employers, the *McElroy* Court strictly applied the administrative exhaustion requirement for retaliation claims under both the ICRA and federal statutes, vacating a judgment exceeding \$3 million on jointly submitted claims of sex discrimination and retaliation. The

Court held the retaliation claim failed as a matter of law where the alleged retaliation happened before plaintiff filed administrative complaints and plaintiff neither checked the "retaliation" box on her complaint form filed with the EEOC nor mentioned retaliatory misconduct in her written description of her charges with the Iowa Civil Rights Commission. *Id.* at 3-5. *McElroy* was remanded for a new trial on the sex discrimination claims because the verdict lumped damages together without a way to distinguish amounts awarded for retaliation alone. *Id.* at 5. Significantly, the *McElroy* Court stated,

continued on page 13

⁶ District Court judges are cautious about granting summary judgment and are rarely reversed on interlocutory appeals for denying a summary judgment motion. Moreover, several recent decisions highlight the difficulty defense counsel face affirming summary judgments on appeal. See, e.g., *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 678-79 (Iowa 2004) (reversing summary judgment to reinstate employment law claims arising from supervisor's after-hours "chest shot" punch killing off-duty employee; holding whether punch constituted "adverse employment action" attributable to employer was fact question for the jury); *Clinkscales v. Nelson Securities, Inc.*, ___ N.W.2d ___, 2005 WL 1366440 (Iowa June 10, 2005) (reversing summary judgment to reinstate tort claims against bar owners for negligently causing grease fire where plaintiff-patron Marine ran to fire to close gas valve after being ordered to evacuate).

The *McElroy* Court tellingly stated:

Although the authorities cited in the foregoing analysis only apply to *McElroy's* Title VII claim, we think--at least on the arguments presented in this case--that the same analysis should be applied to *McElroy's* retaliation claim brought under the ICRA. Because the ICRA is in part modeled after Title VII, we have traditionally looked to federal law for guidance in interpreting it. *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 803 (Iowa 2003). *McElroy* has not argued that we should apply a different analysis to the ICRA. Therefore we decline to forge new ground in the absence of briefing. See *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6 (Iowa 2004)[RACI II] ("[I]t is prudent to delay any consideration of whether a different analysis is appropriate to a case in which this issue was thoroughly briefed and explored."); see also *Pecenka*, 672 N.W. at 803 (noting that despite consistent utilization of the federal analytical framework, Iowa courts are not bound by federal law in interpreting the ICRA). [footnote omitted].

McElroy at 5 (footnote omitted).

The *McElroy* Court's citation to *RACI II* trumpets a strongly held sense of independence among justices willing to diverge from settled federal caselaw when deciding analogous Iowa law issues. In *RACI I*, a sharply divided Iowa Supreme Court broke from longstanding federal and state precedent to hold that taxing land-based casino slot revenue at a higher rate than riverboat casinos violated both state and federal constitutional equal protection requirements. *RACI I*, 648 N.W.2d 555 (Iowa 2002). A unanimous United States Supreme Court reversed on the federal issue. *Fitzgerald v. Racing Ass'n. of Central Iowa*, 539 U.S. 103, 123 S. Ct. 2156, 2161, 156 L.E.2d 97, 105 (2003). On remand, the Iowa Supreme Court again held that the tax differential violated the equal protection clause of the state constitution. *RACI II*, 675 N.W.2d at 16. Justices Carter and Cady vigorously dissented. *Id.* at 16-27.

Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002), is another example of the majority's willingness to diverge from federal precedent. There, the Court held that the Iowa Competition Act provides a cause of action for indirect purchasers, notwithstanding express legislative direction to construe the Iowa statute "to complement and be harmonized with . . . and to achieve uniform application of state and federal laws prohibiting restraints of economic activity and monopolistic practices." Iowa Code §553.2. Federal courts have uniformly denied indirect purchasers (i.e. consumers) the right to sue under the federal antitrust statutes, following the "*Illinois Brick*" rule. Justices Carter and Cady also dissented in *Comes*. 646 N.W.2d at 451-54.

McELROY v. ISU – ANOTHER EXAMPLE OF THE IOWA SUPREME COURT'S WILLINGNESS TO REEXAMINE SETTLED LAW . . . continued from page 12

The timing of the retaliation is crucial in this analysis: If the alleged retaliation began before the filing of the administrative complaint, a subsequent suit for retaliation that was not brought to the attention of the administrative agency is barred.

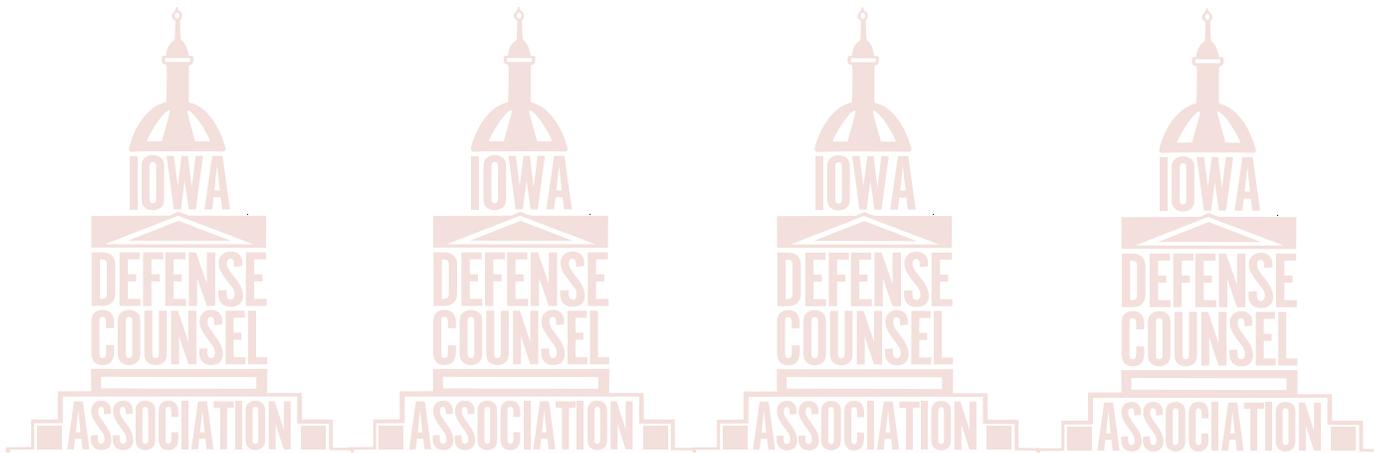
Id. at 4 (citation omitted).

The *McElroy* Court, while applying a federal caselaw-based analysis to decide the ICRA administrative exhaustion issue, expressly noted that it may choose to diverge from federal decisions when

answering parallel state law issues. See *id.* at 5. Federal caselaw often is more developed and can provide sound guidance in construing equivalent Iowa statutes and rules. The Iowa Supreme Court's willingness to diverge from federal caselaw and consider independent analysis probably will inspire more creative advocacy at a cost of some loss of predictability.

Future cases invariably will continue to test the Court's willingness to reconsider settled questions of law notwithstanding tacit legislative acceptance and the values of fairness, predictability and

efficiency served by *stare decisis*. Iowa practitioners are well-advised to make appropriate records in district court to preserve error and take appeals even on issues that appear foreclosed by controlling precedent, when a good faith basis exists for changing the law. Practitioners losing at the Iowa Court of Appeals should consider applying for further review by the Supreme Court in appropriate cases. Finally, practitioners should watch for opportunities to advocate a new and different state law analysis in areas where Iowa courts traditionally have looked to federal caselaw for guidance. We live in exciting times. ■



WELCOME NEW MEMBERS

Gretchen E. Kraemer

Catlin J. Stoner

INSTRUCTING PUNITIVE DAMAGES: LIMITED CONSEQUENCES OF RECENT PUNITIVE DAMAGE JURY INSTRUCTION REVISIONS . . . continued from page 5

ward the [plaintiffs].”⁷ The Court held “a defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”⁸ The award thus violated due process because State Farm was being punished for conduct which was lawful in many of the states where it occurred.

While again refusing to dictate an exact mathematical formula under the second *Gore* guidepost, the *Campbell* Court found the 145 to 1 compensatory to punitive ratio violative of due process. Due process requires “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”⁹ In light of the \$1 million compensatory damage award, the court found the \$145 million punitive damage award unreasonable and disproportionate.¹⁰

Both of the above cited components of the *Campbell* decision are reflected in the December 2004 revision to the Iowa Civil Jury Instructions. When these instructions are employed, juries will now

be directed to consider only conduct that harmed the plaintiff and conduct similar to that which harmed the plaintiff; they may not award punitive damages to punish out-of-state conduct which was lawful where it occurred.¹¹ Additionally, juries will be instructed that a punitive damage award must be reasonably related to the amount of actual damages awarded.¹²

Recent commentary suggests these additions to the ISBA’s punitive damage instructions will result in more deferential post-trial and appellate review.¹³ The argument, it seems, is that an award of punitive damages under the revised instructions amounts to a finding of fact that only relevant conduct has been considered and that the award is reasonably related to the actual damages. Review of pertinent federal and Iowa jurisprudence indicates the revised instructions will not so drastically affect review of punitive damage awards.

A dichotomy exists in punitive damage jurisprudence requiring consideration of both federal and state precedent.

“In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.”¹⁴ Despite this broad discretion, the Fourteenth Amendment to the Federal Constitution does impose substantive limits on an award of punitive damages.

The traditional common-law approach employed a jury instructed to consider the relevant state law of punitive damages. Any award was then reviewed by the trial court and was subject to appellate review. *Pacific Mutual Life Ins. Co. v. Haslip*¹⁵ held this common law approach did not violate due process where the jury was appropriately instructed, post-trial procedures existed for scrutinizing the award, and appellate review ensured punitive damages were reasonable in amount and rational in light of the dual purpose of punishing deplorable conduct and deterring such future conduct.¹⁶

continued on page 15

⁷ *Id.* at 420.

⁸ *Id.* at 422.

⁹ *Id.* at 426.

¹⁰ *Id.* at 426-428.

¹² See revised Instruction 210.1, *supra* note 1.

¹³ See Sawtelle, *supra* note 2.

¹⁴ *Gore*, 517 U.S. at 568.

¹⁵ 499 U.S. 1 (1991).

¹⁶ *Id.* at 19-22.

INSTRUCTING PUNITIVE DAMAGES: LIMITED CONSEQUENCES OF RECENT PUNITIVE DAMAGE JURY INSTRUCTION REVISIONS . . . *continued from page 14*

The Iowa Supreme Court recognized those three general criteria for ensuring reasonableness of an award, requiring “(1) jury instructions explaining the nature, purpose, and basis for the award; (2) posttrial [sic] procedures for scrutinizing the award; and (3) an appellate review process that ensures the award is reasonable and rational.”¹⁷ Iowa Code § 668A.1 addresses the first of those three concerns in requiring the trial court to instruct the jury to answer special interrogatories or make a finding indicating “whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.”¹⁸

Likewise, the December 2004 revisions to Iowa Civil Jury Instructions can be seen as addressing the first of the three general criteria. The revisions refine the instructions regarding the facts upon which the jury may base an award

of punitive damages. They do nothing to alter post-trial or appellate review.

The U.S. Supreme Court has outlined what standards of post-trial and appellate review are necessary to comport with due process. *Honda Motor Co v. Oberg*¹⁹ extended *Haslip* to affirmatively require post-trial and appellate review of the amount of all punitive damage awards.²⁰ *Oberg* examined an amendment to the Oregon Constitution prohibiting judicial review of an award of punitive damages unless the court could affirmatively state no evidence existed to support the verdict.²¹ Thus, if there was any evidence to support an award, that award could not be set aside, regardless of the award’s size.²² Oregon’s denial of judicial review of the amount of punitive damage awards was held to violate the Due Process Clause.²³ This holding contradicts the suggestion that the revised ISBA punitive damage instructions will limit the reduction of punitive damage awards to situations

where the verdict is not supported by substantial evidence or is the result of passion or prejudice.

Any doubt regarding the appropriate standard of review was resolved in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*²⁴ The Court again recognized the dichotomy of applicable state and federal law; states have power to set individual standards for the award of punitive damages, bounded by the Due Process Clause.²⁵ Thus, an award is reviewable by the trial court both under state statutory standards like Iowa Code § 668A.1 and under the constitutional due process standards set out in *Gore*. The Court held, in the federal system, review of the state law claim should employ an abuse of discretion standard, while the constitutional issue requires *de novo* appellate review.²⁶

continued on page 16

¹⁷ *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 866 (Iowa 1994) (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-22 (1991)).

¹⁸ Iowa Code § 668A.1 (2005).

¹⁹ 512 U.S. 415 (1994).

²⁰ *Id.* at 435.

²¹ *Id.* at 418-19.

²² *Id.*

²³ *Id.* at 435 (holding “the common law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of law, and the elementary considerations of justice all support the conclusion that [an award of punitive damages] should not be committed to the unreviewable discretion of a jury”).

²⁵ *Id.* at 432-33.

²⁶ *Id.* at 435.

INSTRUCTING PUNITIVE DAMAGES: LIMITED CONSEQUENCES OF RECENT PUNITIVE DAMAGE JURY INSTRUCTION REVISIONS . . . continued from page 15

The Iowa Supreme Court's recent decision in *Wolf v. Wolf*²⁷ recognized the distinction between the state law and constitutional claims, employing a "correction of errors at law" standard to the state claim, and reviewing the constitutional claim *de novo*.²⁸ Consequently, if an Iowa court does decide to employ the ISBA's revised punitive damage jury instruction, that decision cannot be seen as a delegation of the due process analysis to the jury. The due process analysis cannot constitutionally be delegated.

The decision in *Cooper* was based in part on the Court's view that "unlike

the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury."²⁹ Thus, neither the 7th Amendment nor Iowa Rule of Appellate Procedure 6.14(6)(a)³⁰ restrict review of a punitive damage award.

Even in *State Farm v. Campbell*, which precipitated the ISBA's revision of its model jury instructions, *de novo* review was employed by both Utah appellate courts and by the U.S. Supreme Court.³¹ The Court in *Campbell* reiterated "exacting appellate review ensures that an award of punitive damages is

based upon an application of law, rather than a decisionmaker's caprice."³²

Iowa and federal law require proper jury instruction, post-trial and appellate review of the size of a punitive damage award. The ISBA's recent revision to the Iowa Civil Jury Instructions addresses and refines the first of those three requirements. The revisions do not affect post-trial or appellate review, and will not result in less judicial scrutiny of large punitive damage awards. ■

²⁷ 690 N.W.2d 887 (Iowa 2005).

²⁸ *Id.* at 893-94.

²⁹ *Cooper Industries, Inc.*, 532 U.S. at 437.

³⁰ Iowa R. App. Proc. 6.14(6)(a) states "findings of fact in a law action, which means generally any action triable by ordinary proceedings, are binding upon the appellate court if supported by substantial evidence."

³¹ *Campbell*, 538 U.S. at 418.

³² *Id.*

IOWA DEFENSE COUNSEL ASSOCIATION

41ST ANNUAL MEETING & SEMINAR

September 21-23, 2005 • Hotel Fort Des Moines

APPROVED FOR: 16.0 Iowa CLE HOURS (includes 2.0 hours dedicated to Legal Ethics)
6.0 Federal CLE HOURS (File #05-071)(State ID# 31445)

WEDNESDAY, SEPTEMBER 21, 2005

- 10:00 a.m.** **Registration Open/Exhibitor Set-up**
(Mezzanine, 2nd Floor)
- 11:00 a.m.** **Exhibits Open**
(Mezzanine, 2nd Floor)
- 11:00 a.m.** **Board of Directors Meeting/Luncheon**
(Wedgwood, 2nd Floor)
- 12:50-1:00 p.m.** **Welcome and Opening Remarks**
(State Ballroom, 2nd Floor)
Sharon Greer, IDCA President
- 1:00-1:30 p.m.** **Conspiracy, Trade Secrets, and Intentional Interference - New Developments in Business Torts**
Robert Houghton
Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, IA
- 1:30-2:30 p.m.** **The Future is Now - Practical Tips for Dealing with E-discovery**
Lori Ann Wagner
Faegre & Benson, LLP, Minneapolis, MN
- 2:30-3:00 p.m.** **Defending the Latest Plaintiff's Tactic - Deposition Notices of the CEO and Other Apex Witnesses**
Jeff W. Wright
Heidman, Redmond, Fredregill, Patterson, Plaza, Dkystra & Prah, L.L.P., Sioux City, IA
- 3:00-3:15 p.m.** **Break/Exhibits Open**
- 3:15-4:00 p.m.** **Appellate Review I (Employment, Commercial, Constitutional, Contracts, Damages & Government)**
Hannah Rogers
Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, IA
- 4:00-4:30 p.m.** **Punitive Damages Since Campbell**
Tom Waterman
Lane & Waterman, Davenport, IA
- 4:30-5:00 p.m.** **Effective Appellate Advocacy - A View from the Iowa Court of Appeals**
Honorable Robert Mahan
Judge, Iowa Court of Appeals, Ames, IA
- 5:15-8:00 p.m.** **Welcome Reception Hosted by the Young Lawyer's Committee**
(Wedgwood, 2nd Floor)
Heavy hors d'oeuvres and beverages. Bring your appetite! Featuring the music of Lance Eaton. Sponsored by the exhibitors: IDEX, Inc., Packer Engineering, Sweeney Reporting and Minnesota Lawyers Mutual Ins., Co.

THURSDAY, SEPTEMBER 22, 2005

- 7:30 a.m.** **Registration Open Exhibits Open**
(Mezzanine, 2nd Floor)
- 8:00-8:30 a.m.** **Continental Breakfast Exhibits Open**
(Mezzanine, 2nd Floor)
- 8:30-9:15 a.m.** **Appellate Case Review II (Civil Procedure, Court Jurisdiction & Trial, Evidence, Insurance, Judgment, Limitation of Action)**
(State Ballroom, 2nd Floor)
William Miller
Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, IA
- 9:15-9:30 a.m.** **The New & Improved IDCA Website**
Brent Ruther
Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C., Burlington, IA
Julie Garrison, Associate Director
Iowa Defense Counsel Association, Des Moines, IA
- 9:30-10:00 a.m.** **Class Action Fairness Act of 2005 and Other Developments in Class Action Litigation**
Joseph Gunderson
Gunderson, Sharp & Walke, L.L.P., Des Moines, IA
- 10:00-10:15 a.m.** **Break/Exhibits Open**
(Mezzanine, 2nd Floor)
- 10:15-10:30 a.m.** **Legislative Update: Issues Impacting the IDCA**
(State Ballroom, 2nd Floor)
Robert M. Kreamer
IDCA Executive Director & Lobbyist, Des Moines, IA
- 10:30-11:00 a.m.** **Recent Developments in Medical Malpractice Litigation**
Christine Conover
Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, IA

Hotel Accommodations

- IDCA has a block of rooms reserved at the Hotel Fort Des Moines for the evenings of September 21-22, 2005. Room rates are \$89.00 Single/Double/Triple/Quadruple or \$109.00 for a corporate suite.
- Call 1-800-532-1466 or 515-243-1161 for reservations.
- To be guaranteed the IDCA conference room rate, call before September 2, 2005.
- Hotel Fort Des Moines, 1000 Walnut Street, Des Moines, IA 50309 (515) 243-1161 (main phone), (800) 532-1466 (reservations), (515) 362-5235 (fax) Please make sure to mention Iowa Defense Counsel Association when making your reservation.

“DEDICATED TO IMPROVING OUR CIVIL JUSTICE SYSTEM”

This year's IDCA Annual Meeting & Seminar offers up to the minute information from the bench and from the finest defense lawyers in the country. Some of the highlights of the seminar include: New Developments in Business Torts, Practical Tips for Dealing with E-discovery, Defending the Latest Plaintiff's Tactic, Appellate Review, Punitive Damages Since Campbell, Class Action Fairness Act of 2005, Recent Developments in Medical Malpractice, and much more. You will leave Des Moines and this seminar with fond memories, new ideas, strategies and contacts to assist you in meeting your professional goals – **guaranteed!**

- 11:00-12:00 p.m. The Practical Impact of the New Model Rules**
Honorable David Wiggins
 Iowa Supreme Court, Des Moines, IA
Paul Weick
 Commission of Continuing Education,
 Des Moines, IA
Charles Harrington
 Board of Professional Ethics & Conduct,
 Des Moines, IA
Iris Muchmore
 Simmons, Perrine, Albright & Ellwood, P.L.C.,
 Cedar Rapids, IA
- 12:00-12:20 p.m. Luncheon/Exhibits Open**
(Mezzanine & Independence Hall, 2nd Floor)
- 12:20-12:30 p.m. Annual Meeting of IDCA**
(Independence Hall, 2nd Floor)
- 12:30-1:00 p.m. Report of the United States District Court**
(Independence Hall, 2nd Floor)
Honorable Mark Bennett
 Chief Judge, United States District Court for the
 Northern District of Iowa, Sioux City, IA
- 1:00-1:45 p.m. Iowa Products Liability: Some Questions Answered and Some Answers Questioned**
(State Ballroom, 2nd Floor)
Kevin Reynolds
 Whitfield & Eddy, Des Moines, IA
- 1:45-2:30 p.m. Appellate Case Review III (Negligence, Torts & Indemnity)**
Troy A. Howell
 Lane & Waterman, Davenport, IA
- 2:30-2:45 p.m. Break/Exhibits Open**
(Mezzanine, 2nd Floor)
- 2:45-3:30 p.m. Apportionment, Successive Injuries and Other Emerging Issues in Workers' Compensation**
Coreen Sweeney
 Nyemaster, Goode, West, Hansell &
 O'Brien, P.C., Des Moines, IA
- 3:30-4:30 p.m. Cutting Edge Trial Presentation Technology**
Rick Kraemer
 Executive Presentations, Inc., Los Angeles, CA
- 4:30-5:00 p.m. IDCA Committee Meetings**
(Wedgwood, 2nd Floor)
- 4:30 p.m. Hospitality Room Open**
(Suite 1014)
- 6:30-9:30 p.m. Reception/Dinner/Banquet - Embassy Club**
(801 Grand, 40th Floor, Des Moines, IA)

FRIDAY, SEPTEMBER 23, 2005

- 7:30 a.m. Registration Open/Exhibits Open**
(Mezzanine, 2nd Floor)
- 8:00-8:30 a.m. Continental Breakfast**
(Mezzanine, 2nd Floor)
- 8:30-9:15 a.m. Hot Issues and New Developments in Employment Law**
(State Ballroom, 2nd Floor)
Martha Shaff
 Betty Neuman & McMahon LLP, Davenport, IA
- 9:15-10:00 a.m. Spoliation - What Every Defense Lawyer Needs to Know**
Paul Burns
 Bradley & Riley, P.C., Cedar Rapids, IA
- 10:00-10:15 a.m. DRI and the Benefit to the Defense Bar**
J. Michael Weston
 Moyer & Bergman, Cedar Rapids, IA
Dan McCune
 DRI Mid-Region Representative, Denver, CO
- 10:15-10:30 a.m. Break/Exhibits Open**
(Mezzanine, 2nd Floor)
- 10:30-11:30 a.m. Ethics in the Courtroom**
(State Ballroom, 2nd Floor)
Skip Ames
 Hand Arendall, L.L.C., Mobile, AL
- 11:30-12:00 p.m. Recent Developments in Attorney Client Privilege and Attorney Work Product**
Honorable Thomas Shields
 Magistrate Judge, United States District Court
 for the Northern District of Iowa, Davenport, IA
- 12:00-12:30 p.m. Luncheon/Exhibits Open**
(Mezzanine & Grand Ballroom, 2nd Floor)
- 1:00 p.m. Exhibitor Tear Down**
- 12:30-1:00 p.m. Report from the Iowa Supreme Court** *(Grand Ballroom, 2nd Floor)*
Honorable Louis A. Lavorato
 Iowa Supreme Court, Des Moines, IA
- 1:00-3:00 p.m. Bringing Persuasion & Understanding to the Damages Case**
(State Ballroom, 2nd Floor)
J. Ric Gass
 Gass, Weber, Mullins, L.L.C., Milwaukee, WI
- 3:00-3:15 p.m. Closing Remarks/Adjourn**

IOWA DEFENSE COUNSEL ASSOCIATION

41ST ANNUAL MEETING & SEMINAR REGISTRATION FORM

SEPTEMBER 21-23, 2005

Hotel Fort Des Moines
1000 Walnut Street • Des Moines, IA

Name: _____

Badge Name: _____

Company/Firm: _____

Mailing Address: _____

City, State Zip: _____

Telephone: _____ Fax: _____

Email: _____

Spouse/Guest Badge Name (Wednesday Reception/Thursday Banquet Only): _____

Special Needs Requests (vegetarian meals, wheel chair access, etc.): _____

Note: Full registration for members & non-members includes: Meals, sessions, educational handouts, receptions and banquet. Each person attending the convention must be registered and paid in full prior to the convention. Please pre-register to assist us with an accurate count.

REGISTRATION FEES:

	IDCA MEMBER	NON-MEMBER
Registrant:	\$295	\$395
Young Lawyer Rate (<i>Admitted to practice less than 2 years</i>)	\$150	\$250
Seminar Materials Only:	\$75	\$100

Wednesday Welcome Reception Hosted by the Young Lawyers Committee

Registrant: Yes No Spouse/Guest: Yes No

Thursday Noon Luncheon

Registrant: Yes No

Thursday Night Annual Banquet (Location TBD)

Registrant: Yes No Spouse/Guest: Yes No

Friday Noon Luncheon

Registrant: Yes No

REGISTERING FOR THE CONFERENCE:

Registrations may be faxed to IDCA at (515) 243-2049 or mailed to: IDCA, 431 East Locust Street, Suite 300, Des Moines, Iowa 50309. Call Julie Garrison at (515) 244-2847 or e-mail to staff@iowadefenceseounsel.org for more information.

CONFERENCE CANCELLATION/REFUND POLICY

- If written cancellation is received by September 14, 2005, a full refund will be received.
- No refunds will be received after September 14, 2005. Seminar materials will be forwarded to registrant.
- NO REFUND for No-Shows but seminar materials will be forwarded.

ADDITIONAL INFORMATION

Attire for the conference is business-casual. If you are planning on attending the Banquet, appropriate business attire is required.

FROM THE EDITORS . . .

The IDCA motto is, "Dedicated to Improving our Civil Justice System." It is an organization which seeks to provide valuable services to our members. How do you think we are delivering on our promises? Before you respond (and we do solicit your feedback), and as we approach our annual meeting, let us take a look at the twelve months since our last annual meeting.

Sharon Greer assumed the president's office in September, 2004. She has been masterful in her responsibilities. During her tenure, her diligence and energy was and is superlative. She surrounded herself with a great group of officers and directors and was very successful in her leadership role.

During Sharon's term, the annual meeting of 2004 was a temporally relevant compendium of speakers and subject matters which addressed the improvement of our civil justice system and imparting state of the art information to the attendees.

The serving vice president has the accountability to design the upcoming annual seminar, as is apparent in the agenda included in this edition. Mike Thrall has assembled an outstanding group of presenters and our annual meeting for 2005 will continue to strive for excellence in providing services to our members.

While contemplating how your IDCA is performing, have you been to the website recently (www.iowadefensecounsel.org)? Along with the expert witness database, the legal links database, the word search capability for Defense Update database and related publications, there is also the jury verdicts database.

During my initial defense orientation, my mentor responded to my inquiry of "how much is a broken arm worth," with this reply, "it all depends upon to whom it is attached." A truism then and now. However, the jury verdict information is extremely persuasive in your mediation and/or negotiation work.

Along with the Defense Update, the website is a resource for legislative activity, DRI related issues, seminars, and continuing interaction among defense bar members.

How is the IDCA doing? Please do provide your comments to the officers, the board of directors, or to the editorial board of the Defense Update.

See you at the Fort Des Moines in September. ■

The Editors: Noel McKibbin, West Des Moines, IA; Thomas D. Waterman, Davenport, IA; Kevin Reynolds, Des Moines, IA; Mark S. Brownlee, Fort Dodge, IA; Bruce L. Walker, Iowa City, IA; Michael Ellwanger, Sioux City, IA; Kermit B. Anderson, Des Moines, IA

Iowa Defense Counsel Association

431 East Locust Street, Suite, 300

Des Moines, IA 50309

Phone: (515) 244-2847

Fax: (515) 243-2049

E-mail: staff@iowadefensecounsel.org

Website: www.iowadefensecounsel.org

Presorted Standard US Postage Paid Des Moines IA Permit No. 3885
--