IDCA Case Law Update: Torts/Negligence

Crystal R. Pound | Simmons Perrine Moyer Bergman P.L.C.
cpound@spmblaw.com | (319) 896-4055

Gries v. Ames Ecumenical Housing, 944 N.W.2d 626 (Iowa 2020)
(6-1 affirming district court on legal question, 7-0 reversing the district court and remanding on fact question)

https://www.iowacourts.gov/courtcases/9750/embed/SupremeCourtOpinion

In *Gries*, the Iowa Supreme Court affirmed the viability of the continuing storm doctrine as good law under Restatement (Third) of Torts.

Plaintiff fell on the sidewalk outsider her apartment building and sued her landlord. Pursuant to the continuing storm doctrine, the district court granted landlord's motion for summary judgement. The continuing storm doctrine is well established in Iowa. First adopted in 1953 in *Reuter v. Iowa Trust & Savings Bank*, 57 N.W.2d (1953), the rule states that:

> The authorities are in substantial accord in support of the rule that a business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps. The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action and that ordinary care does not require it.

Id. at 225. After recounting numerous Iowa rulings related to premises lability and the impact of the Restatement (Third) of Torts on those decisions, the Court held the Court's adoption of sections 7 and 51 from the Restatement (Third) of Torts did not favor abandonment of the continuing storm doctrine.

> [T]he continuing storm doctrine reflects a widespread policy consensus that land possessors should not be forced to undertake snow or ice removal in the midst of a storm. The overall social costs of requiring people to go outside and clear during a storm exceed the overall social benefits of cleared passageways that will soon be covered over by additional accumulation. This social consensus is reflected in ordinances around our state that do not require land possessors to remove snow from sidewalks until after the last snow accumulation.
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> In sum, the doctrine holds a land possessor has no duty to remove the natural accumulation of snow or ice during an ongoing storm and for a reasonable time after the cessation of the storm. The doctrine is long-standing in Iowa. The doctrine is supported by public policy considerations. The doctrine is the rule in a number of jurisdictions. We decline Gries's request to abandon the continuing storm doctrine.

Gries, 944 N.W.2d at 631–32 (citations omitted). The Court held, however, that under the facts presented, the defendant landlord failed to establish the continuing storm doctrine entitled defendant to judgment as a matter of law. Justice Appel concurred in part and dissented in part. Justice Appel dissented primarily on the grounds he believes the continuing storm doctrine "archaic, unworkable and outmoded." *Id.* at 636.

Breese v. City of Burlington, 945 N.W.2d 12 (Iowa 2020)
(7-0, reversing the district court)

https://www.iowacourts.gov/courtcases/9758/embed/SupremeCourtOpinion

In *Breese*, the Court clarified and perhaps limited the scope of the public-duty doctrine and found it inapplicable to the facts presented. The Court additionally found the City was not entitled to the state-of-the-art defense. Under the facts of the case, the plaintiff struck a tree branch while riding a bicycle on a sewer box connected to a public pathway.

The public-duty doctrine is long-standing law in Iowa.

> Under the public-duty doctrine, if a duty is owed [by a governmental entity] to the public generally, there is no liability to an individual member of that group. A breach of duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [governmental entity] and the injured plaintiff. [The Iowa Supreme Court] ha[s] applied this doctrine on various occasions to preclude tort claims by individuals against the government.

Johnson v. Humboldt Cty., 913 N.W.2d 256, 260 (Iowa 2018) (internal quotations and citations omitted). The *Breese* Court addressed "the distinction between nonfeasance and misfeasance." 945 N.W.2d at 19. In this context, the Court revisited its prior public-duty cases.

> In *Johnson*, we held the public-duty doctrine precluded a vehicle passenger from suing a county after she was injured when the vehicle she was riding in went off a county road and into a ditch, striking a concrete embankment in the ditch. . . . The plaintiff argued the county was negligent for failing to cause the removal of the concrete embankment constructed by a private landowner, which was located on the county's right-of-way easement over that landowner's private land.
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> [I]n *Estate of McFarlin*, we held the public-duty doctrine precluded boaters involved in an accident on state-owned Storm Lake from an action against the state. We reasoned that plaintiffs' claims, including claims that the state failed to adequately mark a dredge pipe location or post warning signs about the dredging operation, were not actionable against the state because they involved "safety-related duties" owed to the general public. The dredging operation was not being conducted by the state but by a consortium, including the City of Storm Lake and Buena Vista County.
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> [I]n *Raas v. State*, we applied the public-duty doctrine to claims brought by two individuals who were injured by inmates who had escaped from the Iowa Medical and Classification in Oakdale. . . . We held that the public-duty doctrine barred any claim against the state by the plaintiff who had been injured after the inmates had fled the Oakdale premises. However, we found that the plaintiff who had been injured in the Oakdale parking lot was not subject to the public-duty doctrine; he was lawfully present on state property during visiting hours, was an "invitee" of the state, and had a "special relationship" with it.
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> In *Summy v. City of Des Moines*, we decided that the public-duty doctrine did not apply to a claim brought by a golfer who was injured when struck by a ball hit by another golfer while on a municipal golf course. The plaintiff's theory was that the golf course was negligently designed and maintained, so that a player on the fairway for the eighteenth hole was at unreasonable risk of being struck by a golf ball hit by a golfer teeing off at the first hole. Id. at 336. The court found that the doctrine did not apply "because the City's duty was one owed to invitees on the golf course, not to the public at large."

Id. at 18–19 (citations omitted). The Court traced the distinction between nonfeasance and misfeasance to *Johnson*, where the Court explained that the holding would not preclude liability if the governmental entity "negligently erects an obstacle directly in the path of motorists."

> Quoting from a leading treatise on tort law, we explained that the "classic" public-duty doctrine case occurs when "the duty is imposed by a statute that requires the defendant to act affirmatively, and the defendant's wrongdoing is a failure to take positive action for the protection of the plaintiff." We reiterated our belief that "the limited resources of governmental entities—combined with the many demands on those entities—provide a sound justification for the public-duty doctrine" in cases involving nonfeasance. However, we added, "This does not mean the same no-duty rule would protect that entity when it affirmatively acts and does so negligently."

Id. at 19–20 (citations omitted). In finding the public-duty doctrine inapplicable to cases of malfeasance, the Court recognized the ambiguity it was creating.

> We recognize there is a gray area. Some cases can be characterized as examples of either misfeasance or nonfeasance. . . . What is clear is that we have generally applied the public-duty doctrine when the allegation is a government failure to adequately enforce criminal or regulatory laws for the benefit of the general public, as in *Raas*, *Kolbe*, and *Sankey*, or a government failure to protect the general public from somebody else's instrumentality, as in *Johnson* and *Estate of McFarlin*.
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> This case does not fall into either category. The City erected the sewer box and the paved pathway and connected them to each other. They were not instrumentalities built, owned, operated, or controlled by anyone else. They were the City's. Here, a jury could find the City was affirmatively negligent in connecting the public pathway to the sewer box to give the sewer box the appearance that it was part of the public trail system. A jury could find that when the City connected the trail and the sewer box, it needed to take measures either to make the sewer box a safe part of the trail by adding guardrails or to warn pedestrians that the sewer box was not part of the public trail system.

We are left with a new distinction around which case law will need to be built.

Kipp v. Stanford, No. 18-2232, 2020 WL 3264319 (Iowa Ct. App. June 17, 2020)
(7-0 affirming district court)

https://www.iowacourts.gov/courtcases/9636/embed/CourtAppealsOpinion

In *Kipp,* the Iowa Court of Appeals addressed often-controversial plaintiff arguments made in the closing argument of a medical malpractice case. The Court broadly described its approach to reviewing the impropriety of arguments on appeal.

> Assessing the propriety of arguments is inherently contextual and case-specific. A comment or argument made one time may or may not be proper in one case, which would shed little light on whether a similar comment or argument would be proper in a different case or if repeated in either case. While we will endeavor to address all arguments at issue, we necessarily consider them in the context of the closing arguments as a whole and recognize the district court was in a much better position than we are in assessing the impact on the jurors and the trial. This is why the district court is given broad discretion in ruling on the motion for a new trial.

Id. at *6. The Court then turned to specifically problematic language and phrasing used by plaintiff counsel in his closing.

> Plaintiff's counsel began his closing argument by telling the jurors they held an "awesome power" that included the power to hold Stanford accountable for Kipp's injuries. Counsel then explained that "awesome power" also included the power "to be a hero." While we express no opinion on whether it is proper to suggest jurors are heroes by performing their civic duties in general, we note the reference in this case suggested the jurors were only heroes if they found in favor of Kipp. It was not an abuse of discretion for the district court to conclude playing on the jurors' notions of pride of being a hero only if they found in favor of Kipp was improper.
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> The district court also concluded counsel's characterization of the case as a "betrayal" and statements suggesting Stanford needed to admit to a mistake were improper personal opinions. We find no abuse of discretion in this conclusion. It was not an abuse of discretion to conclude that referring to Stanford's actions as a "betrayal" improperly focused the jury's attention on the moral quality of Stanford's alleged misconduct and suggested Stanford had been dishonest or deceitful.
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> The district court did not abuse its discretion in finding it improper for counsel to utilize the theme of "betrayal" or utilize these particular stories to characterize the opposing party as scheming or dishonorable, as "[c]ounsel has no right to create evidence by his or her arguments, nor may counsel interject personal beliefs into argument." And "[s]uch melodramatic argument does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact."
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> Another category of statements at issue is counsel's references to the community and to the social consequences of the jury's decision. Throughout closing and rebuttal arguments, counsel tied aspects of the case back to the community and the jury's place in it, including framing the jury's decision as something about which they will be asked by members of the community after the case ends and telling the jury the defense's position "can't be the standard here in this community." We find no abuse of discretion in the district court's conclusion such statements improperly urged the jury to focus on the greater societal impact and context of their decision and the reaction the community will have to the jury's decision, rather than focusing the jury's attention on the facts before it.
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> The final category of statements includes plaintiff's counsel's statements asking the jury "We have to think about what's the most valuable thing to us. . . . What would we trade for Natalie's experience?" and the statement about social security benefits, both of which the district court weighed when assessing the cumulative effect of counsel's improper statements. The district court concluded the first statement was a "golden rule" argument. Such an argument "asks the jurors to put themselves in the place of a party or victim. Courts frown upon this type of appeal to the emotions or personal interests of the jurors." We find no abuse of discretion in the district court's assessment. Counsel primed the jury to place themselves in Kipp's position by asking them a number of hypothetical questions about how they value their own experiences and about what "the most valuable thing to us" is.

Id. at *6–7 (internal citations omitted). Having found the argument to be improper, the Court turned to the question of prejudice, which must be shown by the movant seeking a new trial. Reviewing the arguments as a whole, the Court of Appeals found the district court did not abuse its discretion in finding prejudice, as the repeated theme of the impermissible argument "premised on impermissible jury considerations." *Id.* at *8. "Plaintiff's counsel made the improper statements throughout closing and rebuttal arguments, and likely influenced the jury's liability determination, which the district court characterized as 'the central and primarily disputed issue' in the case." *Id.*

Youngblut v. Youngblut, 945 N.W.2d 25 (Iowa 2020), *reh'g denied* (July 17, 2020)
(5-2; reversing district court and remanding for further proceedings)

https://www.iowacourts.gov/courtcases/8271/embed/SupremeCourtOpinion

In *Youngblut*, the Court addressed the question of whether a disappointed heir can decline to pursue a will contest and instead bring a later, separate lawsuit against one or more favored heirs for wrongfully inducing the testator to execute that will. At the center of the case, two brothers, Harold and Leonard, stood to inherit from their parents estate, comprised of vast acreage. Approximately three months before their deaths, the Youngblut's changed their wills to give Leonard a greater inheritance than under prior wills. After Youngblut's new will terms became known, Harold chose not to contest the will. Instead, nearly a year after his parents' deaths, Harold eventually brought a claim for tortious interference with an inheritance against his siblings. The jury ultimately found in favor of Harold in the amount of $396,086.88, plus $200,000 in punitive damages. Leonard appealed.

The Court engaged in a lengthy debate on the differences between probate and tort actions, as well as the storied history behind tortious interference claims. The Court also looked at the impact the Restatement (Third) of Torts. Under the Restatement (Second) of Torts, section 774B provides,

> One who by fraud[, duress] or other tortious means intentionally presents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to others for the loss of the inheritance.

Restatement (Second) of Torts § 774B. By comparison, the Restatement (Third) limits the ability to pursue a claim for tortious interference with an inheritance or gift: "A claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court." Restatement (Third) of Torts: Liab. For Econ. Harms § 19(2).

The Iowa Supreme Court ultimately held that "such a 'probate bypass' should not be permitted. "Accordingly, we hold that a claim alleging that the decedent's will resulted from tortious interference by a beneficiary must be joined with a timely will contest; otherwise, it is barred." Youngblut, 945 N.W.2d at 26. Justice Appel dissented, believing *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978) and *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992) (en banc) should control. *Id.* at 42. Justice McDonald also dissented, on *stare decisis* grounds. *Id.* at 43.

Whitlow v. McConnaha, 935 N.W.2d 565 (Iowa 2019)
(7-0, affirming district court ruling)

https://www.iowacourts.gov/courtcases/5937/embed/SupremeCourtOpinion

In *Whitlow*, the question was whether the retrial of a comparative fault action must include a defendant exonerated by the first jury. Plaintiff, a passenger on a motorcycle operated by her fiancé, suffered injuries after a collision between the motorcycle and a farm tractor. Plaintiff eventually brought suit naming the tractor owner and her fiancé. After the jury found the farmer not at fault, the court discharged the jury. Only after the jury left did the parties, including all counsel and the judge, realize the verdict form was not filled out in relation to the second defendant, Plaintiff's fiancé. After plaintiff moved for a new trial against both defendants, the district court ordered a new trial only related to the defendant excluded from the verdict form. The Court of Appeals reversed and remanded.

While the general rule is that a new trail must encompass all issues, it is possible to narrow the scope under some circumstances. *See Bryant v. Parr*, 872 N.W.2d 366, 389 (Iowa 2015). The Iowa Supreme Court cited to *Mumm v. Jennie Edmundson Memorial Hospital,* 924 N.W.2d 512, 519-20 (Iowa 2019) for the contention that a no-negligence finding as to the tractor owner taints the erroneous instruction on the verdict form, and the exonerated defendant does not have to undergo a retrial.

Karon v. Elliot Aviation, 937 N.W.2d 334, 336 (Iowa 2020)
(6-1, affirming district court)

https://www.iowacourts.gov/courtcases/7965/embed/SupremeCourtOpinion

In *Karon*, the Court addressed the issue of a forum selection clause where the plaintiff alleged fraud in a contract's purchase price. Plaintiff sought to avoid the forum-selection clause and brought suit in Iowa, alleging the fraud invalidated the forum-selection clause.

After an extensive review of precedent from other jurisdictions, the Iowa Supreme Court concluded that the fraud allegation as to the transaction generally was insufficient to invalidate the forum selection clause.

> Both parties, it is conceded, were represented in connection with the Purchase Agreement. If a forum-selection clause could be challenged simply based on fraud in an overall transaction, then the advantages of predictability and efficiency would be lost. Predictability would be lost because the parties would not be able to know the locus of litigation in advance (and perhaps retain counsel accordingly). Efficiency would be lost because it would be necessary to litigate the merits in order to determine the locus of litigation. In this case, plaintiffs acknowledge that it would be necessary to litigate their entire fraud claim in Iowa in order to determine whether the litigation should then proceed in Kansas.

Id. at 346. Justice Appel dissented.

Hollingshead v. DC Misfits, LLC, 937 N.W.2d 616 (Iowa 2020)
(6-1; overturning grant of summary judgment)

https://www.iowacourts.gov/courtcases/5676/embed/SupremeCourtOpinion

In *Hollingshead v. DC Misfits*, LLC, an injured party brought a dramshop action against the bar operating under the name "Misfits" in Des Moines. Pursuant to Iowa Code section 123.93, the plaintiff sent notice to what they believed was the defendant's insurance company. However, the plaintiff's notice named an entity that previously, but no longer, owned the bar. Nevertheless, the plaintiff sent the notice to the correct insurance carrier.

The Court held the statute only requires substantial compliance, which was met here as the notice corrected stated the place, time and circumstances of the alleged injury. Justice McDonald dissented.

Susie v. Family Health Care of Siouxland, LLC, 942 N.W.2d 333 (Iowa 2020), *reh'g denied* (May 13, 2020)
(6-1 affirming summary judgment)

https://www.iowacourts.gov/courtcases/3186/embed/SupremeCourtOpinion

In *Susie,* Plaintiff lost an arm and toes due to a rare infection known as necrotizing fasciitis. The Iowa Supreme Court vacated the Court of Appeals and affirmed the trial court's grant of summary judgement. The Court held Plaintiffs failed to present a prima facie case for causation or lost chance of survival case.

The plaintiff fell in her living room, injuring her right arm. After a week, the plaintiff sought care at Family Health Care of Siouxland's urgent care. Her treating physician erroneously diagnosed her with an arm contusion and prescribed pain killers, icing the injury, and following up with her primary care physician if no improvement. Approximately 24 hours after returning home, the plaintiff, extremely ill, was brought to a different hospital and diagnosed with septic shock, kidney failure, and eventually necrotizing fasciitis, also known as flesh-eating disease.

The plaintiff and her husband brought suit against Family Health Care of Siouxland, P.L.C. ("Siouxland"), alleging Siouxland were negligent in their diagnosis and treatment of Plaintiff's necrotizing fasciitis. Plaintiffs also alleged Siouxland's negligence cost the plaintiff her best chance to save her arm and toes. The parties agreed expert testimony was required on the issue of causation, as "the causal connection '[was] not within the knowledge and experience of an ordinary layperson.'" *Id.* at 337.

The plaintiff's expert's report indicated the expert would testify that had Siouxland treated the plaintiff's infection immediately, the plaintiff's amputations would more likely than not have been avoided. However, at deposition, the plaintiff's expert only provided speculation as the effect of antibiotic administration. The Court described the expert's statements as noncommittal, speculative, cryptic, and confusing.

> The opinions by Dr. Schechter provide no guidance for the jury on how or if Sharon's outcome would have been different if antibiotics were administered one day earlier. While an expert is not required to express an opinion with absolute certainty, Dr. Schechter provides only speculative and confusing testimony on causation. The jury cannot be left to speculate about the but-for causal link.

Id. at 338–39. The Court additionally invoked the contradictory affidavit rule, as adopted in *Estate of Gray ex rel. Gray v. Baldi*, which states that a court will reject an affidavit directly contradicting prior testimony unless the affiant provides a reasonable explanation for the apparent contradiction. 880 N.W.2d 451, 463 (Iowa 2016). Ultimately, the Court held that Plaintiff failed to make a prima facie causation or chance of survival claim. Justice Appel dissented.