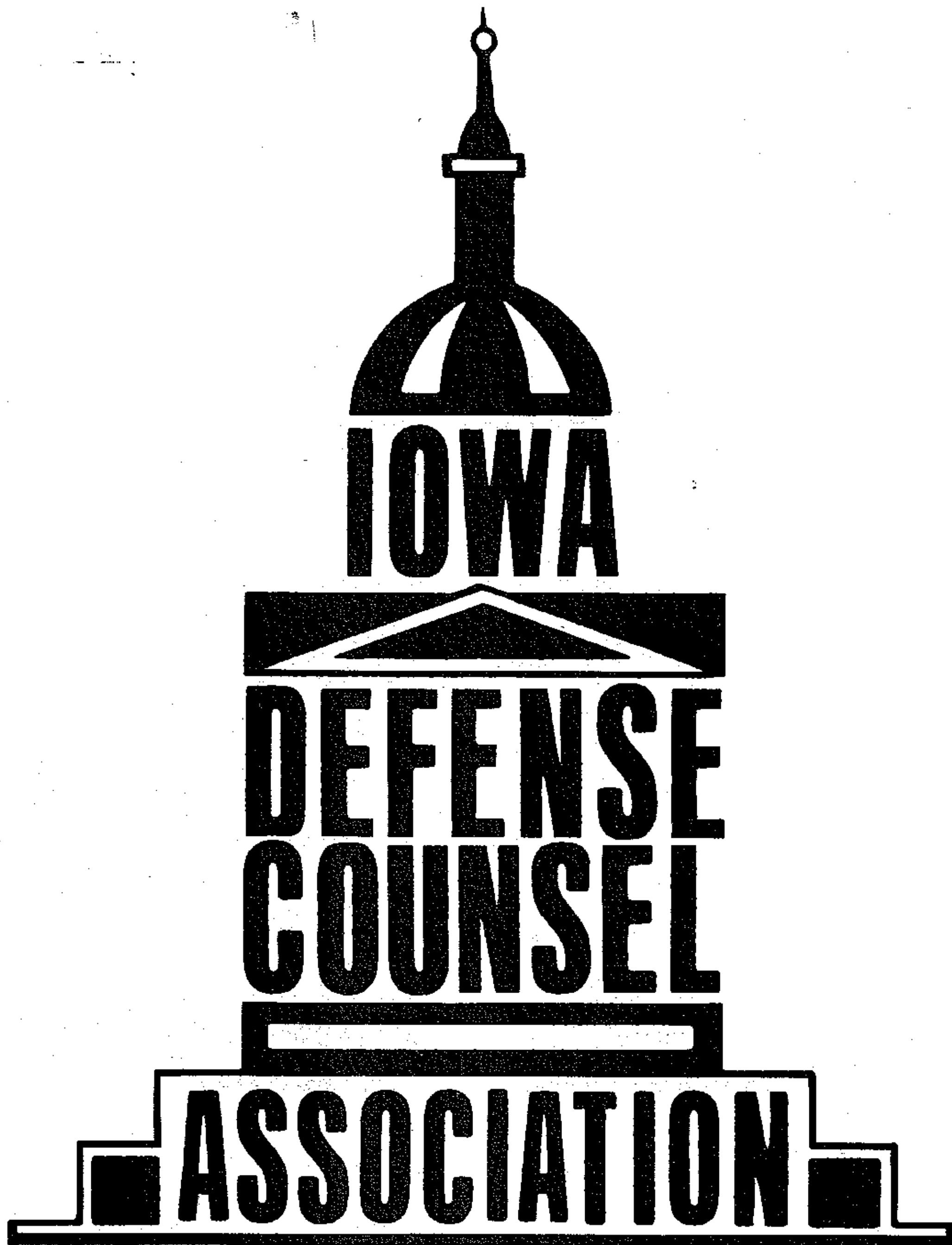


1992
ANNUAL MEETING

OCTOBER 1, 2 & 3
EMBASSY SUITES HOTEL
ON THE RIVER
101 EAST LOCUST STREET
DES MOINES, IOWA 50309

1992 IOWA DEFENSE COUNSEL ANNUAL MEETING

THURSDAY, OCTOBER 1

7:00 a m **Board of Directors Meeting**

8:00 a m **Registration Desk Opens**

8:45-9:00 a m **Introductions and Report of the Association**

9:00-9:45 a m **Chapter 668 Update**
Current Issues Under Comparative Fault
— Richard G. Santi
Des Moines IA

9:45-10:30 a m **Selected Problems Involving Workers' Compensation Liens and Subrogation Rights Affecting Personal Injury Litigation**
— Roger L. Ferris
Des Moines IA

10:30-10:45 a m **Break**

10:45-11:30 a m **The Intentional Acts Exclusion of Personal Liability Insurance Policies. Is it Still Viable?**
— Sharon Soorholtz Greer
Marshalltown IA

11:30-12:15 p m **Underinsurance Motorist Coverage**
— James A. Pugh; David A McNeill
West Des Moines IA

12:15-1:00 p m **Lunch**

1:00-1:30 p m **Federal Court Update and Report on the New Federal Courthouse**
— Judge Harold Vietor

1:30-2:15 p m **Hedonic Damages**
— Megan Antenucci
Des Moines, IA

2:15-3:00 p m **Effective Courtroom Tactics with Computer Animation**
— James E Bernard
Bruce L. Harlan
David Weinberg
Ames, IA

3:00-3:15 p m **Break**

3:15-4:00 p m **Civil Jury Instructions - An Update**
— Michael W. Thrall
Des Moines, IA

4:00-4:45 p m **God, Red Light Districts and Changing the Defense Posture to Where the Sun Does Shine**
— Angela C Simon
Dubuque IA

4:45-5:15 p m **Question and Answer Period for Thursday's Speakers**

6:00 p m **Cocktails and Dinner (Embassy Suites Hotel)**

8:00 p m **Doc Severinsen (Civic Center)**

FRIDAY, OCTOBER 2

9:00-9:45 a m **Selected Problems Between an Insurer and an Insured Who is Insolvent, Including Strategies for Bankruptcy, the Effect of Bankruptcy, Stays, Lifting Stays**
— Eric W. Lam
Cedar Rapids IA

9:45-10:30 a m **Medical Malpractice Update**
— David L Brown
Des Moines, IA

10:30-10:45 a m **Break**

10:45-11:30 a m **Selected Problems Created by Passage of the Americans with Disability Act**
— Constance A. Schriver
Davenport IA

11:30-12:15 p m **Proposed Rule 122, with Advertising and Report on the Activites of the Iowa State Bar Association**
— John D Shors, President
Iowa State Bar Association
Des Moines IA

12:15-1:00 p m **Lunch**

1:00-1:30 p m **Report From the Judiciary**
— Arthur A. McGiverin
Iowa Supreme Court Justice

1:30-2:15 p m **Protection for the Middleman, Section 613.18 Code of Iowa**
— John Werner
Des Moines IA

2:15-3:00 p m **Defense of the Truck Driver**
— R. Jeffrey Lewis
Des Moines, IA

3:00-3:15 p m **Break**

3:15-4:00 p m **Problems with the Defense; The Judicial Perspective**
— Judge Carl E Peterson
President, Iowa Judges Association
Marshalltown, IA

4:00-4:45 p m **How to Brief and Argue a Case before the Iowa Court of Appeals - The Inside Perspective**
— Judge Iowa Court of Appeals

4:45-5:15 p m **Question and Answer Period for Friday's Speakers**

6:00-7:00 p m **Reception**

7:00 p m **Annual Banquet**
— Maintaining a Sense of Humor in the Work Place
Iowa Humorist Joan Johanson
Gowrie IA

SATURDAY, OCTOBER 3

9:00-9:30 a m **Report on the Legislature**
— Legislative Action Committee

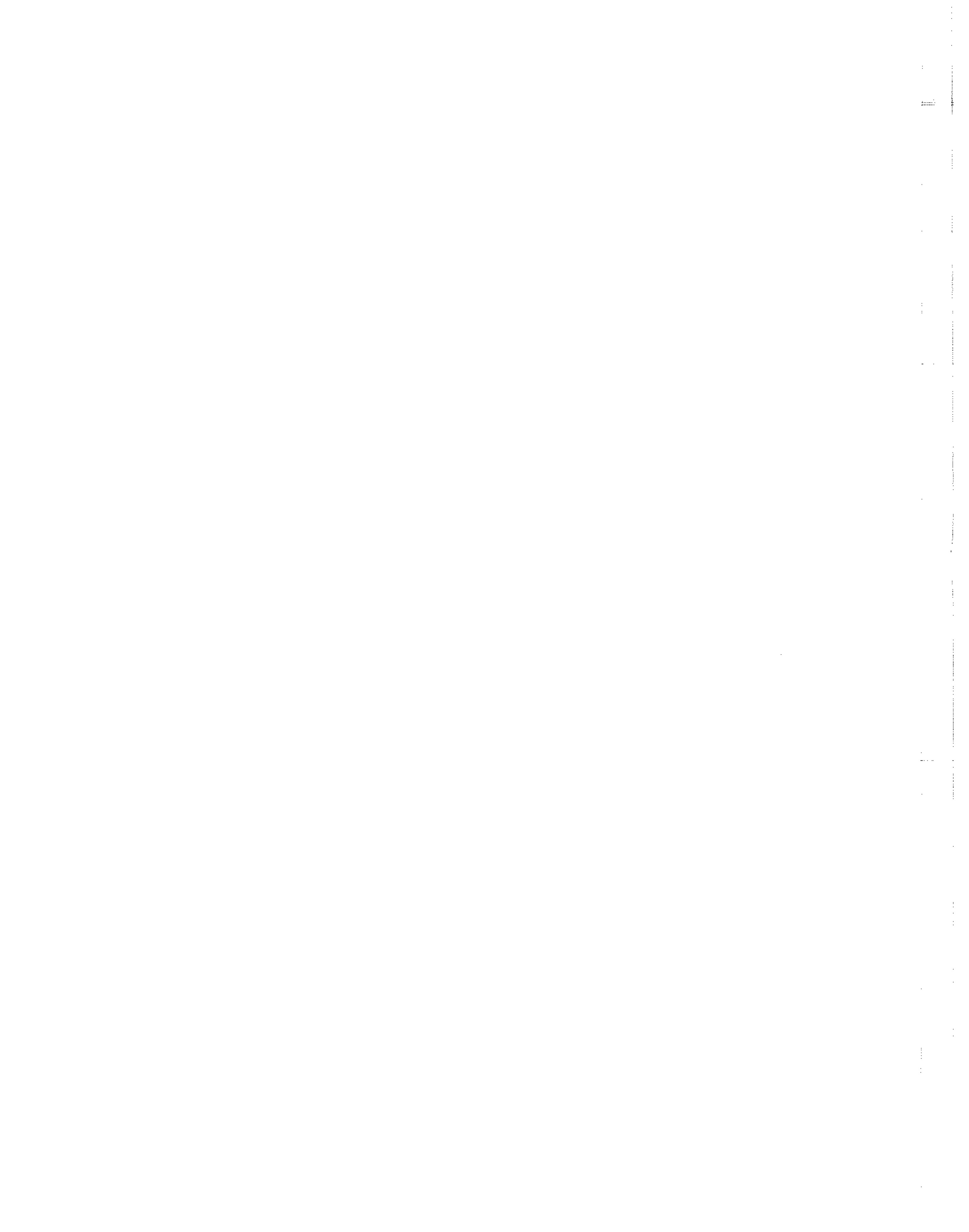
9:30-10:30 a m **Annual Appellants Case Review**
— Gregory M. Lederer
Cedar Rapids IA

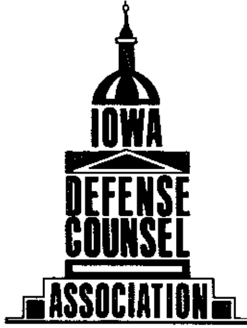
10:30-10:15 a m **Break**

10:45-11:30 a m **Workers Compensation Update**
— Bryron K Orton
Iowa Industrial Commissioner

11:30-11:45 a m **Election of Officers and Directors and Annual Meeting of Iowa Defense Counsel Association**

11:45 a m **Board of Directors Meeting**





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Marshalltown, Iowa 50158

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Des Moines, Iowa 50309

TREASURER

DeWayne Stroud
5400 University Avenue
West Des Moines, Iowa 50266

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Charles E. Miller - 1993
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Davenport, Iowa 52001

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Council Bluffs, Iowa 51502

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Cedar Rapids, Iowa 52401

DISTRICT VIII

Robert A. Engberg - 1992
321 N. 3rd Street
Burlington, Iowa 52601

AT LARGE

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Mark L. Tripp - 1994
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Des Moines, Iowa 50309

Michael W. Ellwanger - 1992
Suite 300,
Toy National Bank Bldg.
Sioux City, Iowa 50309

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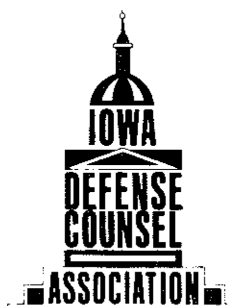
ANNUAL MEETING CHAIRPERSONS

Edward F. Seitzinger - General Program

John B. Grier - Program Chair

*Deceased



1992 ANNUAL MEETING

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A

RECENT DEVELOPMENTS UNDER THE IOWA COMPARATIVE FAULT STATUTE - HAS CHAPTER 668 REACHED MATURITY?

BY

RICHARD G. SANTI
AHLERS, COONEY, DORWEILER,
HAYNIE, SMITH & ALLBEE, P.C.
100 COURT AVENUE, SUITE 600
DES MOINES, IOWA 50309

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RECENT DEVELOPMENTS UNDER THE IOWA COMPARATIVE FAULT STATUTE-HAS CHAPTER 668 REACHED MATURITY?

This outline covers developments in Iowa's comparative fault law between September 1, 1991 and September 1, 1992. For developments before September 1991, the reader is directed to Phil Willson's comprehensive outline, Comparative Fault, presented at the Iowa Defense Counsel Association 1991 Annual Meeting (Oct. 24-26, 1991).

I. STATUTORY CHANGES - NONE.

II. COURT DECISIONS.

1. Pepper v. Star Equipment Company, 484 N.W.2d 156 (Iowa 1992).

   HELD: Fault may not be assigned to a bankrupt defendant (except to the extent of available insurance) even though (a) bankrupt is made a party to the action by consent of bankruptcy court, (b) Chapter 668 contains no requirement that a "party" be capable of satisfying a judgment and (c) when Iowa legislature passed Ch. 668, provision in original bill which would have spread a bankrupt's fault to the other non-bankrupt, at fault parties was not adopted.

   : Rationale for result was prior decision in Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986) in

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which court held that comparative fault statute only applied to parties against whom relief is actually sought and not joined simply for purpose of allocating fault. Since bankruptcy order only permitted joinder of bankrupt for purposes of fault allocation and not recovery, court chose to follow Peterson even though Peterson did not involve a bankrupt party. Also, the court stated it would be unfair to injured plaintiffs to permit siphoning off of liability to a party against whom plaintiff could not collect.

DISSENT: Chapter 668 apportions fault, not solvency.

2. Christopherson v. Deere & Co., 941 F.2d 692 (8th Cir. 1991).

Held: A defendant found 50% at fault does not have to pay third party defendant's share where plaintiff elected not to file a direct claim against the third party defendant. Rationale was that joint and several liability was only meant to apply to parties plaintiff actually sued.

Caveat: Does Christopherson correctly interpret section 668.4? In Pepper, supra, the Supreme Court

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noted Christopherson, footnote 2 at page 158, and stated its disagreement with the decision.

Prediction: Iowa Supreme Court will follow reasoning in Judge Heaney's dissent and hold that a defendant found 50% or more at fault may, at plaintiff's election, be required to pay entire judgment against all defendants, including third-party defendants.

3. Carson v. Webb, ______ N.W.2d ______ (Iowa 1992).
Held: Evidence of medical insurance payments to plaintiff in civil assault and battery action should not have been admitted under §668.14 which modifies the collateral source rule because Ch. 668 does not apply to intentional torts.

4. State v. Smith, ______ N.W.2d ______ (Iowa 1992).
Held: A criminal defendant ordered to pay restitution to the victim is not entitled to apportionment of fault to other criminal defendants because Ch. 668 does not apply to intentional torts.

5. State v. Wagner, 484 N.W.2d 212 (Iowa Ct. App. 1992).
Comparative fault statute inapplicable to restitution claims based on fraud or intentional tort.

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6. Guzman v. Des Moines Hotel Partners, _____ N.W.2d _____ (Iowa 1992).

Plaintiff motorist sued for injuries due to operation of hotel's sprinkler which sprayed water on city street. Suit based on counts of negligence and nuisance. Plaintiff found partly at fault but since defendant found liable under both negligence and nuisance theories, trial court entered judgment for full amount on nuisance claim without reduction for plaintiff's fault.

Held: Negligence, rather than nuisance, is the appropriate theory if the nuisance is negligence based and, therefore, plaintiff's recovery must be reduced by plaintiff's share of fault.

7. Brady v. Dague, _____ N.W.2d ______ (Iowa 1992).

Issue raised on appeal but withdrawn at oral argument as to whether spousal consortium claims should be reduced by fault attributed to spouse in view of Nichols v. Schweitzer, 472 N.W.2d 266, 271 (Iowa 1991) and Schwennen v. Abel, 430 N.W.2d 98 (Iowa 1988) (consortium claims not subject to reduction by imputation of fault assigned to injured parent/spouse).

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8. Dudley v. Ellis, _____ N.W.2d _____, (Iowa 1992).
Issue presented as to whether Ch. 668 applies to gross negligence/co-employee suits. Trial court submitted on comparative fault basis. On appeal, Supreme Court held insufficient evidence to prove elements of gross negligence claim and, therefore, did not decide whether comparative fault applied to gross negligence claims.

9. Garren v. First Realty, Ltd., 481 N.W.2d 335 (Iowa 1992).
In comparative fault cases, Rule of Evidence 408 does not bar evidence offered to show plaintiff made and released claims against other parties since such evidence identifies those settling parties to be included for fault allocation in verdict forms. Also, court approved allocation of fault to seller, real estate agent, appraiser and lender in suit brought by buyer who purchased property in flood plain.

10. Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991).
Suit by injured moped operator against motorist. Issue was raised as to whether moped operator's failure to wear a helmet could be considered in allocation of

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comparative fault under Ch. 668 as unreasonable failure to mitigate damages.

Held: Since legislature has refused to permit failure to wear seat belts to be evidence of comparative fault and there is no common law duty to wear a helmet, failure to wear a helmet cannot be considered as evidence of comparative fault.

Also the court warned against bifurcating trials subject to Ch. 668. The court stated that where defendant was relying on unreasonable failure to mitigate damages as a defense, bifurication would be an abuse of discretion and constitute reversible error.

11. Duntz v. Zeimer, 478 N.W.2d 635 (Iowa 1991).
Upheld constitutionality of Section 321.445(4) which prohibits evidence of failure to wear a seat belt to be considered as comparative fault and limiting such evidence to maximum 5% reduction in damage recovery.

12. Vasquez v. LeMars Mutual Ins. Co., 477 N.W.2d 404 (Iowa 1991).
Insured sued his own insurer for underinsured motorist benefits. The issues at trial concerned the comparative fault of the insured and the tortfeasor and

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the amount of damages. The question was whether the prejudgment interest provision of Iowa Code section 535.3 or the prejudgment interest provision of Iowa Code section 668.13 applied to the action.
Held: Section 668.13 did not apply because the action was essentially on the insurance contract, and not primarily a comparative fault action.

13. Hillrichs v. Avco Corporation, 478 N.W.2d 70 (Iowa 1991).
Section 668.17 (state of the art defense) should be submitted by special verdict and not just by general instructions. (Enhanced injury case).

14. Lanz v. Person, 475 N.W.2d 601 (Iowa 1991).
Negligence of consent driver is not imputed to owner to preclude owner's recovery for vehicle property damage notwithstanding enactment of Chapter 668. Court rejected argument that Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956) had been abrogated by enactment of Ch. 668.

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15. Hilsenbeck v. Iowa Power & Light Co., ____ N.W.2d ____ (Iowa Ct. App. 1992).

Negligence of driver/co-owner is imputed to other co-owner to reduce or preclude recovery for property damage to vehicle.

Contribution claim against co-defendant under Ch. 668 need not be pleaded before trial and can be enforced by post-trial motion.

16. Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991).

Doctrine of last clear chance is subsumed by adoption of comparative fault and trial court need not instruct on this doctrine even as an issue of proximate cause. Also, court costs may not be assessed to any defendant under §625.3 in a comparative fault case where plaintiff is found to be more than 50% at fault.

17. Schulte v. Webster Co., _____ N.W.2d _____ (Iowa Ct. App. 1992).

Immunity provided by §668.10(2) to governmental entities barred injured plaintiff's claim against county for failing to sand/salt or remove ice from roadway.

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18. <u>Ashling v. General Motors Corp.</u>, _____ N.W.2d _____ (Iowa Ct. App. 1992).

Absence of signed release does not preclude inclusion of settling party on verdict form.

III. PENDING LEGISLATION.

1. HF 140 - nonuse of seat belts permitted as evidence of comparative fault; seeks repeal of §321.445(4). (Appendix A)

2. HF 180 - fault of injured spouse/parent to be imputed to consortium claimant; purpose is to overrule <u>Schwennen v. Abell</u>, 430 N.W.2d 98 (Iowa 1988) (Appendix B) (Identical to SF 394).

3. HF 80 - Amendment to collateral source rule (§668.14) to adopt the dissenting opinion in <u>Schonberger v. Roberts</u>, 456 N.W.2d 20 (1990). The majority opinion in that case held that evidence of workers compensation benefits was inadmissible under §668.14. (Appendix C)

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IV. POSSIBLE LEGISLATIVE CHANGES:

1. Abolition of joint and several liability in comparative fault cases such that a defendant only pays percentage of fault attributed to that defendant. This has been proposed as a counterpart to a possible change in 668 which would permit plaintiffs to recover who are found more than 50% at fault (i.e., a pure comparative fault statute).

2. Statutory provision giving a defendant the right to bring back into a case a non-settling defendant dismissed by plaintiff to eliminate perceived need to file cross claims.

3. Legislative annulment of Pepper decision - By defining party to include insolvent or bankrupt parties.

4. Other suggestions?

V. UNRESOLVED ISSUES:

1. Can a plaintiff sue a third party defendant under Ch. 668 after the statute of limitations has expired?

   (a) Continuing confusion over interpretation of Betsworth v. Morey & Raymonds, 423 N.W.2d 196 (Iowa 1988) and Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985).

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(b) Compare Judge Wolle's ruling in Millsap v. Airtherm with Judge O'Brien's ruling in Hoskins v. Emerson (Appendix D and E).

(c) Comment by the Iowa Supreme Court in Pepper, supra, at page 158, appears to support Judge O'Brien's analysis which answers this question in the affirmative.

2. Can comparative fault be used in a gross negligence case?

3. Can comparative fault be used in a first party bad faith case?

4. Issues presently on appeal?

5. Others?

1 Section 1. Section 321.445, subsection 4, Code 1991, is
2 amended by striking the subsection.
3 Sec. 2. Section 321.446, subsection 6, Code 1991, is
4 amended to read as follows:
5 6. Failure to use a child restraint system, safety belts,
6 or safety harnesses as required by this section does not
7 constitute negligence ~~nor-is-the-failure-admissible-as~~
8 ~~evidence-in-a-civil-action~~.
9 EXPLANATION
10 This bill will allow the admissibility of the nonuse of
11 safety belts or safety harnesses as evidence of comparative
12 fault.
13 Current law prohibits the admissibility of the nonuse of
14 safety belts and safety harnesses as evidence in a civil
15 action for damages arising prior to July 1, 1986. For a cause
16 of action arising on or after July 1, 1986, current law
17 prohibits the nonuse of safety belts or safety harnesses as
18 evidence of comparative fault. However, the nonuse may be
19 admitted to determine damages if the parties introduce sub-
20 stantial evidence that the failure to wear a safety belt or
21 safety harness contributed to the injuries of the plaintiff.
22 If the trier of fact finds that the evidence supports a
23 finding that the failure to wear a safety belt or safety
24 harness contributed to the plaintiff's injuries, damages
25 awarded to a plaintiff after reduction for comparative fault
26 can be reduced by five percent or less. This bill strikes
27 these provisions.
28 In addition, provisions prohibiting the admissibility of
29 the nonuse of a child restraint system under section 321.446
30 in a civil action are stricken.
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LSB 1796HH 74
jc/jw/5

APPENDIX A

S.F. ________ H.F. 180

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1 Section 1. Section 668.3, subsection 1, Code 1991, is
2 amended by adding the following new unnumbered paragraph:
3 NEW UNNUMBERED PARAGRAPH. Contributory fault shall not bar
4 recovery in an action by a claimant to recover damages for
5 loss of services, companionship, society, or consortium,
6 unless the fault attributable to the person whose injury or
7 death provided the basis for the damages is greater in
8 percentage than the combined percentage of fault attributable
9 to the defendants, third-party defendants, and persons who
10 have been released pursuant to section 668.7, but any damages
11 allowed shall be diminished in proportion to the amount of
12 fault attributable to the person whose injury or death
13 provided the basis for the damages.
14 Sec. 2. Section 668.3, subsection 2, paragraph b, Code
15 1991, is amended to read as follows:
16 b. The percentage of the total fault allocated to each
17 claimant, defendant, third-party defendant, and person who has
18 been released from liability under section 668.7, and injured
19 or deceased person whose injury or death provides a basis for
20 a claim to recover damages for loss of consortium, services,
21 companionship, or society. For this purpose the court may
22 determine that two or more persons are to be treated as a
23 single party.
24 EXPLANATION
25 This bill provides that the percentage of fault assigned to
26 the person whose death or injury gave rise to a consortium
27 claim shall apply to reduce or bar a judgment for loss of
28 consortium. The bill overrules Schwennen v. Abell, 430 N.W.2d
29 98 (Iowa 1988).
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LSB 1801HH 74

668.14 Evidence of previous payment or future right of payment.

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the replacement or indemnification of actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury by insurance, by governmental, employment, or service benefit programs, by payment awarded pursuant to Chapter 85, 85A, 85B or 86, or from any other source except to the extent that the replacement or indemnification is pursuant to state or federal payments for disabilities. However, evidence and argument as to the proceeds of an insurance policy on the life of a deceased person or the assets of the claimant or the members of the claimant's immediate family shall not be permitted.

2. If evidence and argument regarding replacement or indemnification is presented pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring such replacement or indemnification and as to any existing rights of indemnification or subrogation relating to such replacement or indemnification of losses.

3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury that if it finds liability, it must find whether any of the plaintiff's claimed damages were or will be paid by collateral sources and, if so, how much. The jury should also be instructed to find whether any of those collateral sources are subrogated to the plaintiff's recovery from the tort defendant, and the jury should be instructed that if it finds that such rights of subrogation do exist, the plaintiff's recovery from the defendant may not be reduced by the amount of those collateral benefits. Finally, the jury should be asked to state the amount of economic losses of the plaintiff that were or will be paid by collateral sources and which are also included in its jury award to the plaintiff, if such an award is made.

4. This section does not apply to actions governed by section 147.136.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RICHARD A. MILLSAP, Individually, et al.,	)	CIVIL NO. 86-858-A
Plaintiffs,	)	
vs.	)	RULING ON OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATIONS
AIRTHERM MANUFACTURING COMPANY, a Corporation; et al.,	)	
Defendants.	)	

On August 16, 1988, U.S. Magistrate R. E. Longstaff filed a Report and Recommendation on several pending motions.

The only objections to the proposed rulings recommended by the Magistrate were the objections filed on August 19, 1988, by the plaintiffs who oppose the recommended granting of the motion for summary judgment of Reliance Electric and motion to dismiss of Jay Mawbaker. Both motions assert the Iowa statute of limitations as a bar. Iowa Code § 614.1(2) (1987).

Plaintiffs contend that the defendants may not rely upon their statute of limitations defense when the defendants _might_ be brought into the action as defendants to a third-party complaint. Plaintiffs argue that when defendant Airtherm was granted permission to file its third-party complaint against Reliance, Mawbaker, and Elmer J. Strang, those persons became "parties" under Iowa Code section 668.2(4) and no statute of limitations defense bars the plaintiffs' claims against those third-party defendants as parties in the action.

The court disagrees with the plaintiffs' interpretation of Iowa Code section 668.2(4) and the last sentence of the next to last paragraph in the case of _Betsworth v. Morey's & Raymond's_, ____ N.W.2d ____, ____ (Iowa 1988). Defendant Reliance correctly points out that the statement from the _Betsworth_ case plaintiffs rely upon simply means that the third-party defendant may not rely on a statute of limitations defense against the third-party plaintiff, not that the third-party defendant would be subject to claims asserted by the plaintiff after the applicable limitations period had expired.

The court denies the plaintiffs' objections to the Magistrate's Report and Recommendation filed on August 16, 1988. The court confirms and enters ruling consistent with each of the rulings set forth in that Report and Recommendation, at pages 11 and 12.

IT IS SO ORDERED.

Dated this 1st day of December, 1988.

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

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COUNCIL FILED
89 AUG 27 AM 8:40
CLERK U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

DENISE HOSKINS and MICHAEL HOSKINS,
Plaintiffs,
vs.
EMERSON ELECTRIC CO. and UNION L. P. GAS SYSTEM, INC.,
Defendants.

CIVII NO. 89-38-W

EMERSON ELECTRIC CO.,
Third-Party Plaintiff,
vs.
PHILLIPS 66 COMPANY,
Third-Party Defendant.

PHILLIPS 66 COMPANY,
Third-Party Plaintiff,
vs.
A. O. SMITH CORPORATION,
Third-Party Defendant.

A. O. SMITH CORPORATION,
Third-Party Plaintiff,
vs.
FISHER CONTROLS INTERNATIONAL and QUALITY STEEL CORPORATION,
Third-Party Defendant.

This matter comes before the court pursuant to Fisher International's motion for summary judgment. After careful consideration of the oral and written arguments the court denies the motion.

Facts

Plaintiff Denise Hoskins was injured June 17, 1987 in an l.p. gas explosion. Plaintiffs brought suit against Emerson Electric and Union L.P. Gas within two years of the accident. On May 1, 1990, almost three years after the accident, defendant Emerson Electric filed a third party complaint against Phillips 66. Phillips then brought in A.O. Smith as a third party defendant. On July 31, 1990, A.O. Smith filed a third party complaint against Fisher International. On November 14, 1990, plaintiffs filed a second amended complaint seeking damages directly from Phillips 66 and Fisher International.[1]

Fisher International contends that the plaintiffs can not file suit directly against it. It alleges because it was brought in as a third party defendant after the original statute of limitations had run against it, plaintiff is barred by the statute of limitations from bringing suit directly against it. There is no argument made by the party that the third party complaints against it cannot be maintained, this defendant simply alleges that the

Appendix E

Discussion

Iowa Code § 668.8 states "The filing of a petition under this chapter tolls the statute of limitations for the commencement of an action against all parties who may be assessed any percentage of fault under this chapter." Iowa Code § 668.2.4 defines "party" as used in 668.8 and includes a "third party defendant." The parties in this action have differing views as to the effect of this language. Plaintiffs urge this court to interpret the language in a manner which would allow them to bring an action directly against a third party defendant after the statute of limitations has run if an original defendant brings in the party as a third party defendant. Fisher International contends that since the statute of limitations ran before it was sued by either the original plaintiffs or defendants it cannot be sued directly by the plaintiffs. It contends that once the statute of limitations has run against a defendant a plaintiff is barred from filing suit directly against it.[2]

Plaintiff has cited two Iowa state court cases, Betsworth v. Morey's & Raymonds, 423 N.W.2d 196, (Iowa 1988), and Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985), for the proposition that under Iowa Code § 668 the filing of a suit tolls the statute of limitations against a "party" who might be found at fault. While not directly holding that an action can be instituted against a third party defendant once they are brought in by the original defendant, the cases do seem to indicate that this section allows a plaintiff to bring an action against a third party defendant that they would not be allowed to sue if not for the actions of the original defendant. See, Betsworth, at 198 (once party brought in by a defendant, statute of limitations not a defense for third party defendant); Reese, at 5 (§ 668 "preserves the right of plaintiff to bring a separate action" against a third party defendant).

Fisher International contends that Reese is not applicable because Reese involved a situation where a third party defendant was brought in before the statute of limitations had run. Fisher International alleges that in the present action the third party defendants were brought in after the statute of limitations had run. It argues that under these circumstances the plaintiffs cannot amend their complaint to bring an action directly against it.

This court has closely examined Reese and finds the following chronological facts to be correct:

January 29, 1981	Injury incurred.
1983	Action filed against Werts.
January 29, 1983	Statute of limitations

[2]. The party has not argued that if it had been brought in before the statute of limitations had run that the plaintiffs would not be able to file directly against it. Fisher International agrees that when a third party defendant is brought in before the statute of limitations runs a plaintiff can file an action directly against a third party defendant even after the statute of limitations runs.

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This courtis persuaded by a reading of Iowa Code § 668, along with an examination of the purpose of the chapter, that the interpretation of the chapter espoused by the plaintiff is the correct interpretation. Prior to the enactment of this section, a plaintiff could collect full judgment from any defendant found to be at fault in an action. If a plaintiff sued a defendant, who then brought in a third party defendant, and the original defendant was found to be 2 per cent at fault and the third party defendant to be 98 per cent at fault, a plaintiff could recover the entire 100 per cent from the defendant. The defendant would then be forced to seek contribution from the third party defendant. Under § 668.4 joint and several liability was altered in such a way that a plaintiff could collect the full judgment only against a defendant found to be 50 per cent or more at fault.

If this court were to accept the reasoning as urged by Fisher International in this motion, a third party defendant brought in after the statute of limitations has run could not be directly sued by a plaintiff. If the third party defendant was then found to be 51 per cent at fault the plaintiff could not recover the 51 per cent from the original defendant because of § 668.4. It is also the court's impression that the plaintiff could not recover against the third party defendant because they did not have an action pending against this defendant. See, Slager v. HWA Corp., 435 N.W.2d 349, 357 (Iowa 1989). Thus, a plaintiff would be able to recover only 49 per cent of the judgment. Absent the enactment of § 668 a plaintiff would have been able to collect 100 per cent of the judgment from the original defendant, and the original defendant would have been able to seek contribution from the third party defendant. It is inconceivable to this court that the purpose of § 668 is to lead to such results.

The Iowa Supreme Court, in Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989), made an analysis of the legislature's intent in its enactment of § 668 with regard to its interplay with Iowa Code § 123.92.[4] The Slager court was attempting to determine if Iowa

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[4]. This code section imposes liability upon any person who sells or serves an intoxicating liquor to a person and the intoxicated person causes injury to a third party. In such a situation the injured party can recover the entire judgment from the seller even if the seller is found to be less than 50 per cent at fault. The section provides:

> Any person who is injured in person or property or means of support by an intoxicated person . . . has a right of action for all damages actually sustained, severally or jointly, against any licensee or
> (continued....)

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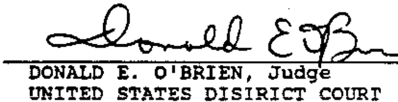
Code § 123.92 should be read as incorporating Iowa Code § 668 or whether Iowa Code § 123.92 should control. If Iowa Code § 668 were found to be controlling, the liquor provider found less than 50 per cent at fault for plaintiff's injuries could not be forced to pay the entire amount of a judgment. Instead, the liquor provider could only be found liable for the amount of damages caused by its negligence. The court, after a lengthy examination, sets forth a scenario much like the one set out by this court, i.e., that the party found most at fault is named as a third party defendant and not as a defendant. Id. at 357-58. It was the Iowa Supreme Court's determination that in such a situation it was not the legislature's intent in enacting Iowa Code § 668 to prevent an innocent plaintiff from recovering 100 per cent of their damages from a tort feasor under the Iowa Dram Shop laws, even if the seller under § 123.92 was found to be less than 50 per cent at fault.

Such an analysis, while not directly on point, is illustrative of the Iowa Supreme Court's interpretation of the chapter's purpose. The Iowa Supreme Court was persuaded that it was not the legislature's intent in enacting § 668 to restrict a plaintiff's collection of a judgment. The court is persuaded that it was not the legislature's intent to reduce a plaintiff's recovery against a party at fault in the enactment of § 668 simply because they were named as a third party defendant rather than as a defendant. To accept Fisher International's position would seriously undermine a plaintiff's recovery in a situation where a third party defendant is found to be more than 50 per cent at fault. This line of reasoning would defeat the entire purpose of § 668. Section 668.8 was intended and designed to protect a plaintiff's full right of recovery which § 668.4 might otherwise deny a plaintiff through the abrogation of joint and several liability.

Upon the foregoing, it is ordered:

Fisher International's motion for summary judgment is denied.

August 27, 1991



DONALD E. O'BRIEN, Judge
UNITED STATES DISIRICT COURT

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[4](...continued)
permittee, who sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known the person was intoxicated . . . .

Iowa Code § 123.92

	appears to run.[3]
February 27, 1983	Werts (defendant) brings in third party defendants Bloomfield and ABCM.
July 1, 1984	Plaintiff moves to amend to include ABCM. Court overrules motion based on statute of limitations and timeliness and does not allow suit to proceed against this defendant.

Reese, 379 N.W.2d at 2-3. The appellate court held it was reversible error for the trial court having refused to permit the plaintiff to amend her complaint to add ABCM as a defendant. Id. at 5. While the court did not directly address the issue of whether on remand the plaintiff should be allowed to sue ABCM directly, the implication is that she should be allowed to do so. Id. The court stated:

> Section 668.8 tolls the statute of limitations upon filing of a petition under chapter 668 as to all parties who may be assessed any percentage of fault. When this provision applies, the statute of limitations will not shield a third-party defendant from an action by the plaintiff based on causal fault that defeats the plaintiff's right to a joint and several judgment pursuant to section 668.4 We believe section 668.8 is a trade-off for the modified joint and several liability rule of section 668.4 and is intended to ameliorate it. . . .
>
> . . . In any event, section 668.8 preserves the right of plaintiff to bring a separate action against ABCM."

Id. (emphasis supplied). The court notes that in this situation ABCM was brought in after the statute of limitations appeared to have run and the court held in dicta that § 668.8 preserved plaintiff's right to bring just such a suit.

Plaintiffs cite Betsworth v. Morey's & Raymonds, 423 N.W.2d 196, (Iowa 1988) for the proposition that they are able to directly sue the third party defendants. Fisher International, however, contends Betsworth supports its position. In Betsworth the following chronological events occurred:

December 1, 1983	Accident
June 14, 1985	Action filed
December 1, 1985	Statute of limitations runs
June 11, 1986	Amendment
December 17, 1986	Plaintiff seeks to add Sioux City. The court holds Sioux City could not be added as a defendant because attempted amendment was made after the statute of limitations had run.

[3]. This court is unable to say precisely when the statute of limitations ran because there is no holding in the opinion as to the date the statute of limitations ran. However, under a logical reading of the case, since an accident was involved and not a latent or hidden defect, the statute of limitations would have run two years after the date of the accident. See, Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 351 (Iowa 1987); Franzen v. Deere & Co., 377 N.W.2d 660, 662 (Iowa 1985); Chrischilles v. Griswold, 150 N.W.2d 94, 101 (Iowa 1967) (all holding "statute of limitations begins to run when the person injured discovers or in the exercise of reasonable care should have discovered the allegedly wrongful act").

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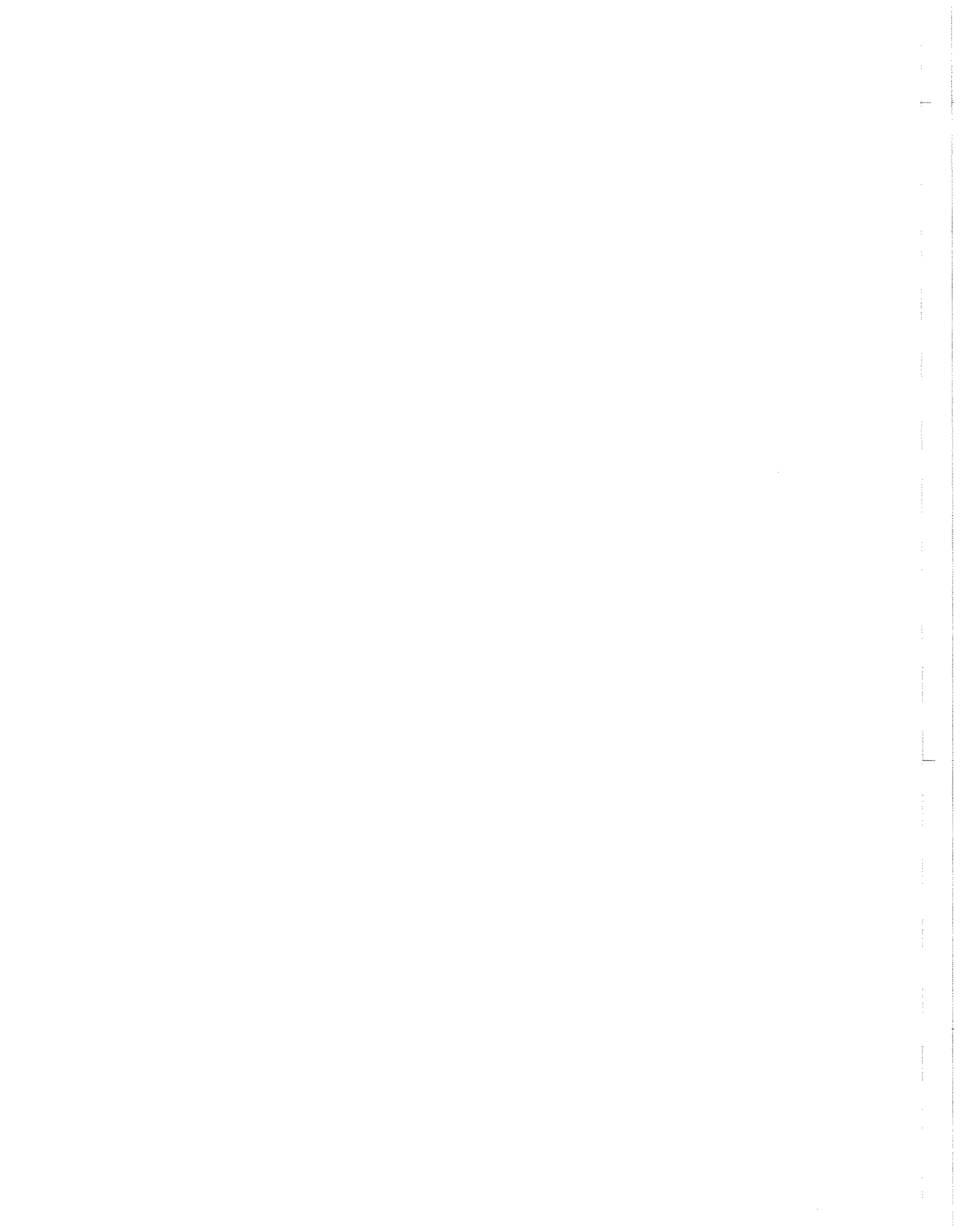
Id. at 197-98. In Betsworth, Sioux City was not brought in as a third party defendant by a defendant, but rather as a defendant by the plaintiff. In such a situation this court is in agreement that the statute of limitations would be a defense against the plaintiff's claims. However, the Betsworth court stated in dicta that "[t]here is always the possibility, of course, that such a defendant might be brought in as a third party defendant, and in that case the statute of limitations would not be a barrier." Id. at 198. In the case now before the court Fisher International was brought in first as a third party defendant, it was then sued directly by the plaintiff. This appears to be exactly the situation the court was addressing in Betsworth.

At oral arguments Fisher International presented a Southern District of Iowa case in which it alleges Judge Wolle addressed the issue before this court and held that an action by the plaintiff directly against a third party defendant was not permissible. See, Millsap v. Airtherm Manufacturing Co., No. 86-858-A (S.D.Ia. August 16, 1988). At oral arguments in this case all parties were given a chance to respond to the Millsap opinion.

This court has closely examined Millsap, and does not find it controlling in this situation. Millsap involved a situation where the plaintiff was attempting to add defendants after the statute of limitations had run. As such, they were not a "party" as defined in § 668.2.4. The court determined that the parties could not be added as defendants. However, in a footnote the court did state that defendant's claims against the parties as third party defendants should be allowed. Id. at 12. Not only is the timing in this action crucial, but also significant is the fact that Fisher International was originally brought in not by the plaintiff, but rather by other defendants. As such, Fisher International is a "party" as defined in Iowa Code § 668.2.4 and the statute of limitation is tolled against them. In Millsap the party that was sought to be added was not a "party" as defined in § 668.2.4.



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SELECTED PROBLEMS INVOLVING WORKERS' COMPENSATION LIENS AND SUBROGATION RIGHTS AFFECTING PERSONAL INJURY LITIGATION

by

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We are all familiar with the basic scheme of the Iowa workers' compensation law. If an employee is injured under circumstances giving rise to liability by someone other than the employer, in the workers' compensation context referred to as a third party, the employer or workers' compensation insurance carrier[1] is entitled to be repaid from the third party recovery. Not too many years ago, most of us would have accepted the foregoing as a close-to-accurate restatement of the law. However, a number of important exceptions, usually based on interpretation of the very poorly drafted statute, have been recognized, and today, a better restatement of the law is that under some circumstances an employer can recover workers' compensation payments from third parties liable for the injury.

This article will first outline the basic scheme of the statute. Then, it will review which payments made by the employer qualify for indemnity. Next, procedural hurdles necessary for preservation of the lien and exercise of

[1] For convenience, from this point on, I will refer only to the employer, but that term is intended to include the insurance carrier.

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subrogation rights will be examined. Finally, an attempt will be made to specify what portions of the third party recovery can and cannot be reached by the employer.

THE STATUTE

Section 85.22, Code of Iowa, is the operative statute.[2] The statute provides that an injured employee may maintain an action for workers' compensation benefits and may also maintain a third party action. If a third party action is commenced, the statute places the burden upon the employee to serve a copy of the third party original notice upon the employer not less than ten days before trial. Out of the "recovery of damages" the employer is to be "indemnified" for the "compensation" which it has paid, with legal interest, less "attorney fees" of the employee's attorney. Additionally, the employer is granted a lien on "the claim for such recovery and the judgment thereon," but to preserve the lien a notice of lien must be filed with the clerk of the district court where the action is pending within 30 days after "receiving notice" of the suit.

The statute also grants the employer a right of subrogation against third parties, but this subrogation right comes into being only if the employer gives the employee a 90 day written notice (30 days if the third party is a city or special charter city) to proceed with the third party suit, and the employee fails to do so. When suit is

[2] A complete copy of Section 85.22 is set forth at the end of this article.

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brought by the employer, division of the recovery is detailed by the statute, but the statute is not equally specific when the employee brings suit.

Neither the employee nor the employer can settle a third party claim without the written consent of the other, and if consent is refused, then the written consent of the industrial commissioner is required.[3] If a third party settlement is reached, the employer is required to file a memorandum of the settlement with the industrial commissioner.

PAYMENTS QUALIFYING FOR INDEMNITY

The statute provides that the employer is to be indemnified for "compensation" "paid to the employee." Employees have often argued that "compensation" means "weekly compensation" and that the cost of medical benefits is not subject to indemnity. The principal arguments for this position were that medical benefits are not paid to the employee, but rather, are paid directly to the medical provider pursuant to the employer's obligation under Section 85.27 to "furnish" medical care, and that "compensation" had

[3] The statute is not specific as to how the industrial commissioner's approval is obtained. However, Section 17A.2, Code of Iowa, defines a contested case as "a proceeding ... in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Thus, the consent proceeding is treated as a contested case, and although the Commissioner may (or may not) put it on a fast track, absent cooperation of the parties, an employee who is expecting to go to trial tomorrow or next week or probably even next month will not likely have the industrial commissioner's determination within that time frame, and if appeal rights are exercised, there is literally no possibility of obtaining quick consent.

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been interpreted in some other sections of the Code to mean "weekly compensation." These arguments were, however, considered and rejected in Johnson v. Harlan Community School District, 427 N.W.2d 460 (Iowa 1988), holding that the employer's right to indemnity extends to medical and hospital services furnished to the employee, and basing its decision on the premise that "the purpose of the subrogation provisions of section 85.22(1) is to permit the employer to recoup monies it has been required to pay .... (W)e see no reason why the legislature would distinguish between amounts which employers or insurers are required to pay injured employees as weekly benefits and amounts paid for the medical and hospital care which the employer is required to furnish ...." Previously, the federal court held likewise. Youngs v. Clinton Foods, Inc., 188 F.Supp. 15 (S.D. Iowa 1960).

Although no specific judicial authority can be cited, the reasoning of the Court's decision in Johnson would seem to apply equally to other forms of compensation provided under Chapter 85, such as burial expenses under Section 85.28 and rehabilitation benefits under Section 85.70. However, it would be difficult to argue that payments made by the employer not for the benefit of the employee, such as payments to the second injury fund under Section 85.65 and the cost of independent medical examinations under Section 85.38, are "compensation" qualifying for indemnity. In summary, all four kinds of workers' compensation benefits -

weekly, medical, rehabilitation, and burial - qualify for indemnity, but other payments and expenses do not.

While all four kinds of workers' compensation benefits qualify for indemnity, a distinction has been made between past workers' compensation benefits paid and future benefits to be paid. It is with great reluctance that I conclude that the Court has held that the employer's right of indemnity extends only to workers' compensation benefits paid at the time of the third party recovery and that no right of indemnification exists as to payments after recovery. Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992). In Fisher, although it is very difficult to decipher from the facts, it must have been the case that Fisher's third party judgment, including interest, exceeded the amount of the employer's lien by a relatively small amount. The employer sought a credit for this excess against future payments which it would owe. Because of the importance of the case, and because this writer considers it as either inarticulately written or poorly reasoned, the relevant portion of the case is here set forth in full:

> [7] VI. Hartford claims that, under Iowa Code section 85.22(1), it is entitled to a credit for future payments of workers' compensation benefits it will make. The contention is without merit.
>
> Iowa Code section 85.22(1) provides that "the employer ..., or the employer's insurer which paid [the compensation], shall be indemnified out of the recovery of damages *to the extent of the payment so made*...." (emphasis added).[4] We think this provision is significant for resolving

[4] Emphasis was added by the Court, not this writer.

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> Hartford's claim. Iowa Code section 85.22(1) makes no provision for a credit to the employer or workers' compensation insurance carrier against benefits that will be paid in the future. This is in sharp contrast with Iowa Code section 85.22(2), which makes a specific allowance for future workers' compensation benefits. We see nothing in chapter 85 directing a credit for the payments not made. Hartford's right to indemnification extends only to the payments it made at the time Fisher secured his recovery.

In criticizing Fisher, let me begin by saying that before Fisher, I know of no attorney, claimant's or defendant's, who believed future benefits were not qualified for indemnity. The industrial commissioner routinely gave credit against such payments and workers' compensation and third party settlements routinely took such credit into account. See, for instance, the recitation of facts in Bertrand v. Sioux City Grain Exchange, 419 N.W.2d 402 (Iowa 1988). Fisher based its reasoning on the differences between Subsections 85.22(1) and (2). Subsection (1) applies to cases pursued by the employee in which the employer has a right of indemnity and a lien. Subsection (2) applies to cases in which the employee does not pursue his or her own case, and the employer exercises its right to subrogation. Where the employer pursues the case, the statute provides that from the recovery the employer is to retain an amount equal to the present value of estimated future workers' compensation benefits. In other words, the employer keeps the third party recovery up to the amount it has paid or will pay, and then continues paying workers' compensation benefits to the full extent of the employee's

entitlement. The Court viewed this as being in "sharp" contrast to Subsection (1) which "makes no provision for a credit ...." But neither does Subsection (2); a credit involves not paying something which would otherwise be due, and keeping the third party recovery and continuing to make workers' compensation benefits is not a credit. Under Subsection (1) the employer clearly has no right to receive the value of future benefits at the time of third party recovery, but it is not a necessary interpretation of Subsection (1) that the employer has no right of indemnity from the recovery at the time future payments become due, which right could be exercised by taking a credit against the amount which would otherwise be payable at the time it became payable.

The Court has often held that the purposes of Section 85.22 are two: to allow the employer to recoup the monies it has paid and to prevent double recovery by the claimant. March v. Pekin Ins. Co., 465 N.W.2d 852 (Iowa 1991), Johnson v. Harlan Community School District, 427 N.W.2d 460 (Iowa 1988), and Black v. Chicago Great W. Ry., 187 Iowa 904, 174 N.W. 774 (1919). Neither of these objectives is met by Fisher. The employer pays out money which it is prohibited from recouping and the employee obtains double recovery. To paraphrase Johnson, I see no reason why the legislature would make such a distinction. The Court has often held that it interprets statutes consistently with their intended purpose and to avoid absurd results. Bertrand v. Sioux City

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Grain Exchange, 419 N.W.2d 402 (Iowa 1988), Beier Glass Co. v. Brundige, 329 N.W. 2d 280 (Iowa 1983). It should have done so in Fisher.

Not only does Fisher not accomplish the legislative purpose, it leads to another absurdity. The employee's and employer's relative recoveries are now dependent upon the timing of the third party recovery. What conceivable rationale could exist for such a formulation?

It is possible that Fisher should not be read as set forth above, but such a reading would be strained. If the Court used "credit" to mean that the employer is not entitled to present custody of that portion of the third party recovery representing future benefits which it will be required to pay, but such would seem to be inconsistent with its bold statement that the "right to indemnification extends only to the payments it made at the time Fisher secured his recovery." Nevertheless, reference to Bertrand v. Sioux City Grain Exchange, 419 N.W.2d 402 (Iowa 1988) demonstrates a loose usage of the word "credit" in this context in a prior case and also a case in which, although not challenged, the right of indemnification for future benefits was assured without comment.

PRESERVATION OF LIEN AND

EXERCISE OF RIGHT OF SUBROGATION

As mentioned earlier, the employee is required by statute to "serve" a copy of the third party original notice upon the employer not less than 10 days before trial.

Manner of service is not specified by the statute. The importance of the service requirement is that it triggers the employer's obligation of filing its notice of lien. Prospectively, to be safe, an employer should assume a very low standard of service, and probably should equate "service" with "notification". An employer should also assume that any kind of notice giving the essential information contained in the third party original notice will suffice. In Amour-Dial, Inc. v. Lodge & Shipley Company, 334 N.W.2d 142 (Iowa 1983), the employee "filed" a "Notice to Employer," and this was treated as the operative act triggering the employer's obligation to file its notice of lien, thus implying the sufficiency of something less than strict compliance with the statute, although it is not clear that the employer contested the sufficiency of the notice. There is no doubt that the best procedure is for the employer to file a notice of lien within 30 days after it becomes aware from any source of the pendency of the third party action; then no claim of late filing can possibly prevail. Retrospectively, if the filing deadline has arguably been missed, there is room to argue a higher service standard, up to and including service of a true copy of the third party original notice upon the employer in the manner of original notice.

Once sufficient notice has been given to the employer, it has 30 days to file, not merely serve, its notice of lien with the clerk of the court in which the third party action

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is pending.[5] In Amour-Dial, Inc. v. Lodge & Shipley Co., 334 N.W.2d 142 (Iowa 1983), the employer filed its notice of lien 36 days after notice was given. The Court held that "late filing of the notice of lien results in its termination." However, the Court distinguished between existence of the lien, which gives the employer rights against third party defendants, and the right of indemnity which exists independently and gives the employer rights against the employee and the employee's recovery. In other words, if the deadline is missed, in practical effect, the employer may lose the protection of having the third party defendant look out after its interests at the time of third party recovery, but it can still recover directly from the employee to the extent of the employee's recovery. The danger, of course, is that the employee may spend the money, so in those cases where the lien is lost, especially careful monitoring of the third party action is essential. It should, however, be noted that while Amour-Dial held that late filing resulted in loss of the employer's statutory lien, the Court refrained from passing on the effect of late filing on other rights the employer might have against the third party defendant.

In Amour-Dial, the employer argued that notwithstanding late filing of its lien, it nevertheless retained its right of subrogation against the third party. The Court rejected

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[5] A sample notice of lien is provided at the end of this article.

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[5] A sample notice of lien is provided at the end of this article.

this argument, holding that a right of subrogation did not come into being until "(1) a proper demand upon the employee to initiate the action and (2) a refusal or failure to take action within ninety days." Not having made the proper demand, and the employee having initiated action against the third party himself, the employer had no right of subrogation. The Court held likewise in Southern Surety Co. v. Chicago, Rock Island and Pacific Railroad Co., 215 Iowa 525, 245 N.W. 864 (1932).

In American Mutual Liability Insurance Co. v. State Auto Insurance Association, 246 Iowa 1294, 72 N.W.2d 88 (1955), the third party defendant settled with the employee for a pittance ($29.90) without the employer's consent shortly after the injury, in return for a covenant not to sue. The employer, learning of this occurrence, gave the employee the 90 day notice to sue, and when the employee could not sue, itself filed suit utilizing its right of subrogation. The Court approved this procedure. Further, relying on the provisions of Section 85.22(5), providing that covenants not to sue and other compromise settlements "shall be considered as having been paid as damages resulting from and because of legal liability against said third party," held that the pittance paid by the third party was an admission of liability, and the Court required the employer only to prove employee's damages. Amour-Dial specifically found it unnecessary to revisit American

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Mutual, but before relying on American Mutual an attorney should carefully evaluate its reasoning.

In practice, it frequently occurs that employers miss the deadline for filing their notice of lien and that they fail to give the 90 day notice to sue. While not desireable and while having negative consequences, such failures are usually not, as a practical matter, fatal to recovery. When the deadline for filing notice of lien is missed, careful monitoring and frequent contact with the employee's attorney is ordinarily sufficient to secure reimbursement at the time of third party recovery. Sometimes it is a greater problem when the employer waits until less than 90 days before the statute of limitations will run on the third party action to give the 90 day notice to sue. Under such circumstances, the right of subrogation is effectively lost, because by the time it comes into being, the statute has run. When the employer waits too long, the only recourse is to persuade the employee to file suit, and for the employer to then file its lien. This writer is aware of several occasions on which employers have successfully persuaded employees to do so, combining their powers of persuasion with full payment of the employee's attorney fees as well as costs and expenses.

THE REACHABLE THIRD PARTY RECOVERY

So far, we have seen that most of what an employer pays out qualifies for indemnity, at least, if paid before the third party recovery, but, from an employer's perspective,

it is unfortunately the case that the entire third party recovery cannot be reached.

Let's start, though, with an addition to the third party recovery which can be reached. In Fisher vs. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992), the Court held that interest included in and on the judgment is subject to the employer's right of indemnification. This is, incidentally, a separate question from whether the employer is entitled to recover interest on the benefits which it has paid, answered affirmatively in Farris v. General Growth Development Corp., 354 N.W.2d 251 (Iowa App. 1984).

The Court has also held that the employer's right to indemnity is not to be reduced by the percentage of fault allocated to the employee in the third party action. Fisher v. Keller Industries, Inc., 485 N.W. 2d 626 (Iowa 1992).

From the employee's third party recovery, there is to be deducted a reasonable attorney fee, with reasonableness to be judged by the same standards as are applicable to determining reasonableness of an attorney fee in any case, e.g., time spent, difficulty, the attorney's standing and expertise, etc. The employer is not bound by the employee's contingency fee contract. Kirkpatrick v. Patterson, 172 N.W.2d 259 (Iowa 1969). However, in Farris v. General Growth Corp., 381 N.W.2d 625 (Iowa 1986), the Court, though applying the aforementioned criteria, approved a one-third contingency fee, and this writer believes that in the absence of an easy recovery or substantial contribution to

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prosecution of the third party action by the employer's attorneys, a one-third contingency fee will usually be determined to be reasonable. In Farris v. General Growth Corp., 381 N.W.2d 625 (Iowa 1986), the workers' compensation carrier argued that attorney fees and costs should be paid off the top of any recovery, with the workers' compensation right of indemnity applying to the net recovery. This would, in effect, require the employee to pay all attorney fees and costs. The Court rejected this argument, holding that there was to be a sharing of the attorney fee, with a reasonable fee to be paid from the insurance carrier's share. In Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992), the Court held that expenses of litigation are an "adjunct to attorney fees," and are to be treated in the same way.

The Court has held that an employee's underinsured motorist recovery is not subject to the employer's right of indemnification. March v. Pekin Ins. Co., 465 N.W.2d 852 (Iowa 1991). In March, the employee had purchased the underinsured policy himself, but the employer sought indemnity from the employee's underinsured recovery. The Court reasoned that the language of Section 85.22 applies only against tort recoveries, and that underinsured motorist recovery is a recovery in contract. Narrowly, March does not address uninsured motorist recovery, but it does rely on uninsured motorist cases from other jurisdictions, and there is not more than a little doubt as to the Court's future

holding in an uninsured motorist case. The language of March also leaves room for arguing for a different result if a policy is purchased by the employer rather than the employee.

The most troublesome of problems associated with unreachable portions of third party recoveries occurs in those cases involving independent third-party recoveries by the employee's spouse or children. In Bertrand v. Sioux City Grain Exchange, 419 N.W.2d 402 (Iowa 1988), there was a recovery by the estate of the deceased employee, apparently unapportioned as to what part represented loss to the decedent's estate caused by premature death, and what portion represented loss of consortium by the surviving spouse and children. The decedent left a spouse, one minor and three adult children. The estate's recovery was divided among the spouse and children according to the laws of intestacy then existing. The employer had paid workers' compensation benefits only to the surviving spouse, and sought indemnity from the children. The Court held that "the employer's right to withhold benefits under section 85.22(1) extends only to that portion of the wrongful death proceeds actually paid or legally available to the person entitled to receive the workers' compensation benefits. The employer's liability to a dependent is not reduced by the amount of damages recovered by the estate but paid to someone else." In the future, a careful employer will consider whether to seek to have workers' compensation

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benefits apportioned by the industrial commissioner between the surviving spouse and children pursuant to Section 85.43.

The holding in Bertrand, can be criticized on several grounds, but even accepting the basic proposition which it enunicates, there are still grounds for serious challenge. First, workers' compensation benefits paid to an employee, or in the case of death to a spouse, are for the benefit of not just the employee, but also the employee's dependents. They are income replacement. The workers' compensation statute allows, but does not require, apportionment of the death benefit between a surviving spouse and children. Thus, in Bertrand, it can be seen that the argument for adult children keeping their share of the third party recovery is different than that of the minor child. Workers' compensation benefits paid to the spouse were for her benefit and that of the minor child, and it seems to this writer that reasoning not allowing the employer to reach at least the minor child's recovery is faulty. It can also be asked, what would the result have been had the decedent disposed of his property by will, so that a portion was to go to Aunt Tillie instead of to a dependent? Under Bertrand, it would seem that Aunt Tillies' share of the estate's wrongful death recovery might not be reachable. Workers' compensation death benefits are not paid to the employee or the employee's estate, but go directly to dependents. At a minimum, the Court should distinguish between the estate's recovery and the dependents' consortium

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recovery, allowing full indemnity from the estate's recovery for preventive death and indemnity from others to the extent they received workers' compensation benefits or were the beneficiary of those benefits.

In Mata v. Clarion Farmers Elevator Co-Op, 380 N.W.2d 425 (Iowa 1986), the full horrors of abuse encouraged by not allowing the employer full rights of indemnity blossomed. The employee was injured at work and received workers' compensation benefits. He filed a third party action, as did his spouse and children for loss of consortium. His spouse settled her claim for $30,000, his five children for $4,000 each and he dismissed his case, leaving the employer high and dry. The Court allowed the employer to intervene to contest the plaintiffs' outrageous (my characterization) actions, holding that the dismissal was ineffective in the absence of written consent by the employer, and remanded for the lower court to determine whether or not a part of the settlement should be allocated to the employee, but in either case allowing the employer to pursue the case for recovery against the third party. So in Mata, while the Court corrected the injustice of the dismissal, it still limited the employer's right of indemnification to the recovery by the person receiving the workers' compensation benefits, even though those benefits were paid not just for the benefit of the employee, but also for the benefit of his spouse and children.

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In summary, whether in the case of death or injury, the employer's right of indemnity should apply against the recoveries of all of those persons for the benefit of whom the workers' compensation benefit was paid whether or not the actual recipient, that is, the employee, the spouse and the minor children. Under Bertrand and Mata, however, the right of indemnity applies only against the recovery of the person entitled to receive workers' compensation benefits.

85.22 Liability of others — subrogation.

When an employee receives an injury or incurs an occupational disease or an occupational hearing loss for which compensation is payable under this chapter, chapter 85A or chapter 85B, and which injury or occupational disease or occupational hearing loss is caused under circumstances creating a legal liability against some person, other than the employee's employer or any employee of such employer as provided in section 85.20 to pay damages, the employee, or the employee's dependent, or the trustee of such dependent, may take proceedings against the employer for compensation, and the employee or, in case of death, the employee's legal representative may also maintain an action against such third party for damages. When an injured employee or the employee's legal representative brings an action against such third party, a copy of the original notice shall be served upon the employer by the plaintiff, not less than ten days before the trial of the case, but a failure to give such notice shall not prejudice the rights of the employer, and the following rights and duties shall ensue:

1. If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's attorney or the attorney of the employee's personal representative, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

2. In case the employee fails to bring such action within ninety days, or where a city or a city under special charter is such third party, within thirty days after written notice so to do given by the employer or the employer's insurer, as the case may be, then the employer or the insurer shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might. In case of recovery, the court shall enter judgment for distribution of the proceeds thereof as follows:

a. A sum sufficient to repay the employer for the amount of compensation actually paid by the employer to that time.

b. A sum sufficient to pay the employer the present worth, computed at the interest rate provided in section 535.3 for court judgments and decrees, of the future payments of compensation for which the employer is liable, but the sum is not a final adjudication of the future payments which the employee is entitled to receive and if the sum received by the employer is in excess of the amount required to pay the compensation, the excess shall be paid to the employee.

c. The balance, if any, shall be paid over to the employee.

3. Before a settlement shall become effective between an employee or an employer and such third party who is liable for the injury, it must be with the written consent of the employee, in case the settlement is between the employer or insurer and such third person; and the consent of the employer or insurer, in case the settlement is between the employee and such third party; or on refusal of consent, in either case, then upon the written approval of the industrial commissioner.

4. A written memorandum of any settlement, if made, shall be filed by the employer or insurance carrier in the office of the industrial commissioner.

5. For subrogation purposes hereunder, any payment made unto an injured employee, the employee's guardian, parent, next friend, or legal representative, by or on behalf of any third party, or the third party's principal or agent liable for, connected with, or involved in causing an injury to such employee shall be considered as having been so paid as damages resulting from and because said injury was caused under circumstances creating a legal liability against said third party, whether such payment be made under a covenant not to sue, compromise settlement, denial of liability or otherwise.

6. When the state of Iowa has paid any compensation or benefits under the provisions of this chapter, the word "employer" as used in this section shall mean and include the state of Iowa.

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOHN DOE,	:	
Plaintiff,	:	
vs.	:	
THIRD PARTY, INC.,	:	NOTICE OF WORKERS' COMPENSATION LIEN
Defendant.	:	

The employer, ABC Corporation, and the workers' compensation insurance carrier, DEF Insurance Company, give notice of their lien on plaintiff's claim for recovery and the judgment thereon, including interest, for all workers' compensation benefits paid and to be paid, plus interest thereon.

____
[Employer or Insurance Carrier Representative or Their Attorney]

Copy mailed to:
[Served on all parties or their attorneys by ordinary mail]

THE INTENTIONAL ACTS EXCLUSION OF PERSONAL LIABILITY INSURANCE POLICIES. <u>IS IT STILL VIABLE?</u>

SHARON SOORHOLTZ GREER
Cartwright, Druker & Ryden
Marshalltown, Iowa

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I. THE ANSWER: <u>Maybe</u>.

II. PRESENT STATUS.

A. There are currently two cases before the Iowa Supreme Court which may provide insight into this area.

1. <u>AMCO Insurance Co. v. Christopher J. Haht, et al.</u>, (Case No. 91-973 from O'Brien County, Iowa).

During a neighborhood ball game on June 9, 1988, Christopher Haht (age 11) threw a baseball which struck another young boy in the head. The young boy, Lottman, died a few days later. AMCO filed a petition seeking a declaratory judgment that its homeowner's policy did not provide coverage to Christopher Haht for his legal liability arising from the death of Lottman and that there was no duty to defend. AMCO asserted its exclusion for intentional acts as the reason for its denial of coverage and duty to defend.

Christopher said in his recorded statement that he threw the ball at Lottman intending to hurt him. Two years later in a deposition, after the suit is filed, Christopher said he did not intend to hit Lottman with the ball or intend to hurt him. The trial court believed the transcribed statement version, but held that the "hurt" intended by Christopher did not rise to a level of bodily injury.

The trial court determined that because Christopher did not intend to seriously injure Lottman, the exclusion in the homeowner's policy was not triggered. AMCO appealed and the case was submitted and argued to the Supreme Court this summer with an expected decision some time in the fall of 1992.

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2. Matthew Mark Boles v. State Farm Fire & Cas. Co., (No. 91-1463, Story County, Iowa).

On March 14, 1989, Gregory Martin and Matthew Boles were in a barroom fight. Both men had been drinking. Martin, who was extremely intoxicated, was making rude comments to women in the bar when he made a rude sexual comment to one of Boles' friends and lifted up the back of her long sweater. Boles protested. Martin blew smoke in Boles' face and made a disparaging comment to Boles and Boles, using his fist and a drinking glass, struck Martin in the head on the side of his face. Boles' explanation was that it was a mere reflex and that his right hand reflexively came off the table and he had forgotten the beer glass in his hand. The beer glass then hit Martin above the left eye causing injury.

In the declaratory judgment action, the Court determined that the act was an intentional act by Boles and found in favor of State Farm on its Motion for Summary Judgment. On the appeal of this matter, the Court of Appeals found that Boles reflexively brought his hands up to separate himself from Martin and did not intend to hit or harm Martin. Because the injury was not due to self defense and because the facts show there was a possibility the injury was not intended or expected by Boles, the Court of Appeals required State Farm to provide a defense in the Martin action. The case has now been granted further review by the Supreme Court and will be considered in October of 1992.

B. Today to avoid the intentional injury trap, creative lawyering on the part of the plaintiff's counsel has so far proven successful.

C. An insurance company does not have a duty to defend if there is not coverage, since the duty to defend is contractual. State Farm Auto. Ins. Co. v. Malcolm, 259 N.W.2d 833 (Iowa 1977). To determine if there is a duty to defend, the court construes the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record. Id. If

it appears that the claim made is not covered by the indemnity insurance contract, the insurer has no duty to defend. Weber v. IMT Ins. Co., 462 N.W.2d 283, 285 (Iowa 1990). There is no duty to defend if the company is not bound to indemnify the insured, even though the claim against him should prevail in that action. Id.; New Hampshire Ins. Co. v. Christy, 200 N.W.2d 834 (Iowa 1972); Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443 (Iowa 1970).

Therefore, the insurer's duty to defend arises when there is a potential or possible liability to pay based on the facts at the outset of the case. Weber v. IMT Ins. Co., 462 N.W.2d 283, 285 (Iowa 1990); McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117, 119 (Iowa 1984). If the totality of the facts fail to disclose potential coverage (the insurer does not have to assume that other facts might be added later which would require coverage) the insurer can proceed in two ways: (1) it can initiate a declaratory judgment action against its insured, or (2) it can elect to do nothing running a risk that the insured will seek indemnity if coverage is established at trial. Id.

III. THE ANALYSIS:

A. Typically, an insurance policy contains provisions relating to the type of coverage provided and typically the policy sets forth the exclusions precluding certain activities from coverage. For purposes of our discussion, some sample language is provided from an insurance contract:

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LIABILITY COVERAGES

If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and

2. provide a defense at our expense by counsel of our choice. . . .

* * *

Occurrence is generally defined as:

> An accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**.

* * *

EXCLUSIONS

Coverage X and Coverage Y do not apply to:

1. **bodily injury** or **property damage:**

   (a) which is either expected or intended by an insured; . . .

B. First examine whether there is coverage under the insurance contract. For example:

1. Typically the analysis starts with whether there is an occurrence under the policy. Occurrence usually is defined as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Thus, if the actions of the insured, from the standpoint of the insured, are intended, there can be no occurrence.

   a. The termination of an employee is an intentional act and not an occurrence. You cannot terminate an employee by accident. John's Cocktail Lounge v. Insurance Co., 563

A.2d 473 (NJ 1989).

b. A wrongful discharge claim is not covered by a comprehensive liability policy as an employee's discharge is not an occurrence under the policy. Smithway Motor Xpress v. Liberty Mut., 484 N.W.2d 192 (Iowa 1992).

c. Intangible losses such as loss of use or diminution of value are not property damage where property damage is defined as physical injury or destruction to tangible property. Kartridg Pak Co. v. Travelers Indem. Co., 425 N.W.2d 687 (Iowa App. 1988). The specific issue in the Kartridg case, was whether the diminution in value of the backbones (which were run through a deboner to separate and meat and bone but did not accomplish the result needed in order to sell the meat for human consumption), constituted "property damage" as defined by the policy. If the diminution in value of the backbones was considered property damage, then it would follow that lost profits and investments would be covered by the policy. Id.

d. City of Carter Lake v. Aetna Cas. & Sur., 604 F.2d 1052 (1979). The City of Carter Lake was held not to intend to cause the sewage backups even though the underlying acts and omissions of Carter Lake were intentional and therefore the exclusion for intentional acts was not applicable. The Carter Lake case held that if the insured knew or should have known that there was a substantial probability that certain results would follows his acts or omissions, then there would not be an occurrence or accident as is defined in the policy. The result ceased to be expected and the coverage is present as the probability that the consequences will follow decreases and becomes less than a substantial probability. R. E. Keeton, Basic Text on Insurance Law, Section 5.4(c), at 298-300 (1971).

2. The cardinal principle in determining coverage under the policy is the intent of the parties. When the definition of occurrence is examined, it is clear that the plain terms of the policy require that injury or damage be neither expected nor intended. The definition of accident alone

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would halt any argument that the employer in a termination case intended the act, but not the resulting harm.

3. The argument that while the act might be intended, the incidental harm is not does not result in coverage. The Smithway court determined that the intentional discharge of an employee is not an accident and any resulting damages claimed, such as lost wages, emotional and mental injury, are intended and expected. Smithway Motor Xpress v. Liberty Mut., 484 N.W.2d 192, 195 (Iowa 1992).

4. The determination of whether an injury is accidental is made from the point of view of the insured and what he intended or should reasonably have expected. In Re Wade v. Continental Ins. Co., 514 F.2d 304, 306-07 (8th Cir. 1975). Accident is an unintended and unexpected event. Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990).

C. Next, examine the exclusions in the contract of insurance. Even with an occurrence, the policy still may not afford coverage if such activity is specifically excluded in the contract. Obviously, if the insured intended the act and the injury, the exclusion applies. If, however, the insured claims he or she did not intend the actual injury, the exclusion still operates if the insured is deemed to have expected the injury.

1. If it is determined from the standpoint of the insured that there has been an occurrence, the next step is to examine the exclusions under the policy to see if they prohibit coverage. The insurer must define any exclusions in the policy in clear and explicit terms. State Farm Auto. Ins. Co. v. Malcolm, 259 N.W.2d 833 (Iowa 1977). The Court cannot strain the words and phrases of the policy to impose liability where it is not intended and is not purchased. Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443 (Iowa 1970).

2. A victim (Altena) of sexual acts committed by the insured brought a declaratory judgment action seeking coverage under the insured's homeowner's and umbrella liability policies. Altena v. United

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Fire & Cas. Co., 422 N.W.2d 485 (Iowa 1988). Senard, the insured, denied that he intended to harm Altena by such contacts.

"Bodily injury" was defined as bodily harm, sickness, or disease including required care. Excluded from the coverages under the two policies were any acts committed by the insured with the intent to cause personal injury and any bodily injury which is expected or intended by the insured. Coverage under both policies was not allowed because of the nature of the act.

The intentional act exclusion is consistent with "the central idea that insurance concerns fortuitous losses only" and generally provides "no coverage for unintentional loss." R. E. Keeton, Basic Text on Insurance Law, Section 5.4(b), at 291 (1971). The Altena court adopted the majority view on the type of intent that must be established under the intentional injury exclusions. The majority view is that the insured must have intended the act and to have caused some kind of bodily injury.

3. As in the Altena case, the intent to do the act and cause injury may be "actual" or may be inferred by the nature of the act and the accompanying reasonable foreseeability of harm. Thus, in the Altena case, the fact that the insured actually did not intend the harm that was suffered by the victim, was irrelevant. Because the insured's acts amounted to sexual abuse, the intent to injure was inferred as a matter of a law. The Altena court also noted that the criminal character of the acts was further recognition of the injury inherent in the commission of them. Id.

   The Altena court specifically found that it is immaterial if the actual injury caused is of a different degree or character than that intended. Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 488 (Iowa 1988).

4. Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990). The Court analyzed the case not on whether there was an occurrence under the terms of the policy, but whether the pollution exclusion (which excluded coverage for bodily injury or property damage from the discharge of waste materials) is sudden and accidental in the case where hog manure

was discharged on the roadside destroying the neighbor's sweet corn crop. The Court determined that hog manure is waste. Id.

The insured knew about the manure spills on the road, so they were expected and not accidental. The Court determined that the Webers/insureds had no coverage under the liability policy because the pollution exclusion precluded coverage based upon the fact that the discharge of the waste material on the road was not accidental in view of the history of such discharges on the road.

The Court then looked at the umbrella policy for the Webers and determined that an occurrence did take place within the meaning of the umbrella policy. The focus was whether the property damage (the injury to Newman's corn) was expected or intended from the standpoint of the insureds, Webers. Although the insureds knew that they were spilling manure, there was no evidence that they spilled the manure in an effort to intentionally contaminate the neighbor's sweet corn crop.

In determining whether the damage was expected from the standpoint of the insured (whether they knew or should have known that there was a substantial probability that certain consequences would result) the Court determined that the insured did not have any reason to know that Newman was suffering property damage to his sweet corn as a result of the manure spills.

5. McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117 (Iowa 1984). During a dispute at a county fair involving cattle, words erupted into action resulting in an assault and battery suit against McAndrews (the insured) and Clemons. McAndrews asserted that he acted only in self defense in popping Clemons. McAndrews felt that since the act was done in self defense, it was not intended. The Court, assuming that McAndrews did act in self defense, determined that the intentional act exclusion applied because there is an inference of intent to harm that necessarily follows the deliberate blow to someone's face, even though there may be a justification for the intentionally caused harm.

6. State Farm Mutual Auto. Ins. Co. v. Coon, 208 N.W.2d 532 (Mich. 1973). State Farm filed a declaratory action claiming it had no liability to

suffering is strictly limited to that time period between the incident which caused death and death itself. Lang, 294 N.W.2d at 562; Schlichte, 265 N.W.2d at 727. Instantaneous death bars claims for pain and suffering, including claims for hedonic damages, in a survival action. Therefore, hedonic damages' status as an element of pain and suffering requires that the decedent survive for some interval between the injury and death, that the decedent maintain some level of consciousness during this interval, and that the decedent be cognizant of the damage.

Nevertheless, two lines of cases have permitted recovery of hedonic damages for the interval succeeding a decedent's death. Actions brought pursuant to 42 U.S.C. § 1983 have granted hedonic damages for the time period which followed a decedent's death. See, e.g., Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). In effect, this permitted hedonic recovery for the loss of life. Section 1983 actions were designed, however, to rectify tort damages occasioned by the infringement of a constitutional right. Therefore, these damages were not intended to compensate the decedent as much as rectify or punish the constitutional deprivation which resulted in the decedent's death. Sterner, 747 F. Supp. at 274 (determining that the underpinnings of section 1983 actions were inapplicable to claims governed by state law which are not based upon constitutional deprivations nor designed for deterrence). In addition, Connecticut's wrongful death statute specifically permits recovery of hedonic damages after a decedent's death. Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271 (1974) aff'd in part and rev'd in part, 524 F.2d 384 (2nd Cir.); Kinery v. Danbury Hospital, 183 Conn. 446, 439 A.2d 406 (1981).

Regardless of the rhetoric, according to Iowa law, three things must be established before hedonic damages may be recovered in a survival action. First, recovery pursuant to the survival statute is contingent upon the decedent's entitlement had he or she lived. Accordingly, an estate may recover hedonic damages only if the decedent would have been entitled to that award had he or she lived. Second, it must be established that the decedent survived the accident and was cognizant for some interval prior to death.

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Finally, substantial evidence must indicate that the decedent actually experienced pain and suffering.

Pain and suffering damages are awarded in survival actions to compensate decedents for any conscious pain and suffering experienced prior to death. The decedent could have sought this recovery had he lived. Awarding hedonic damages when the deceased did not experience conscious pain and suffering or mental anguish would directly contradict the rule limiting damage awards to the actual loss suffered by a claimant. Dealers Hobby, 255 N.W.2d at 134; Adams, 173 N.W.2d at 105.

IV. Theories of Recovery of Hedonic Damages in Wrongful Death/Survival Actions.

A. Theories Supporting Hedonic Damage Awards in Iowa Wrongful Death Cases and Responses.

Although hedonic damages are not typically awarded for the value of lost life (i.e. for the period subsequent to a decedent's death), several commentators advocate hedonic awards in that circumstance. Furthermore, it has been vehemently argued that hedonic loss should be extricated from claims for pain and suffering because the two injuries are distinct, separate losses suffered by an injured party. This section will summarize theories which may arise or be forwarded by the plaintiff in this dispute.

1. Hedonic Damages Should Be Awarded For Loss Of Life.

(a) Plaintiff's Argument: Hedonic damages should be allowed for the time period subsequent to death, thus compensating decedents for the loss of life. Otherwise, compensation is not awarded for a decedent's loss of life. It is wrong and patently improper to argue that a decedent's life has no intrinsic value aside from its pecuniary or monetary worth - its value to the estate. Accordingly, awards for the loss of a decedent's life will prevent inadequate compensation for the decedent or his estate.

Response: Iowa's integrated Survival/Wrongful Death scheme is designed

to enable an estate to prosecute actions held by a decedent, recover for damages experienced subsequent to an injury and prior to death, and compensate the estate for its loss. If compensation for life itself was intended, the legislature could have specifically provided for recovery of that loss or the judiciary could have interpreted the statute to include that recovery. Instead the statute only permits those recoveries which a decedent could have made had he survived, enlarged to include pecuniary loss suffered by the estate.

(b) Plaintiff's Argument: Although tort and personal injury damages are awarded to compensate or make the victim whole, deterrence is a legitimate goal of damage awards. Consequently, limiting the recovery of decedents or their estates to damages actually experienced or pecuniary losses suffered fails to deter tortious conduct. Conversely, hedonic damage awards will serve as an incentive to regulate and minimize tortious behavior.

Response: It is unlikely that individual actors will consider the fact that hedonic damages can be awarded when evaluating their actions. Therefore, hedonic awards will not serve to deter tortious conduct; but instead, merely increase awards to decedents' estates. Furthermore, if a tortfeasor's behavior is reckless or extremely indifferent to the potential consequences, Iowa courts have the authority to award punitive damages in a survival action. The potential threat of punitive damages should adequately deter egregious behavior, without injecting the hedonic damage inquiry into all survival actions.

(c) Plaintiff's Argument: If hedonic damages are only granted to injured parties who survive tortious injury, and not those wrongfully killed, it may in reality become cheaper to kill than to gravely injure a party.

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Response: This anomaly will always be present in jurisdictions which only compensate consciously experienced losses. Furthermore, hedonic damage awards will not further the compensatory purpose of tort/survival damage awards. If the decedent did not experience the loss, an award will not compensate the decedent nor make him whole. In addition, the estate only suffered financial damage because of the untimely death. The best means to compensate the estate is with an award for the financial loss it experienced. Iowa's hybrid statute accomplishes this goal.

(d) Plaintiff's Argument: It is inappropriate to deny awards for hedonic loss merely because they are too speculative. Damages for pain and suffering, loss of consortium, and mental distress are very speculative; yet are regularly awarded. The speculative nature of hedonic damages does not mandate denial of their recovery when other speculative damages are readily recoverable. Furthermore, the mere fact that damages are difficult to quantify does not justify blanket abolition.

2. Hedonic Losses Should Be Independently Considered.

There are also several arguments which support separation of hedonic damages from the pain and suffering category.

(a) Plaintiff's Argument: Hedonic damages should be independent of pain and suffering awards because hedonic loss is distinguishable from pain and suffering. Pain and suffering damages are awarded for what is imposed upon an injured party. In other words, the negative effect of tortious conduct on an injured party's life. Conversely, hedonic damages measure what is taken away from an injured party, a deprivation of the right to live life and appreciate its attendant joys.

Response: Although this argument is influential, it does not negate the argument

that hedonic damages should not be awarded to an injured party who did not consciously suffer or was not cognizant of the deprivation.

(b) Plaintiff's Argument: Independent awards for hedonic loss and pain and suffering will facilitate efficient operation of the judicial system. Separate consideration of these two categories will clarify issues for juries. A jury can specifically award separate amounts for pain and suffering and for the deprivations of life caused by an injury. Furthermore, requiring juries to separately delineate these awards will facilitate appellate review. Appellate courts will be able to determine exactly what was awarded for each element of a victim's loss. Consequently, appellate courts may more easily determine if a damage award was excessive or inadequate.

Response: Although some of these arguments are influential, they do not change the status of Iowa law nor mandate reversing the longstanding construction provided to the survival statute. Recovery in survival actions is strictly limited to those actions or elements upon which the decedent could have recovered had he survived, expanded by recovery for damage to the estate. A separate hedonic element is clearly duplicative of the pain and suffering element.

B. Rationales Against Hedonic Awards in Iowa.

1. Hedonic damage awards may facilitate or engender double recovery. Our judicial system consciously avoids awards which duplicate other elements of damage already granted. Double recovery is abhorred. Factfinders are eminently aware of the effect an injury has on a person's life, this issue is constantly before them. Consequently, hedonic awards may duplicate elements which a jury has already considered and compensated when awarding damages for pain and suffering. Accordingly, hedonic damages should merely be an element considered when awarding damages for pain and suffering.

2. Hedonic damage awards encourage speculative damage grants. Separate consideration of this nebulous, intangible, highly speculative element of damages will merely heighten jury conjecture.

3. Damage awards are designed to compensate an injured party for injuries sustained. Separate hedonic awards will merely serve to artificially increase damage awards. Furthermore, hedonic damage awards in death actions, where a decedent did not consciously suffer, will not further this compensatory rationale.

4. A decedent cannot be made whole for his loss of life. Consequently, monetary damages will not compensate the decedent for that loss. In effect, said damages will become punitive. Accordingly, the compensatory purpose of damage awards will be subverted. However, this argument is not wholly determinative in Iowa. Although many states deny recovery of punitive damages in wrongful death/survival actions, the Iowa Supreme Court clearly held that punitive damages may be recovered pursuant to a survival action.

5. Hedonic damage awards for a decedent's loss of life will merely augment estates with no concomitant benefit to the decedent. The decedent will not garner any benefit from a hedonic damage award, nor will the decedent appreciate this award in any way. It merely enlarges the estate and benefits the decedent's survivors. Survivors who were not entitled to this hedonic award for any damages they suffered, but will instead receive a windfall merely because the decedent lost his life.

V. Expert Evidence

"The hedonic value of life refers to the value of the pleasure, the satisfaction, or the 'utility' that human beings derive from life, separate and apart from the labor in earnings value of life. To determine the hedonic loss, we seek to measure the value of human beings separate from the value of their output as mere 'economic machines.'"

9.1 Michael L. Brookshire & Stan V. Smith, Economic/Hedonic Damages: The Practice Book for Plaintiff and Defense Attorneys.

Economists have developed two methodologies by which a value can be placed on human life. Experts are now regularly employed in hedonic damage cases to explain the monetary value of life itself to the jury.

E

A. The Human Capital Approach.

This method measures the value of life by calculating what the person's death cost the overall economy in terms of lost economic productivity. J. McClurg, It's A Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 Notre Dame L. Rev. 57 (1990).

This method, based on economic output, has been largely rejected as too narrow in that it cannot measure the "pleasure" component in life, beyond production in the marketplace. Note, Hedonic Damages For Wrongful Death: Are Tortfeasors Getting Away With Murder?, 78 Geo. L.J. 1687 (1990).

B. The Willingness to Pay Approach.

This method attempts to calculate a figure to reflect the subjective value each person places on his or her life. Note, Hedonic Damages for Wrongful Death: Are They Getting Away With Murder?, 78 Geo. L.J. 1687 (1990).

1. Economists determine what a person or group is willing to pay for a safety item or device to reduce chance of death or the premium they require to work in a high risk setting, and then work backwards from those figures to evaluate life itself.

2. Consumer Purchasing Studies.

   (a) Evaluates dollars spent by consumer on safety products like smoke alarms and seatbelts, and produces a value for life.

   (b) Example: If people are willing to pay $100.00 for an airbag in an automobile that will recuce the probability of their death in a head-on collision from 3 in 10,000 to 2 in 10,000, then the value of a human life is $1,000,000.00. In other words, if 1/10,000th of a life is worth $100.00, then

the whole life is worth 10,000 times $100.000 or $1,000.000.00.

(c) These studies value life in a range between $450,000.00 to $610,000.00.

R. Palfin & B. Danninger, § 2.1 Hedonic Damages 5 (1990).

3. Wage Studies.

(a) Measures the differences in deaths and wages by occupation, and estimates the value of life by the premiums paid to workers in high risk jobs.

(b) These studies yield values for life between $1.5 million and $8.5 million. R. Palfin & B. Danninger, § 2.1 Hedonic Damages 6 (1990).

4. Contingent Valuation Studies or Surveys.

(a) Uses hypothetical questions to ask people how much they would pay to reduce their chance of dying in a particular situation, like an auto accident.

(b) An advantage is that hypothetical situations can be drawn closely to case on trial.

(c) Has produced values for life ranging from $2.8 million to $ 3 million.

R. Palfin & B. Danninger, § 2.1 Hedonic Damages 7-8 (1990).

Overall valuation under the Willingness to Pay Approach ranges from $50,000.00 to $8.9 million per life. Blomquist, The Value of Human Life: An Empirical Perspective, 19 Econ. Inquiry 157 (1981).

C. Federal Government Valuations on Life.

1. The Environmental Protection Agency has sponsored two studies, one in 1983 and an update in 1989, on the value of human life.

(a) Executive Order 12291 issued in 1981 by President Reagan required federal agencies

to perform a cost-benefit analysis for proposed regulations.

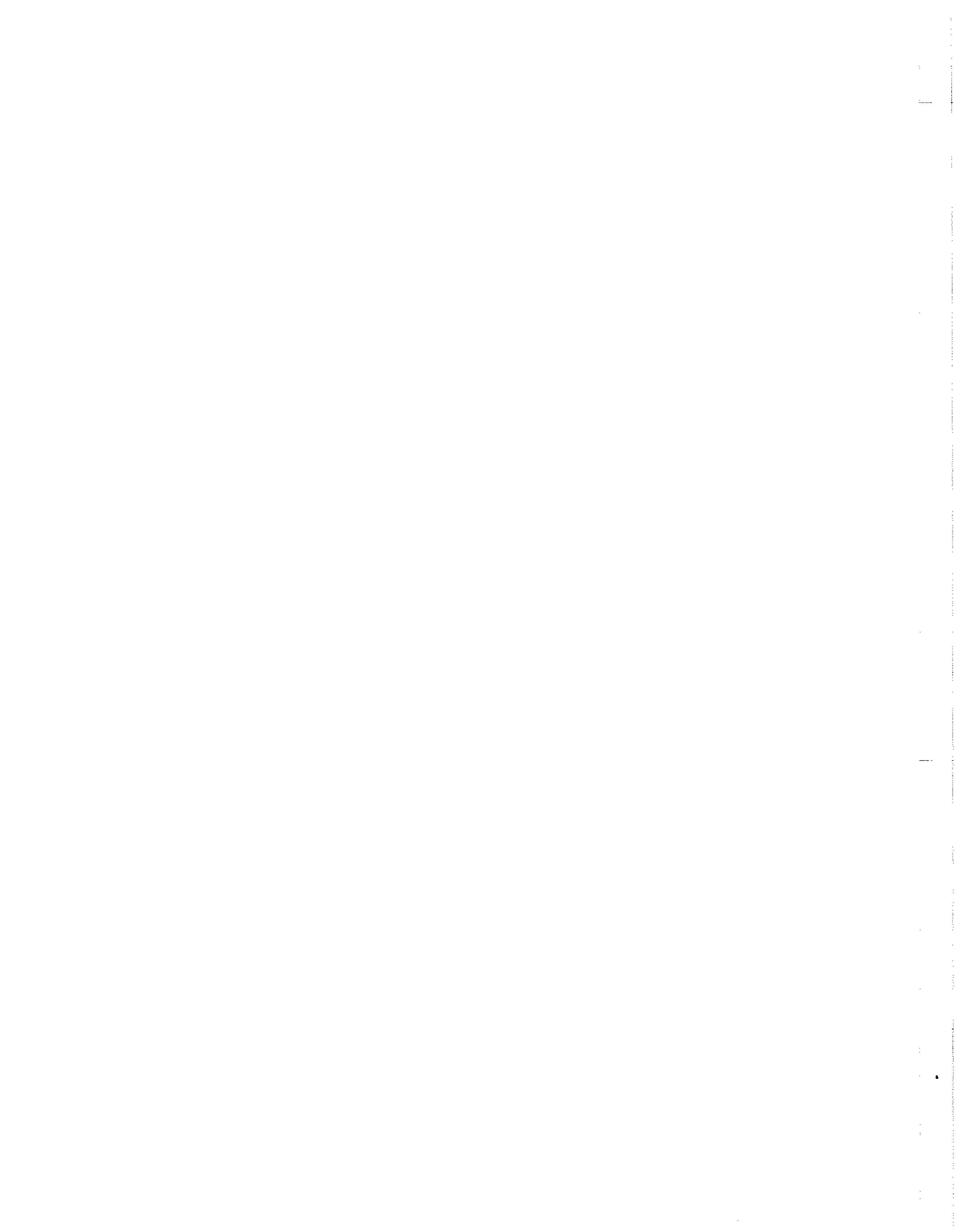
(i) EPA's attempt to show how many lives will be saved and the value of those lives.

2. 1983 study: Valuing Reductions in Risks: A Review of the Empirical Estimates.

   (a) $400,000.00 to $7,000,000.00.

3. 1989 Study: Valuing Risks: New Information on the Willingness to Pay for Changes in Fatal Risks.

   (a) $1.5 million to $3 million.



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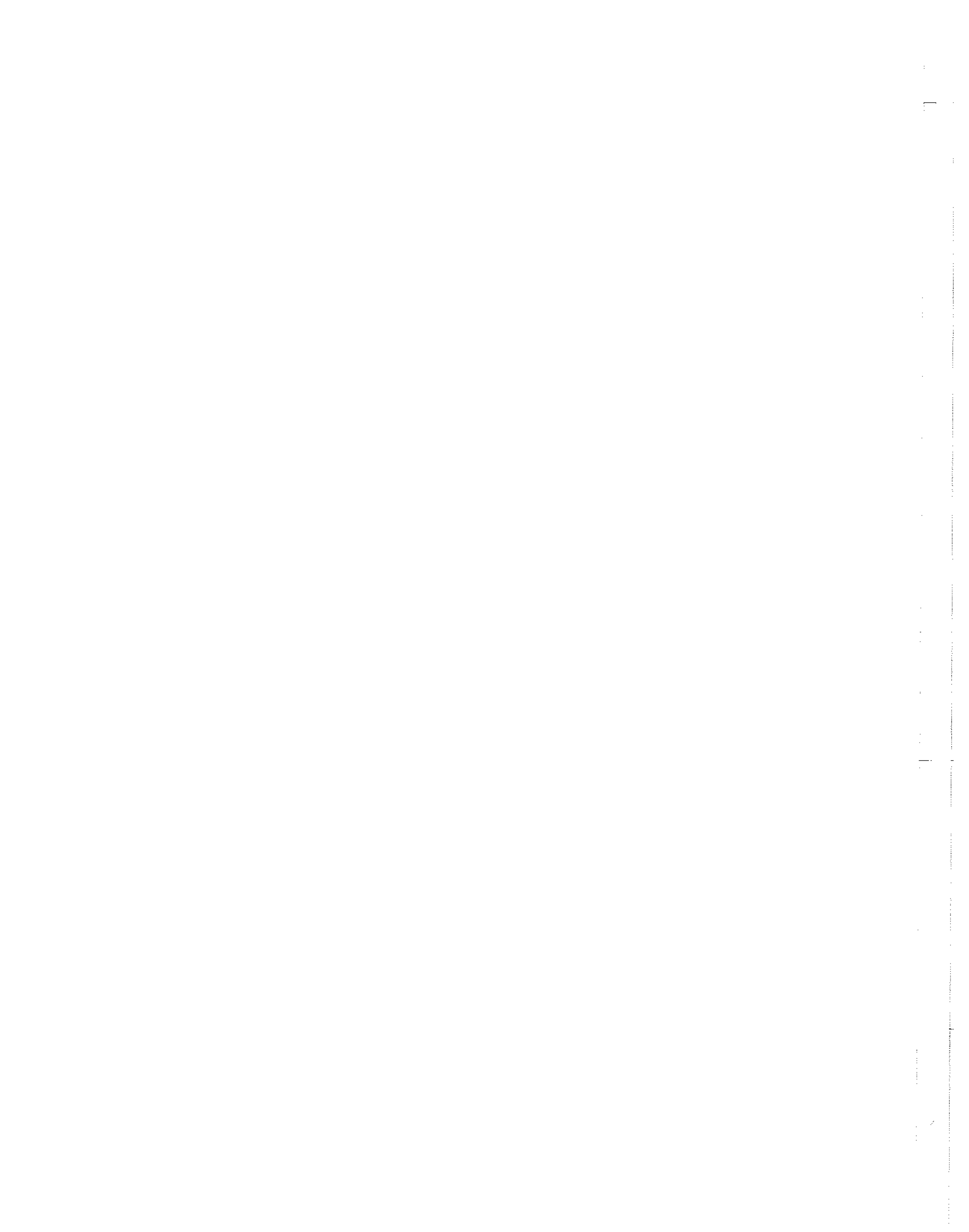


Introduction

Many attorneys are discovering that computer animation can communicate a precise, focused picture of their client's claims. Nothing creates a "you are there" experience more emphatically than a professionally designed and developed computer-generated animation.

Definitions

1. Computer animation refers to the display of a sequence of computer-generated images, and differs from cartoon animation in two ways.

   (a) Motion in computer-generated animations can be based on scientific analyses.

   (b) Images produced can be based upon precise object definitions.

2. Two methods are used to generate the motion of objects in a computer animation.

   (a) **Computer simulation** utilizes the computer to predict the behavior of physical systems, resulting in a scripted animation.

   (b) **Key frame animation** refers to animation where the motion is generated by interpolating between specified frames, without using the laws of physics to calculate the motion of the objects.

3. There are two methods used to display the objects in computer animation.

   (a) **Wire frame animation** uses line segments to display objects.

   (b) **Shaded animation** displays objects as solids with color and highlights, resulting in more realistic objects.

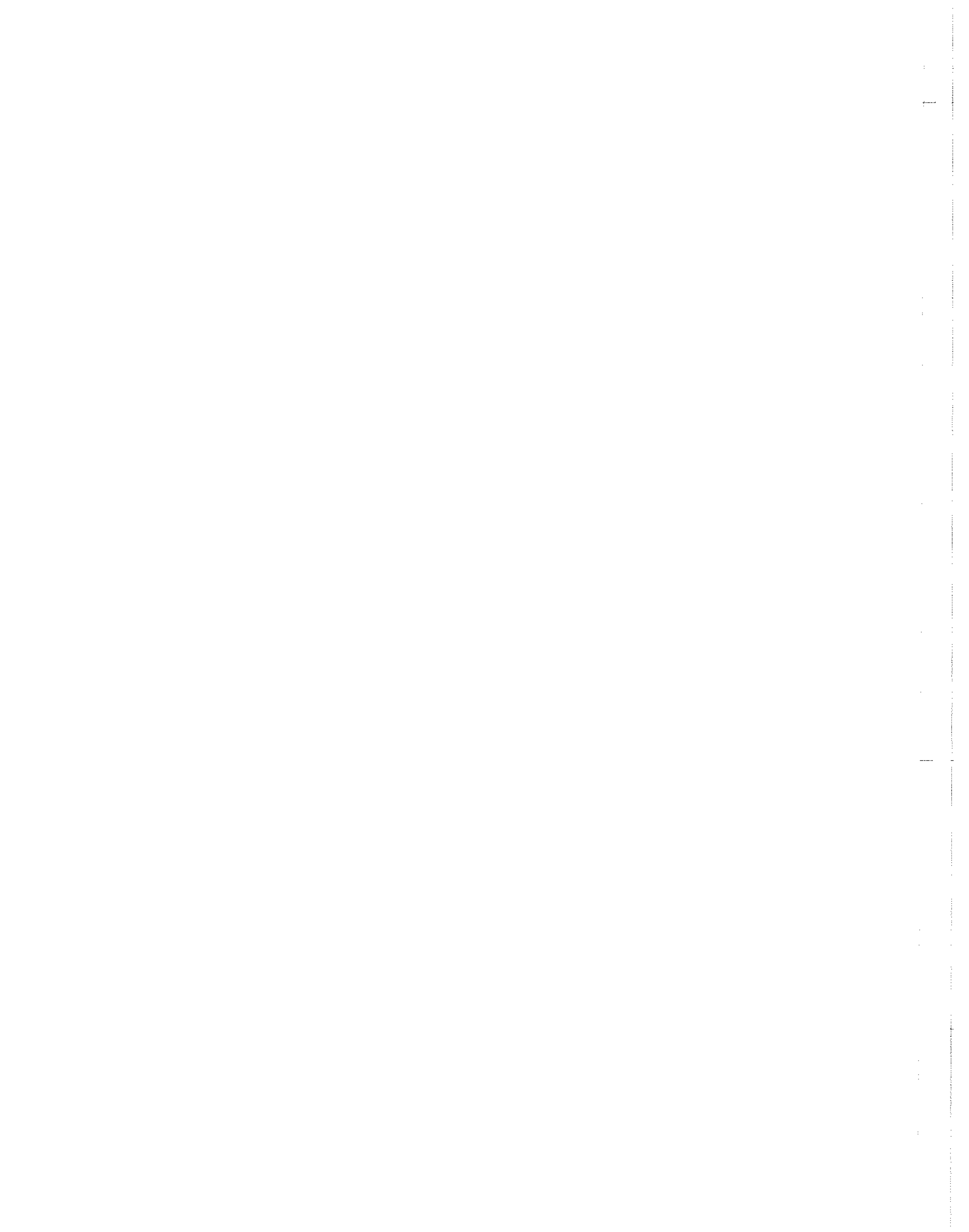
4. Animations can be created in either two or three dimensions.

Special Techniques

1. Computer animation supports a variety of useful presentation techniques providing substantial benefits over live videotape or photographs.

   (a) **Viewpoint** - Objects and events can be animated from any vantage point.

   (b) **Motion** - The speed of an animation can be changed to help illustrate complex relationships.



(c) **Detailing** can be used to emphasize a particular part of a mechanism, highlighting parts with texture or color, or using cross sections of an object.

(d) **Dissolves** - Photographs can dissolve into the computer-graphic representation of a scene.

Case Histories

1. **Brush v. Rockwell et. al.** - Aviation

   (a) An animation was used to explain a complicated linkage in a small aircraft.

      (i) Plaintiff claimed that a loose hose clamp interfered with a portion of the elevator control linkages, causing the plane to crash shortly after takeoff.

      (ii) Defendant needed to prove that the loose clamp could not have interfered with the linkages to the degree needed to cause the crash.

   (b) EAI created two animations.

      (i) The first illustrated that the clamp could not have caused the accident.

      (ii) The second indicated that the accident was caused by the pilot's seat sliding back, based on eyewitness testimony and physical evidence.

      (iii) Animations helped achieve a favorable out-of-court settlement.

2. **Persis Ballou v. Ivan Joe Hudson & Klug, Inc.** - Bicycle/Truck.

   (a) An animation was used to show the timing of an event, when a truck and a bicyclist collided at an intersection.

      (i) The bicyclist claimed that the truck driver was at fault.

      (ii) The defendant needed to show the jury the relative positions of the truck and bicyclist during the period leading up to the accident and show that the bicyclist had ample time to stop and avoid the truck.

   (b) EAI reconstructed the accident backward from the point of impact.

      (i) The animation became the focal point of the defense argument.

      (ii) The jury determined that the bicyclist could have stopped before the point of impact, and that the defendant was not negligent.

3. **Triple Trailers**

(a) Debate over triple trailers.

(i) Proponents of triple trailers argue that the trucks have increased fuel economy and they decrease exposure of the public to trucks.

(ii) Several studies have shown that acceleration amplification, the "crack-the-whip" phenomenon, leads to decreased stability of the triple trailers.

(b) Portland, Oregon accident where a triple trailer lost control on an entrance ramp to the interstate.

(i) Reconstruction and animation showed that the tractor's loss of control and resulting accident would have occurred even if the tractor had been pulling a single trailer.

(ii) Animations were shown on a CNN "Special Assignment" addressing the triple trailer issue.

(c) Accident involving a triple trailer that had maneuvered to avoid a deer on the free-way.

(i) The motorist who had hit the deer was on the shoulder of the freeway inspecting his car for damage.

(ii) The last trailer of the truck whipped out as the truck passed, striking the motorist.

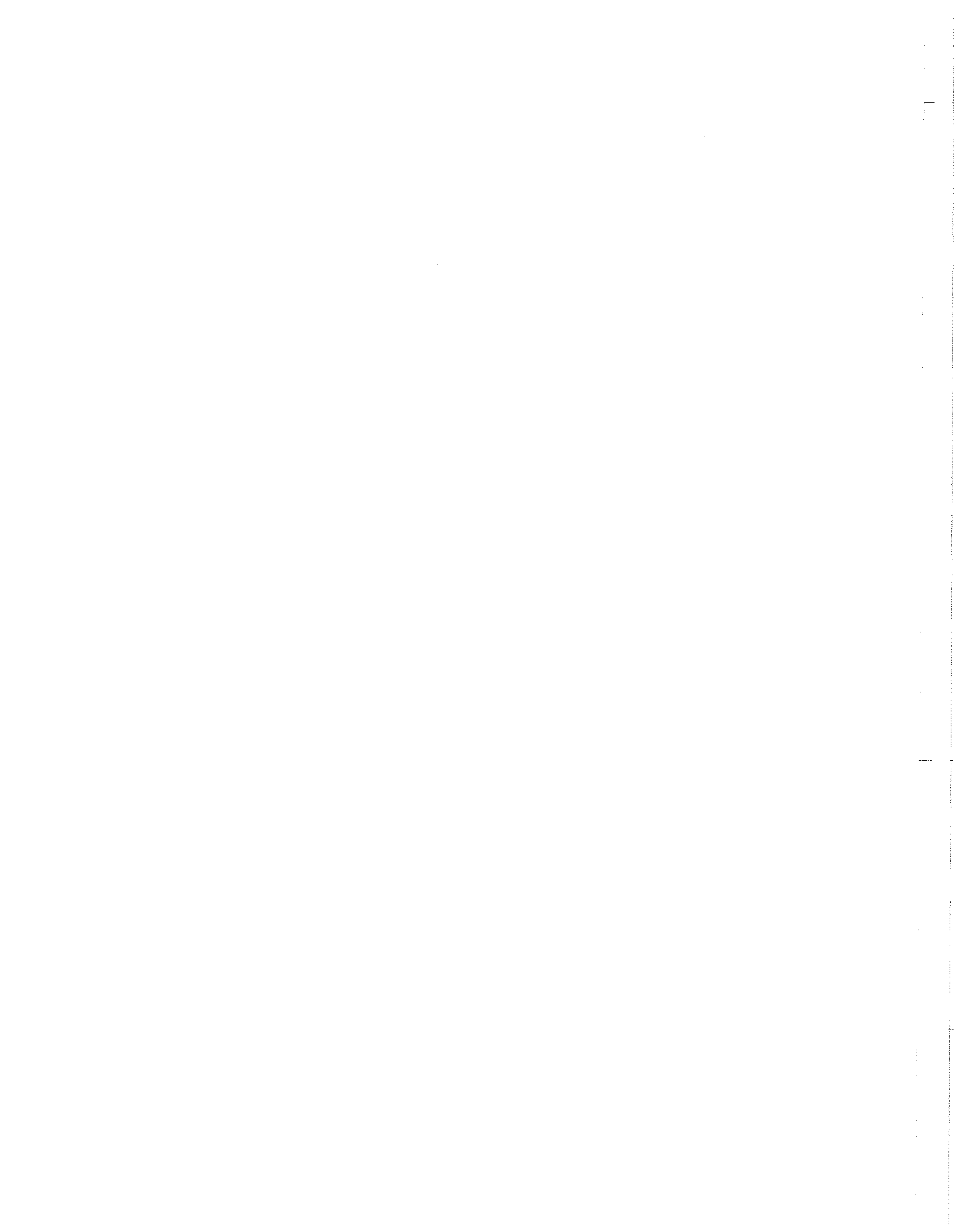
4. **Laba, et. al. v. Province of New Brunswick, et. al. (Cormier Village Hayride Accident)** - Truck Rollover

(a) This case involved a log truck travelling along a country road that rolled over attempting to negotiate a turn at the bottom of a hill.

(i) Plaintiff claimed that a momentary increase in superelevation in the curved part of the road was part of the accident cause.

(ii) Defendant needed to prove that the superelevation was not part of the cause of the accident.

(b) EAI created a mathematical model of the highway, based on survey information, including details on superelevation.



(i) The semitrailer was simulated driving on the highway at increasing speeds until the truck rolled over.

(ii) The rollover speed turned out to be much the same with or without superelevation in the road.

(iii) The animation was displayed as supporting evidence that the superelevation in the road was not important, and the case settled before trial.

5. **Mosinee Paper Corporation v. James River Corporation of Virginia** - Patent Infringement.

(a) EAI created computer animations to illustrate infringement of a patent on paper towel dispensers.

(i) The plaintiff claimed that the defendant was infringing a patent on a transfer device that would dispense a second roll of towels when the first roll was exhausted.

(ii) The defendant claimed that there was no infringement.

(b) Several animations were used.

(i) Mechanisms prior to the patent were illustrated to show that there was no relevant prior art.

(ii) Another animation showed that the defendant's design prior to the infringing mechanism was not similar to the infringing mechanism.

(iii) The infringing mechanism was compared to the patented mechanism, showing similarities.

(iv) The animations were used in a summary judgement hearing, and the plaintiff was awarded a trial, which is now underway.

Admissibility

1. Computer animations and simulations are generally admissible as demonstrative evidence, and possibly as substantive evidence.

2. The Federal Rules of Evidence provide bases for admission.

(a) Rule 401 establishes a relevancy requirement for all evidence.

(b) Rules 702, 703, and 704 permit computer animations and simulations to be entered as expert witness testimony.

(c) Rule 901(b)(9) permits authentication of computer animations and simulations by "describing a process or system used to produce a result, and showing that the process or system produces that result."

3. The trend in case law is toward admissibility of computer simulations.

(a) In **Perma Research & Development v. Singer Co.,** 542 F.2d 1 1 1, (2nd Cir.) *cert. denied,* 429 U.S. 987 (1976) the court allowed experts to testify to their ultimate conclusion that an automotive device was perfectible based upon computer simulations.

(b) In **Schaeffer v. General Motors Corp.,** 372 Mass. 171, 360 N.E.2d 1062 (1977) the court found that computer simulations must meet the test for admission of scientific theory: It must have found general acceptance in the appropriate scientific community.

(c) In **People v. McHugh,** 124 Misc. 2d 559, 476 N.Y.S. 2d 721 (1984) the court admitted a computer reenactment of a fatal car crash, commenting "A computer is not a gimmick and the court should not be shy about its use, when proper."

4. Here are some tactics for admitting computer simulation into evidence.

(a) Disclose in advance to opposing counsel to avoid exclusion under Rule 403 and enhance chances of settlement.

(b) Qualify your expert under Rule 702.

(c) Authenticate your animation evidence by indicating that dimensions and scientific details were accurately conveyed from expert to animator, and that the animation fairly portrays these details.

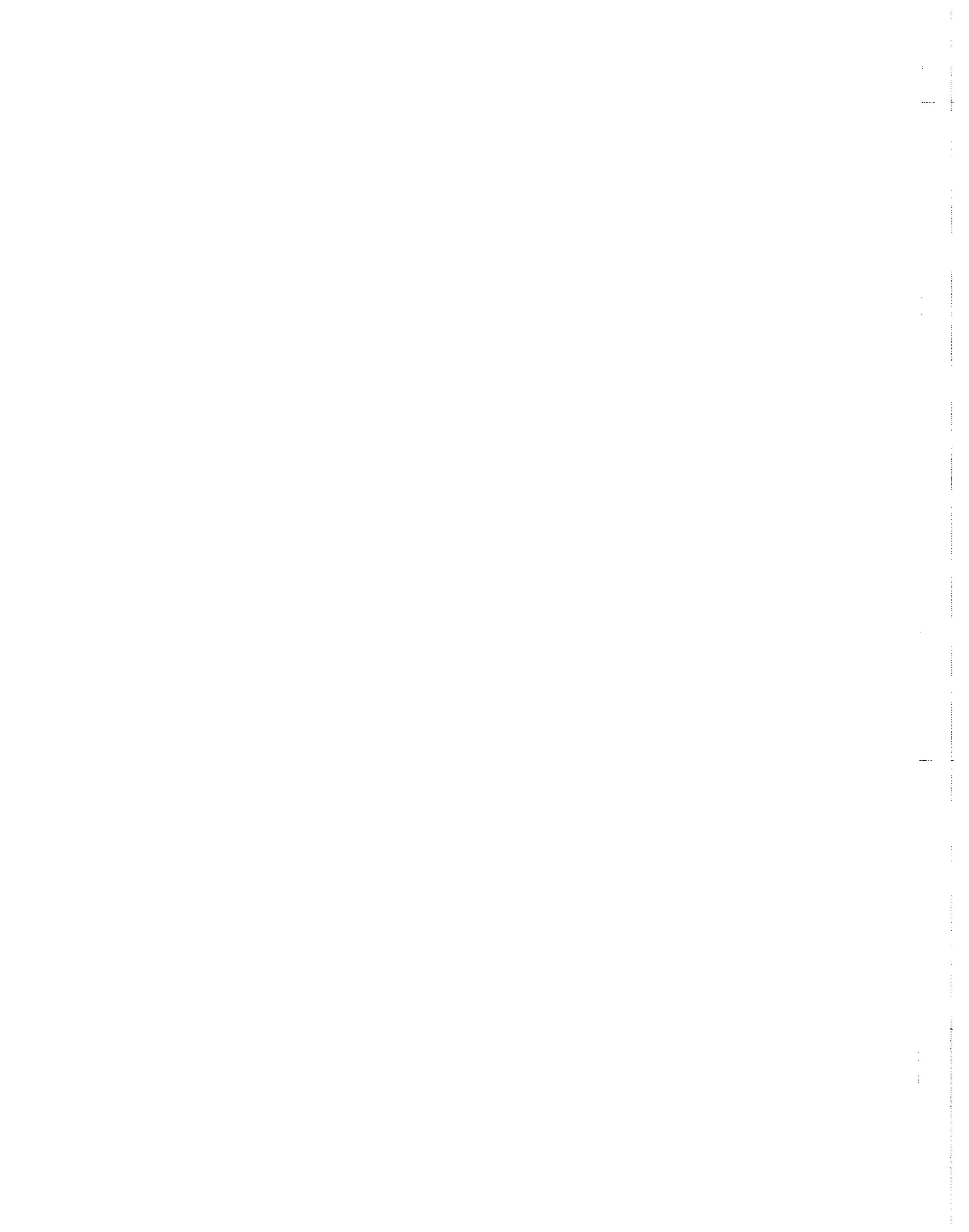
Defending Against Computer Animations

1. Try to keep them out of the courtroom.

(a) If presented as illustrations of expert opinion:

(i) Try to block the expert.

(ii) Question the chain of information between expert and animator.



(b) If it is well presented as representing expert opinion:

(i) Question the underpinning of the animation, the expert's opinion.

(ii) If key frame techniques were also used, then the animation is very vulnerable because the animated motion between key frames is based on interpolation, not the laws of physics.

Understanding Computer Simulation

1. Simulation is the use of a model to help explain "reality."

(a) Model may be mechanical, such as the use of a replica to explain how a system works.

(b) Model may also be a computer algorithm using programmed rules to compute the behavior of a mechanical system.

(i) Us ing the computer algorithm has several advantages.

(aa) Given the same input, the computer will always compute the same answer, leaving no chance for surprises in court.

(bb) The computer answers can be used to create graphics, including still pictures and animations.

(cc) The exposure is in the rule that the expert uses to create the algorithm, which can be minimized if the expert programs the computer with both high and low extreme values that might be reasonable given the situation.

2. Simulation of Highway Vehicles

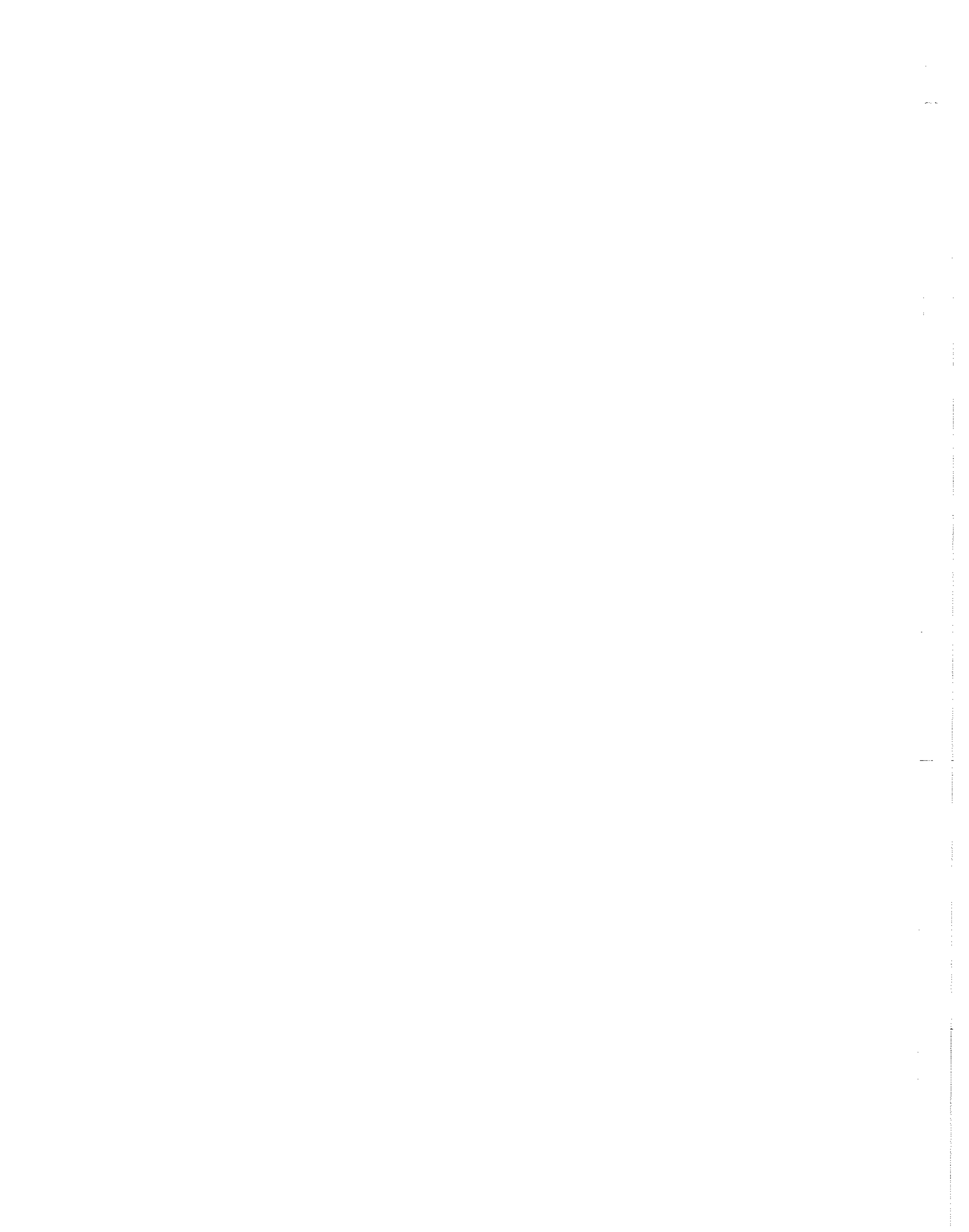
(a) Vehicle simulations are now very well documented.

(i) Anyone can use them.

(ii) Make sure your expert is an expert that understands vehicles.

(b) Unless the situation is very unusual, a competent expert will use code that is already written, not use a client's money to fund the development of a simulation.

(c) When up against an expert, get an expert.



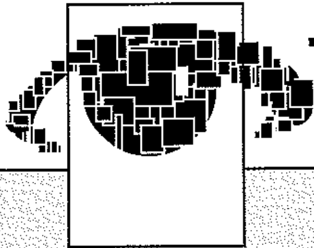
(d) It is impossible to know every one of the input parameters as well as you would like - attack by questioning parameters.

Summary

1. Simulation is a very powerful tool that needs to be used with care.

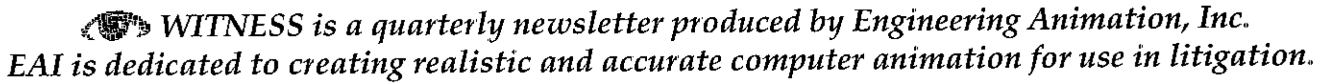
2. The courtroom use of simulation can be very effective in explaining complex technical phenomena.

Summer 1992



WITNESS™

AN ENGINEERING ANIMATION, INC. NEWSLETTER



*WITNESS is a quarterly newsletter produced by Engineering Animation, Inc.
EAI is dedicated to creating realistic and accurate computer animation for use in litigation.*

Animations of all terrain vehicles, like this three-wheeler, highlight rider motion.

Vehicular injury animation

Viewers see occupant injuries occur

When people are injured in vehicular accidents, liability often depends on the precise manner in which the injury occurred. Working backwards from physical evidence, engineers can reconstruct an accident with scientific accuracy. The traditional tools of reconstruction experts — occupant schematics, body locations, time plots, velocities and accelerations — prove baffling to untrained audiences, and may even add to their confusion.

When reconstruction findings are presented in the form of a computer animation, jurors see firsthand the complex physical forces in a high-speed accident.

When reconstruction findings are presented in the form of a computer animation, jurors see firsthand the complex physical forces in a high-speed accident. On a television monitor, they watch vehicles moving, colliding and changing shape. They observe the motion of the people inside those ve-

Accident and injury evidence, continued page 2.

INSIDE:

Animations show how injuries could have been prevented in seat belt case

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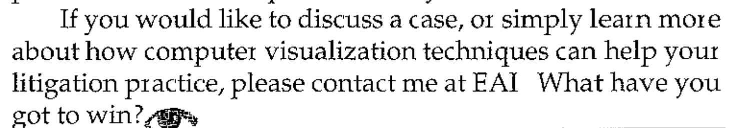
> **EAI animations have a 100% trial admissibility record, making judges and juries eyewitnesses to the relevant events.**



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A SURVEY OF THE LAW OF FIDUCIARY RELATIONSHIPS

Defining a Fiduciary Relationship

The Iowa Supreme Court gives the most detailed definition and explanation of fiduciary relationships in Kurth v. Van Horn.[1] It states:

> A fiduciary relationship has been generally defined in this way:
>
> > A fiduciary relation exists between two person when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.[2]
> >
> > A fiduciary relationship has also been defined as [a] very broad term embracing both technical fiduciary relations which exist whenever one man trusts in or relies upon another. One founded on trust or confidence reposed by one person in the integrity and fidelity of another. A "fiduciary relation" arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic or merely personal. Such relationship exists when there is a reposing of faith, confidence, and trust, and the placing of reliance by one upon the judgement and advice of the other.[3]
> >
> > Some relationships necessarily give rise to a fiduciary relationship. Such relationships would include those between an attorney and client, guardian and ward, principal and agent, executor and heir, trustee and cestui que trust.
> >
> > Some of the indicia of a fiduciary relationship include the acting of one person for another; having and the exercise of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another. [citations omitted]. Because the circumstances giving rise to a fiduciary duty are so diverse, any such

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[1] 380 N.W.2d 693 (Iowa 1986)

[2] Restatement (Second) of Torts §874 comment a, at 300 (1979).

[3] Black's Law Dictionary 564 (5th ed. 1979) (citations omitted)

relationship must be evaluated on the facts and circumstances of each individual case. [citations omitted].

Kurth, 380 N.W.2d at 695-96. The above seems to give the Iowa Supreme Court's best explanation and definition of fiduciary relationship or duties. As mentioned, each relationship must be determined upon its own facts. What follows is a closer look at the Court's treatment of fiduciary duties and relationship under various circumstances.

F

VARIOUS SITUATIONS INVOLVING FIDUCIARY RELATIONSHIPS

The Court looks at many different factors in determining whether a fiduciary relationship exists. Often education and experience of the parties in relation to the education and experience of the other party is important. You may want to note the different factors as you read the remainder of this outline.

An Agency is a Fiduciary Relationship

Agency has been defined as a fiduciary relationship which results from (1) manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to the former's control, and (2) consent by the later to so act. Pillsbury Company v. Ward[4].

In Kendall/Hunt Publishing v. Rowe[5], the Supreme Court found that there was a fiduciary (agency) relationship because Rowe was continuously subject to the will of Kendall. For example, all final decisions about publishing particular works were made by the Kendall home office. Rowe, as an agent, was therefore obligated to represent only Kendall and not any adverse party and to refrain from competition with Kendall in the publishing field.

A Trust is a Fiduciary Relationship

The Restatement (Second) of Trusts §2 (1959) defines a trust as follows:

> A trust, as the term is used in the Restatement of this Subject, when not qualified by the word 'charitable', 'resulting' or 'constructive' is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to

---

[4] 250 N.W.2d 35 (Iowa 1977)

[5] 424 N.W.2d 235 (Iowa 1988)

deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

***

A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.

***

[A trust is] a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with it for the benefit of another.[6]

In Eldred v. Merchants Nat. Bank[7], the Court held that the fiduciary duties were limited to those stated in the trust indenture. The Court looked at the circumstances and notes that it was significant that Defendants held no assets in trust. The Court distinguished this situation from the typical trust arrangement in which a trustee held and administered a corpus for the sake of a beneficiary.

The Court also held that an indenture trustee's fiduciary duties may be limited to those stated in the trust indenture where the language of that instrument clearly expresses such an intent and the surrounding circumstances support that interpretation.

Executor/Devisee

Just as trustees have a fiduciary duty to the beneficiaries of the trust, so do the executors of a will have a fiduciary duty to the devisee. In Matter of Estate of Wiese[8], the devisee objected to an executor's final report asserting that the executor had failed to sell securities within a reasonable time after the testator's death resulting in a loss to the estate.

The Court notes that the Model Prudent Person Investment Act, adopted by the legislature in 1965 provides the following statutory standard of care for fiduciaries:

1. Investment by fiduciaries. In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment

---

[6] NFO Members' Custodial Account v. Beneficiaries of Aforesaid Trust, 255 N.W.2d 162 (Iowa 1977)

[7] 468 N.W.2d 221 (Iowa 1991)

[8] 257 N.W.2d 1 (Iowa 1977)

> and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not for the purpose of speculation, but with regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety, of their capital. Within the limitations of the foregoing standards, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, specifically including, but not by way of limitation, bonds, debentures and other corporate obligations and stocks and shares, preferred or common, which person of prudence, discretion and intelligence acquire or retain for their own account. ***

F

Wiese, 257 N.W.2d at 4. In short, any fiduciary is held to the business judgment rule.

Fiduciary Relationships in Real Estate

In an action to recover a real estate commission upon the sale of Defendants' farm, Defendants counterclaimed on the basis of constructive fraud, breach of fiduciary duty and wrongful instigation of suit.

The Court stated:

> Real estate brokers and salesman represent their clients in the capacity of agent. This is a fiduciary relationship which requires a high degree of honesty and trust between the parties. ***

Although normally a fiduciary relationship exists between real estate brokers and salesman and their clients, the Court found that a fiduciary relationship did not exist at the time of the claimed omissions. The general rule is that a person is not subject to a fiduciary duty in making terms as to compensation with a prospective principal.[9]

Investor/Stockbroker Relationships

An investor who purchased limited partnership securities brought action against her stockbrokers for violation of a fiduciary relationship. The investor was advised by the stockbroker to buy limited partnership securities without the stockbroker informing her of risks involved. The investor had no prior dealings with the

---

[9] Action Real Estate Corp. v. Buecheck, 309 N.W.2d 502 (Iowa 1981)

broker and the broker knew that she trusted him and relied upon his judgment and advice. Yet, he failed to tell investor that she was not investing in A-rated bonds as she had requested. A breach of fiduciary duty was found under these circumstances.[10]

Promoters

First Nat. Bank v. One Craig Place, Ltd.[11] deals with the fiduciary duty owed by promoters, officers and directors of a corporation to minority shareholders. In this case, the majority stockholders financed the purchase of their stock by pledging the assets of the corporation. This obviously put the minority shareholders in a less secure financial position.

F

The Court states that the promoter is in the situation akin to that of agent or trustee of the company and his dealings with it must be open and fair. As promoters, these men stood in a fiduciary relationship to the company to be organized and those who subscribed for its stock.

Promoters occupy a fiduciary relation to the corporation on which relation the stockholders may rely. The corporate entity and the stockholders, in particular, may presume that these trustees will perform their duties with the diligence, honesty and the utmost good faith, inherent and implicit in their functions. They are not required to be ever on their guard and watchful lest those trustees misapply, destroy, embezzle, steal the corporate assets or defraud them.

In another case involving promoters and fiduciary duty is Smith v. Bitter[12]. In that case, Steve and Joe Smith and Bitter formed a corporation to own and operate a tavern. The Smiths were to be responsible for the remodeling of the real estate and Bitter was to provide legal services and loan expertise.

At the time the real estate was purchased, the corporation had not yet been formed. Therefore, the three were negotiating as promoters and not as a corporation. A promoter is one who undertakes to bring about the incorporation, procures for it the rights and capital by which it is to carry out its purposes and establishes it as able to do business.

The Smiths and Bitter owned a fiduciary duty to the corporation for which they were acting and to its stockholders. The Court reasoned

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[10] McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989)

[11] 303 N.W.2d 688 (Iowa 1981)

[12] 319 N.W.2d 196 (Iowa 1982)

that the fact that the promoters themselves were not stockholders does not alter that obligation.

Bitter contends that the corporation does not have legal title to the real estate because the original offer to purchase worked an equitable conversion in favor of the Smiths and him as individuals. Bitter cannot profit personally from this transaction, nor can he assert personal ownership of real estate against those toward whom he was bound to exercise the utmost good faith.

F

Corporate Directors and Shareholders

The Iowa Supreme Court has stated the following about the fiduciary relationships between corporate directors and shareholders:

> Stockholders, other than director and officers, stand on an equal footing and deal with each other at arm's length. No power with respect to the corporate property has been conferred on one not possessed by the other. But power akin to that of an attorney, priest, agent or co-partner is conferred on the directors and officers by those selecting them to manage corporate affairs. Not that they have control of the shares of the stockholders, but that they do control nearly everything of value. The fiduciary obligation is to the stockholders in a body, why not to the component parts represented by the shares? The relative position is such as to inspire confidence and experience has frequently demonstrated that it actually exists. Why should the law say then that it does not, for that one is not the trustee for the other, when this is not a requisite in other relations?
>
> The fiduciary relationship may exist whenever special confidence is reposed whether the relationship be that of blood, business, friendship or association, by one person in another when they are in a position to have an exercise or do have and exercise influence over each other.[13]

Majority and Minority Shareholders

There are many cases that have held that officers and directors of corporations have a fiduciary duty toward the shareholders.[14]

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[13] Dawson v. National Life Insurance Company, 176 Iowa 362, 377, 157 N.W. 929, 931 (1916)

[14] See, e.g. Rowen v. LeMars Mutual Insurance Co., 282 N.W.2d 639, 649 (Iowa 1979); Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 525 (Iowa 1974); Holden v. Construction Machinery Co., 202 N.W.2d 348, 356-58 (Iowa 1972); Gord v. Iowana Farms Milk Co., 245 Iowa 1,

Linge v. Ralston Purina Co.[15] extends this analysis to majority shareholders owing a fiduciary duty to minority shareholders. In that case, Ralston held approximately ninety-three percent of the stock at the time of the alleged wrong-doings. The minority shareholders allege that the stock was wrongfully appropriated and sought actual and punitive damages.

Directors of Corporations to Other Directors

In Kurtz v. Trepp[16], the Court notes that a fiduciary relationship exists between directors of a corporation. (citation omitted). It also notes that a fiduciary relationship exists between joint venturers such as partners. (citation omitted). The Plaintiff argues that there is no fiduciary relationship because both parties were represented by counsel and that Plaintiff had repudiated the relationship. The Court, finding a breach of fiduciary duty, stated that a party cannot unilaterally end a fiduciary relationship. Even though a fiduciary duty may exist in situations such as corporations to shareholders, a corporation's directors may not be liable for actions taken under the business judgment rule.[17]

Lend Lenders and Participating Lenders

The Iowa Supreme Court has held that participating lenders could sue lead lender on a breach of fiduciary duty theory. In Clinton Fed. S & L v. Iowa-Des Moines Nat.[18], the participating lenders contended that the lead lender knew the borrower was in trouble and should have appraised the participating lenders of the borrower's trouble at the earliest possible time.

The participating lenders attempted to prove the lead lender negligently breached the participation agreement by failing to disclose to them the alleged default of the developer in failing to make construction interest payments by advancing construction interest to the developer and by disbursing loan proceeds when it should have known that the developer could not open the hotel. Although the Court held the participating lenders and lead lenders stood in a fiduciary relationship, the participating lenders had failed to carry their burden of proof on each and every one of the allegations.

16-17, 60 N.W.2d 820, 829 (1953).

[15] 293 N.W.2d 191 (Iowa 1980)

[16] 375 N.W.2d 280 (Iowa App. 1985)

[17] Hanrahan v. Kruidenier, 473 N.W.2d 184 (Iowa 1991)

[18] 391 N.W.2d 712 (Iowa App. 1986)

A Confidential Relationship Equals a Fiduciary Relationship

In Peoples Bank and Trust Co. v. Lala[19], the debtors and employee of mortgagee bank stood in a confidential relationship to each other. The Court cites authority defining a confidential relationship as:

> [T]he phrases "fiduciary relations" are "confidential relations" are ordinarily used as convertible terms and have reference to any relationship of blood, business, friendship or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, or do have and exercise, influence over each other.
>
> ***
>
> The gist of the doctrine of confidential relationship, therefore, is the presence of a dominant influence under which the act is presumed to have been done. (citation omitted). By reason of the trust which has developed, the one who reposes confidence is not on guard; he is exposed and relies on the other. (citations omitted). As such, cases founded on confidential relationships do not require a showing that the confidant actually stood over the other to the confidant's wishes.

In this case, the Defendants had obtained all of their business and personal financing through the Plaintiffs for over 20 years. At the same time the parties were close and personal friends. There was sufficient evidence that during the years the Defendants had placed special trust and confidence in the Plaintiff and the Plaintiff was in a position to exercise influence over the Defendants, and therefore, had a duty to act with good faith.

The Plaintiff failed to disclose information on homestead exemption rights. When combined with the facts that the Plaintiff could not reach the homestead without the wife's signature and her confidential relationship with Plaintiff, the Court felt the relationship warranted a closer examination.

Where a relationship of trust or confidence exists between two parties to a transaction the superior party has a duty to disclose all material facts of which he is aware or at least those favorable to his own position and adverse to the other. Wilden Clinic, Inc. v. City of Des Moines.[20]

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[19] 392 N.W.2d 179 (Iowa App. 1986)

[20] 229 N.W.2d 286, 293 (Iowa 1975)

Examples of a Fiduciary Relationship with No Breach Found

In Irons v. Community States Bank[21], the Plaintiffs alleged that the bank advised them to seek financing from the FmHA in furtherance of the bank's own interest. The Court simply stated that it failed to see how this was a breach of a fiduciary duty. The bank had already informed the Irons that it would not loan them operating money and the bank was not under any fiduciary duty to loan the Irons any money.

The Irons also claim a fiduciary breach because the bank failed to notify the Irons of the terms between FmHA and the bank. The purpose of the agreement was to subrogate the bank's interest previously secured by collateral to the FmHA. Only by subrogating these loans would FmHA loan the money.

The Court also noted that the Irons were free to inquire into the nature and extent of the FmHA-bank agreement. The Irons did not inquire. The Court also notes that the Irons were not unsophisticated borrowers. The Court notes that Plaintiff was aware of the loan process and had dealt with the bank on both large and small loans.

In Mitchellville Cooperative v. Indian Creek Corp.[22], the Court found that there was no breach of the fiduciary duty owed by a co-operative to a member of the co-operative. The member in this case alleges that the co-operative breached its duty by not informing the member of the co-op was also dealing with a non-member competitor of the member. The Court noted that the By-laws specifically allowed the co-op to trade with non-members. The Court also found the Board of Director's conduct was not so oppressive as to require the Supreme Court to reverse the Trial Court's ruling in this regard.

The member also complained that the co-op breached its duty by not providing for an equitable program to redeem deferred dividends held by the co-op. The Court noted that the member had both a law degree and a veterinary degree. Accordingly, he was aware that the co-op had no policy for redemption as far back as 1979 and he continued to remain a member of the co-op.

In Liska v. First Nat. Bank in Sioux City,[23] the Plaintiff is the wife of the now deceased, Dr. Liska. Dr. Liska created an inter vivos trust with the Defendant, First National Bank, as trustees. Mrs. Liska contended that the Defendant executors negligently or intentionally included in Dr. Liska's inter vivos trust all of the couple's jointly held property, as well as property owned solely by

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[21] 461 N.W.2d 849 (Iowa App. 1990)

[22] 469 N.W.2d 258 (Iowa App. 1991)

[23] 322 N.W.2d 892 (Iowa App. 1982)

Mrs. Liska. This resulted in the payment of more than $48,000 in excess estate and inheritance taxes.

The Court found that the Defendants, as trustee of Dr. Liska's revokable trust and as executors of his estate, had a fiduciary duty. However, the Court notes that the actions and omissions complained of were not objected to by Mrs. Liska when she had the opportunity to do so. The Court concluded that she acquiesced by her silence.

F

In Iowana Farms Milk Co.,[24] Plaintiff claimed that the Defendants owed a fiduciary obligation to the Plaintiff and failed to sustain the burden of showing affirmatively the discharge of this obligation. The Court found that there was no breach of the duty because the Plaintiff was well-educated, was skilled in the dairy business and his education and qualifications perhaps exceeded those of the Defendants. The Plaintiff, in his capacity, was a stockholder, officer and director and knew all the facts which would be important in determining the value of the stock of the company.

Examples of No Fiduciary Relationship Found

In Hoffman v. National Medical Enterprises,[25] the Court found no fiduciary or confidential relationship. In this case, the parties were businessmen negotiating the sale of Pro-Lung. Plaintiffs were represented by counsel at all times pertinent to this endeavor. There is nothing in the record to suggest inequality of the parties or dominance of Plaintiffs by Defendants during negotiations. The Court stated that a finding of a confidential relationship is not supported by the evidence.

In Kurth v. Van Horn,[26] the Iowa Supreme Court rejected the contention that a confidential relationship exists when a depositor becomes the borrower. [Note that other circumstances may change this analysis.]

In another lender case, Harsha v. State Sav. Bank,[27] Plaintiffs asserted that they had an oral agreement with an officer of the bank, for the bank to loan them money to open and operate a livestock feed sale business. The Plaintiffs sought and obtained an SBA guarantee of $25,000 and made the bank aware of this fact.

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[24] Gord v. Iowana Farms Milk Co., 60 N.W.2d 820 (Iowa 1953)

[25] 442 N.W.2d 123 (Iowa 1989)

[26] 380 N.W.2d 693 (Iowa 1986)

[27] 346 N.W.2d 791 (Iowa 1984)

The Plaintiff business gave the bank a note for $25,000. The bank loaned the Plaintiffs' business $5,000 on three separate occasions, but refused to lend it the remaining $10,000. There was sufficient evidence that loss of the $10,000 long-term loan was damaging to the business. Plaintiffs were successful on their breach of contract claim. However, they failed to present sufficient evidence that the bank tortiously interfered with their business, nor were they able to make a showing for severe emotional distress.

F

Who has the Burden of Proving a Fiduciary Duty?

In Poulsen v. Russell,[28] the parties conceded that a fiduciary relationship existed between two shareholders, each who owned fifty percent of the stock in a corporation. The question of who has the burden of proof was raised upon appeal, but was not decided because there was no objection to the jury instruction. The Court instructed the jury that the burden was on the Defendant to show that he did not breach his duty.

In Clinton Land co. v. M/S Assoc. Inc.,[29] the Court discussed the burden of proving a fiduciary relationship. In that case, the Plaintiffs were owners of a motel. The Defendants were real estate brokers engaged by the Plaintiff to find a buyer for the motel.

Part of the dispute involved the extension of the closing date. The sellers insist they did not agree to an extension; the Defendants said the extension was made with the Plaintiffs' understanding.

The Court states that a real estate broker's relationship with the seller is that of an agent to a principal. Included in the relationship is a strict duty of undivided loyalty and disclosure. The Court, citing authorities, states that the relationship is confidential and fiduciary.

The Plaintiffs argue that a fiduciary must establish that he properly discharged his obligations when violations of fiduciary duty are the subject of controversy. The Court explains that the burden does not shift automatically upon allegations of a breach of fiduciary duty. It states:

> The shift in the burden does not occur simply by the reason of attaching a label to the relationship. Rather, the shift occurs from facts that often occur in a relationship. There is no shift of the burden unless,

[28] 300 N.W.2d 289 (Iowa 1981)

[29] 340 N.W.2d 232 (Iowa 1983)

under the facts presented, the fiduciary is shown to be in a position to take advantage over the principal, or appears to have a closer access to the facts.[30]

Fiduciary Duties and the Restatement of Torts

Restatement (Second) of Torts §551 (1977) provides that the superior party in a confidential or fiduciary relationship may be liable for nondisclosure:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he had failed to disclose if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them;

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading;

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so;

(d) The falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and,

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

See Wilden Clinic, Inc., 229 N.W.2d at 293.

[30] Clinton Land Co., 340 N.W.2d at 235

Comment f identifies the kinds of relationships of trust and confidence which are subject to the disclosure requirement of §551:

> Other relations of trust and confidence include those of the executor of an estate and its beneficiary, a bank and an investing depositor and those of physician and patient, attorney and client, priest and parishioner, partners, tenants in common and guardian and ward. Members of the same family normally stand in a fiduciary relations to one another, although it is of course obvious that the fact that two men are brothers does not establish relation of trust and confidence when they have become estranged and have not spoken to one another for many years. In addition, certain types of contracts, such as those of suretyship or guaranty, insurance and joint adventure, are recognized as creating in themselves a confidential relation and hence as requiring the utmost good faith and full and fair disclosure of all material facts.

/tlb

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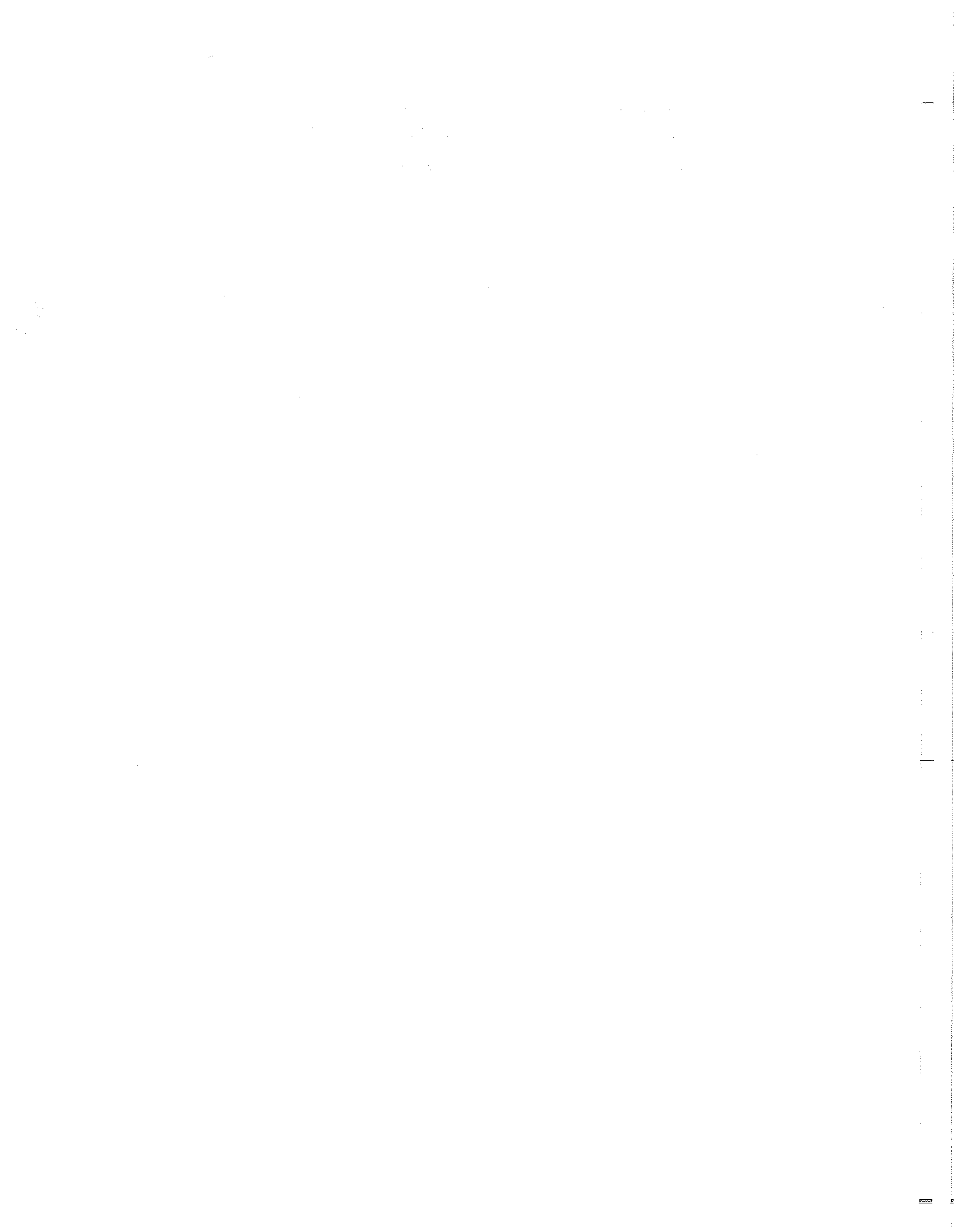

CIVIL JURY INSTRUCTIONS - AN UPDATE

Michael W. Thrall
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1900 Hub Tower
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Iowa Jury Instructions Committee - Drafting Policy

A. The policy of the Committee is to draft an Iowa civil or criminal instruction only if there is Iowa authority for the instruction. The instructions shall be impartial statements of the Iowa law.

B. General Guidelines

1. The instruction shall be an accurate statement of the law.
2. The instruction shall be as brief and concise as practicable.
3. The instruction shall be understandable to the average juror.
4. The instruction shall be neutral, unslanted and free of argument.

C. Specific Guidelines

1. Use plain English, simple, short and concrete words.
2. Make it look and sound like talk.
3. Use short sentences.
4. Use short paragraphs.
5. Omit unnecessary words.
6. Use active voice rather than passive.
7. Avoid negative forms, and especially double negatives.
8. Use personal pronouns, "I" for the Judge and "you" for the jury.

9. Whenever possible, leave out the words: "as to," "determine," "facilitate," "herein," "hereof," "however," "if any," "therefrom," "theretofore," "thereof," "otherwise," "require," "that," "the," "whether," and "which."

10. Replace "locate" with "find"; "prior to" with "before"; "sufficient" with "enough"; "in the event that" with "if".

11. Put prepositions at the end whenever it sounds right to do so.

12. Use sex neutral language: eliminate the pronoun; repeat the noun; use a synonym for the noun; change the pronoun to "the," "a," "this" and the like; use "one"; use "it"; use the imperative; reword; and use the passive (the last resort).

13. Where appropriate for clarity and ease of understanding, use lay language in place of exact case or statutory language so long as an accurate statement of the law is maintained.

D. Instructions must always be tailored to fit the facts of the case. The instructions are not intended to provide jury instructions which are applicable without change in all cases.

II Plain English and Instructing the Jury.

III Recent Revisions to the Iowa Jury Instructions.

A. December 4, 1991 report to Board of Governors.

B. June 5, 1992 report to Board of Governors.

THE
IOWA STATE BAR ASSOCIATION

IOWA JURY INSTRUCTIONS COMMITTEE
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December 4, 1991

Board of Governors of the
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

Attention: Carroll Reasoner, President

Re: Iowa Jury Instructions Committee

Dear Members of the Board:

We submit the following for approval.

1. Exhibit 1 - **Iowa Civil Jury Instructions Chapter 1300 - Dram Shop Liability.** Revised Table of Contents.

2. Exhibit 2 - **Iowa Civil Jury Instruction 1300.7 - Definition of "Knew Or Should Have Known."** New Instruction.

3. Exhibit 3 - **Iowa Civil Jury Instruction Chapter 1400 - Insurer - Excess Liability.** Revised Table of Contents.

4. Exhibit 4 - **Iowa Civil Jury Instruction 1410.1 - First Party Bad Faith - Essentials For Recovery.** Revised.

5. Exhibit 5 - **Iowa Civil Jury Instruction 1420.1 - Insurance Contract - Essentials for Recovery.** Revision of Iowa Civil Jury Instruction 2410.1 which is renumbered as 1420.1.

6. Exhibit 6 - **Iowa Civil Jury Instruction 1500.3 - Negligence Defined.** Revised.

7. Exhibit 7 - **Iowa Civil Jury Instruction 1600.2 - Negligence - Duty Of Physician.** Revised.

8. Exhibit 8 - **Iowa Civil Jury Instruction 1600.3 - Negligence - Duty Of Specialist.** Revised.

9. Exhibit 9 - **Iowa Civil Jury Instruction 1600.4 - Negligence - Duty Of Hospital - Professional Service.** Revised.

10. Exhibit 10 - **Iowa Civil Jury Instruction 1600.5 - Negligence - Duty Of Hospital - Nonmedical, Administrative, Ministerial Or Routine Care.** Revised.

11. Exhibit 11 - **Iowa Civil Jury Instruction 1600.6 - Negligence Of Chiropractors.** Revised.

12. Exhibit 12 - **Iowa Civil Jury Instruction 1600.7 - Negligence - Duty Of Chiropractor.** Revised.

13. Exhibit 13 - **Iowa Civil Jury Instruction 1600.8 - Chiropractor Or Health Care Practitioner Undertaking To Treat A Patient In A Manner Not Permitted By License.** Revised.

14. Exhibit 14 - **Iowa Civil Jury Instruction 1700.4 - Railroad Crossings - Speed.** Revised.

15. Exhibit 15 - **Iowa Civil Jury Instruction 1700.5 - Railroad Crossings - Defective Crossings.** Revised.

16. Exhibit 16 - **Iowa Civil Jury Instruction 1700.6 - Railroad Crossings - Headlights.** Revised.

17. Exhibit 17 - **Iowa Civil Jury Instruction 1700.7 - Railroad Crossings - Plaintiff's Negligence.** Revised.

18. Exhibit 18 - **Iowa Civil Jury Instruction 2900.4 - Design And Construction Of Public Way.** Revised.

19. Exhibit 19 - **Iowa Civil Jury Instruction 2900.5 - Design And Construction Of Public Improvements.** Revised.

20. Exhibit 20 - **Iowa Civil Jury Instruction 2900.6 - Duty To Maintain Regulatory Devices.** Revised and Authority added.

21. Exhibit 21 - **Iowa Criminal Jury Instruction Chapter 1500 - Forgery.** Revised Table of Contents.

22. Exhibit 22 - **Iowa Criminal Jury Instruction 1500.5 - Forgery - Credit Card.** Revised.

23. Exhibit 23 - **Iowa Criminal Jury Instruction 1500.7 - Credit Card - Degree Of Forgery.** New Instruction.

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The Committee appreciates your support and your consideration of these Instruction changes. The Committee is continuing its effort to update and revise Instructions as necessary and to add Instructions as the law develops.

Very truly yours,

Mark McCormick, Chair

MM/lj
Enclosures

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CHAPTER 1300

DRAM SHOP LIABILITY

1300.1 Essentials For Recovery

1300.2 Definition Of Intoxication

1300.3 Proximate Cause

1300.4 Affirmative Defense - Lack Of Contribution

1300.5 Affirmative Defense - Complicity

1300.6 Affirmative Defense - Assumption Of Risk

1300.7 Definition Of "Knew Or Should Have Known"

Comment

Note: All instructions apply to the Dram Shop Law as amended in 1986. Attorneys and judges may want to keep the old instructions in their binders to use in causes of action which accrued before the amendment's effective date.

Authority

Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989)

Exhibit 1

12/31

1300.7 Definition Of "Knew Or Should Have Known." The phrase "knew or should have known" means that the person had actual knowledge or that a reasonably observant person under the same or similar circumstances would have had knowledge.

Authority

Hobbiebrunken v. G&S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991) (approving definition in dram shop context)

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CHAPTER 1400

INSURER - EXCESS LIABILITY

Excess Liability

1400.1 Bad Faith Actions - Essentials For Recovery

1400.2 Definition Of Bad Faith

Insurer Liability

1410.1 First-Party Bad Faith - Essentials For Recovery

Insurer Contract Liability

1420.1 Insurance Contract - Essentials For Recovery

Exhibit 3

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1410.1 First-Party Bad Faith - Essentials For Recovery. The plaintiff must prove all of the following propositions:

1. The defendant [denied plaintiff's claim] [refused to defend the plaintiff].
2. There was no reasonable basis for [denying the claim] [refusing to defend].
3. The defendant knew or had reason to know that there was no reasonable basis for [denying the claim] [refusing to defend].
4. The denial was a proximate cause of damage to the plaintiff.
5. The nature and extent of damage.

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

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Authority

North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 829 (Iowa 1991)

Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990)

Dolan v. Aid Ins. Co., 431 N.W.2d 790 (Iowa 1988)

Comment

Note: Element 2, the lack of a reasonable basis for denying the claim, is an objective element. This element will usually be determined by the court as a matter of law. Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250 (Iowa 1991).

Exhibit 4

1420.1 Insurance Contract - Essentials For Recovery. The plaintiff must prove all of the following propositions:

1. The plaintiff was insured for loss due to [theft, fire, storm, liability, etc.] by the defendant on the date of loss.

2. The plaintiff had paid the premiums which were due.

3. The plaintiff had a loss by [theft, fire, storm, liability, etc.] which was covered by the insurance policy with the defendant.

4. [The plaintiff gave the defendant timely proof of loss.]

   [The plaintiff's failure to give timely proof of loss was [excused] [waived] [not prejudicial to the defendant].]

5. The defendant did not pay the plaintiff's claim.

6. The nature and extent of damage.

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

Authority

Watson v. National Sur. Corp., 468 N.W.2d 448, 451 (Iowa 1991)

American Guar. & Liability Ins. Co. v. Chandler Mfg. Co., 467 N.W.2d 226 (Iowa 1991).

Comment

Note: Where the policy condition at issue is other than the requirement of timely proof of loss, modify paragraph 4 accordingly.

Note: For measure of recovery of total property loss, see McIntosh v. Home Mut. Ins. Ass'n of Iowa, 198 Iowa 1038, 1039, 200 N.W. 694 (1924). To determine actual cash value by using market value and/or

replacement cost, see Britven v. Occidental Ins. Co., 234 Iowa 682, 685-87, 13 N.W.2d 791, 793-94 (1944); Stortenbecker v. Iowa Power & Light Co., 250 Iowa 1073, 1080, 96 N.W.2d 468, 472 (1959).

Note: See Henschel v. Hawkeye-Security Ins. Co., 178 N.W.2d 409, 415-17 (Iowa 1970) concerning legal excuse for not giving notice of loss. See Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 637 (Iowa 1984) concerning legal excuse or no prejudice for not giving notice of loss within a specific time period. See Basta v. Farm Property Mut. Ins. Ass'n, 217 Iowa 240, 249, 252 N.W. 125 (1933) on the issue of the insurance company's waiver of a proof of loss statement. See American Guar. & Liab. Ins. Co. v. Chandler Mfg. Co., 467 N.W.2d 226 (Iowa 1991) concerning breach of the cooperation clause.

Note: See Instruction 2400.11 for a definition of waiver of performance.

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1500.3 NEGLIGENCE DEFINED. An attorney must use the degree of skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances.

A violation of this duty is negligence.

Authority

Devine v. Wilson, 373 N.W.2d 155, 157 (Iowa App. 1985)

Martinson Manufacturing Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984)

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1600.2 Negligence - Duty of Physician. A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances.

A violation of this duty is negligence.

Authority

Speed v. State, 240 N.W.2d 901 (Iowa 1976)

Perin v. Hayne, 210 N.W.2d 609 (Iowa 1973)

Exhibit 7

12/91

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1600.3 Negligence - Duty of Specialist. Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner.

A violation of this duty is negligence.

Authority

McGulpin v. Bessmer, 241 Iowa 1119, 1132, 43 N.W.2d 121, 128 (1950)

Exhibit 8

12/91

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1600.4 Negligence - Duty of Hospital - Professional Service. A hospital must use the degree of skill, care and learning ordinarily possessed and exercised by other hospitals in similar circumstances.

A violation of this duty is negligence.

Authority

Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98 (Iowa 1971)

Dickinson v. Mailliard, 175 N.W.2d 588 (Iowa 1970)

Clites v. State, 322 N.W.2d 917 (Iowa App. 1982)

Comment

Caveat: The court should examine the Kastler decision to decide if the service rendered was a professional service or a nonprofessional service. (See Instruction 1600.5 if a nonprofessional service was rendered.)

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Exhibit 9

1600.5 Negligence - Duty of Hospital - Nonmedical, Administrative, Ministerial or Routine Care. A hospital must use the degree of ordinary care and attention that the known mental and physical condition of a patient requires.

A violation of this duty is negligence.

Authority

Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98 (Iowa 1971)

Comment

Caveat: The court should examine the Kastler decision to decide if the service rendered was a professional service or a nonprofessional service. (See Instruction 1600.4 if a professional service was rendered.)

1600.6 Negligence Of Chiropractors As To Acts Done Within Scope Of License Not Defined As "Additional Procedures And Practices" Authorized By Senate File 474, 1983 Regular Session. A chiropractor must use the degree of skill, care and learning ordinarily possessed and exercised by chiropractors in similar circumstances.

A violation of this duty is negligence.

Authority

Correll v. Goodfellow, 255 Iowa 1237, 125 N.W.2d 745 (1964)

Iowa Code section 151.8

Acts 1983 Regular Session, 70 G.A. Chapter 83 (1983)

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Exhibit 11

PRINTED 1/92

1600.7 Negligence - Duty Of Chiropractor As To Acts Done Within Scope of License Subsequent To July 1, 1983 Defined As "Additional Procedures And Practices" Authorized By Senate File 474, 1983 Regular Session. A chiropractor must use the degree of skill, care and learning ordinarily possessed and exercised by health care practitioners permitted by law to perform the [treatment] [procedure] [services] in similar circumstances.

A violation of this duty is negligence.

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Authority

Iowa Code section 151.1

Iowa Code section 151.8

Acts 1983 Regular Session, 70 G.A. Chapter 83 (1983)

Exhibit 12

1600.8 Chiropractor Or Health Care Practitioner Undertaking To Treat A Patient In A Manner Not Permitted By License. Plaintiff claims the defendant negligently used [equipment] [a procedure] in treating the plaintiff and failed to use the degree of skill, care and learning ordinarily possessed by [physicians] [health care practitioners permitted by law to perform said procedures].

A violation by the defendant of those provisions of the statutes which define and limit treatments which may be administered by a licensed [chiropractor] [health care practitioner] is not in itself negligence.

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In treating the plaintiff by use of [equipment] [a procedure], defendant exceeded the scope of authority which defendant had to practice under defendant's license and entered the field of practice of [medicine] [other health care field]. In using the [equipment] [procedure] defendant must use the degree of skill, care and learning ordinarily possessed and exercised by [physicians] [other health care practitioners permitted by law to perform said procedure] in similar circumstances.

A violation of this duty is negligence.

Authority

Correll v. Goodfellow, 255 Iowa 1237, 125 N.W.2d 745 (1964)

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1700.4 Railroad Crossings - Speed. Railroads are required to use ordinary care as to the speed of their trains at road crossings.

A violation of this duty is negligence.

Authority

Daly v. Illinois Central Railroad Co., 250 Iowa 110, 93 N.W.2d 68 (1957)

Jensvold v. Chicago & Great Western Ry. Co., 236 Iowa 708, 18 N.W.2d 616 (1945)

Comment

Note: A violation of a duly executed city ordinance or regulation as to speed is negligence per se.

Exhibit 14

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1700.5 Railroad Crossings - Defective Crossings (Public Highway). Railroads are required to keep railroad crossings in good repair.

A violation of this duty is negligence.

Authority

Iowa Code section 327F.1

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Exhibit 15

12/31

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1700.6 Railroad Crossings - Headlights. A locomotive is required to have a headlight that will make it possible for the locomotive operator to see an unlighted obstruction on the track 300 feet ahead in clear weather.

A violation of this duty is negligence.

Authority

Iowa Code section 327F.14

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Exhibit 16

12/31

PRINTED 1/92

1700.7 Railroad Crossings - Plaintiff's Negligence - Look And Listen. A driver of a motor vehicle is required to use ordinary care in looking and listening for trains in driving toward a railroad crossing. This must be done at a time and place when the vehicle can be stopped if a train is seen or heard.

A violation of this duty is negligence.

Authority

Maier v. Illinois Central Railroad, 234 N.W.2d 388 (Iowa 1975)

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Exhibit 17

PRINTED 1/92

2900.4 Design and Construction of Public Way. The plaintiff must prove all of the following propositions:

1. The defendant [designed] [made specifications regarding] [adopted a design regarding] [adopted specifications regarding] [constructed] [reconstructed] a [street] [highway] [road].

2. The [design] [specification] [construction] [reconstruction] was not according to a generally recognized engineering or safety standard, criteria or design theory existing at the time of the [construction] [reconstruction].

3. The defendant was negligent in failing to comply with a generally recognized engineering or safety standard, criteria or design theory existing at the time of the [construction] [reconstruction].

4. The negligence was a proximate cause of damage to the plaintiff.

5. The nature and extent of the damages.

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

Authority

Iowa Code section 25A.14(8)
Iowa Code section 613A.4(7)
Connolly v. Dallas County, 465 N.W.2d 875, 877 n.3 (Iowa 1991)

Exhibit 18

12/91

PRINTED 1/92

2900.5 Design and Construction of Public Improvements. The plaintiff must prove all of the following propositions:

1. The defendant [designed] [made specifications regarding] [adopted a design regarding] [adopted specifications regarding] [constructed] [reconstructed] (describe public improvement).

2. The [design] [specification] [constructed] [reconstructed] was not according to a generally recognized engineering or safety standard, criteria or design theory existing at the time of the [construction] [reconstruction].

3. The defendant was negligent in failing to comply with a generally recognized engineering or safety standard, criteria or design theory existing at the time of the [construction] [reconstruction].

4. The negligence was a proximate cause of damage to the plaintiff.

5. The nature and extent of the damages.

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

Authority

Iowa Code section 25A.14(9)
Iowa Code section 613A.4(8)
Connolly v. Dallas County, 465 N.W.2d 875, 877 n.3 (Iowa 1991)

Comment

Caveat: This instruction was drafted solely for use in state of the art municipal and state tort cases. If other specifications of negligence are submitted, this instruction must be carefully tailored to the specific facts.

Exhibit 19

12/91

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2900.6 Duty To Maintain. Once a (regulatory device)* has been placed, created or installed, the municipality has a duty to use ordinary care to maintain it.

A violation of this duty is negligence.

* Insert the particular traffic control device involved.

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Authority

Iowa Code section 364.12(2)

Iowa Code section 668.10(1)

Comment

Note: Iowa Code section 668.10(1) states the State of Iowa and municipalities shall not be found at fault for failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign. But see Phillips v. City of Waukee, 467 N.W.2d 218, 220 (Iowa 1991) and Hershberger v. Buena Vista County, 391 N.W.2d 217 (Iowa 1986).

CHAPTER 1500

FORGERY

1500.1 Forgery - 715A.2(1)(a)

1500.2 Forgery - 715A.2(1)(b)

1500.3 Uttering A Forged Instrument - 715A.2(1)(c) and 715.2(1)(a)

1500.4 Uttering A Forged Instrument - 715A.2(1)(c) and 715.2(1)(b)

1500.5 Forgery - Credit Card

1500.6 Credit Card - Defense

1500.7 Credit Card - Degree Of Forgery

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1500.5 Forgery - Credit Card. The State must prove both of the following elements of Forgery:

1. On or about the _____ day of __________, 19___, the defendant used a credit card for the purpose of obtaining (name of property or service).

2. a. The defendant knew the credit card was [stolen] [forged] [revoked] [cancelled].

   b. The defendant knew [he] [she] was not authorized to use the credit card.

If the State has proved both of these elements, the defendant is guilty of Forgery and you must then determine the degree of the Forgery as explained to you in Instruction No. ______. If the State has failed to prove either of these elements, the defendant is not guilty.

Authority

Iowa Code section 715A.6

Comment

Note: Use 2a or 2b depending upon the charge.

Note: In the event the defendant claims the defense of Iowa Criminal Jury Instruction 1500.6, use the following paragraph in lieu of the last paragraph of this instruction:

"If the State has proved both of these elements, you will then determine if the defendant has proved [his] [her] defense according to Instruction No. ______. If the defendant has failed to prove [his] [her] defense according to this instruction, the defendant is guilty of Forgery. You must then determine the degree of the Forgery, as explained to you in Instruction No. ______. If the defendant has proved [his] [her] defense, or the State has failed to prove either of the elements, the defendant is not guilty."

Exhibit 22

12/31

1500.7 Credit Card - Degree of Forgery - Definition and Interrogatory. If you find the defendant guilty of Forgery, you must then determine the degree of the Forgery by Credit Card. I have attached a question which must be answered, and by so doing, you will determine the degree of the Forgery.

In answering the question, the State must prove the value of the property or services which the defendant obtained or sought to obtain. You will check the blank next to the appropriate value on the verdict form.

The following are the two degrees of Forgery by Credit Card:

1. Property or services valued at $500 or less.

2. Property or services valued more than $500.

Note: The following would appear on the verdict form:

"We, the jury, find the value of the property or services obtained or sought to be obtained to be:

1. $500 or less. ______

2. More than $500. ______

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Exhibit 23

THE
IOWA STATE BAR ASSOCIATION

IOWA JURY INSTRUCTIONS
COMMITTEE
Mark McCormick, Chair
2000 Financial Center
Des Moines, Iowa 50309
Telephone 515-243-7100
Fax 515-282-7615

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June 5, 1992

Board of Governors of the
Iowa State Bar Association
521 East Locust Street
Des Moines, Iowa 50309

Attention: Carroll Reasoner, President

Re: Iowa Jury Instructions Committee

Dear Members of the Board:

We submit the following for approval.

1. Exhibit 1 - **Iowa Civil Jury Instructions Chapter 200.9 - Loss of Future Earning Capacity.** Revision of Comment.

2. Exhibit 2 - **Iowa Civil Jury Instruction 210.2 Special Interrogatories - Punitive Damages.** Elimination of Comment on effect of answer to question no. 3.

3. Exhibit 3 - **Iowa Civil Jury Instruction Chapter 600.7 - Control - Common Law.** Revised.

4. Exhibit 4 - **Iowa Civil Jury Instruction 600.61 - Stopping On Traveled Way - Exception - Disabled Vehicle.** Revised.

5. Exhibit 5 - **Iowa Civil Jury Instruction 600.72 - Lookout.** Revised.

6. Exhibit 6 - **Iowa Civil Jury Instruction 600.74 - Legal Excuse.** Authority added.

7. Exhibit 7 - **Iowa Civil Jury Instruction 900.2 - Essentials for Recovery - Condition of Premises - Duty to Licensees.** Revised.

8. Exhibit 8 - Iowa Civil Jury Instruction 1000.10 - Affirmative Defense - State Of The Art. Comment and Authority added.

9. Exhibit 9 - Iowa Civil Jury Instruction 1200.2 - Intentional Interference With Prospective Business Advantage - Essentials For Recovery. Corrected typographical error.

10. Exhibit 10 - Iowa Civil Jury Instruction 1410.1 - First-Party Bad Faith - Essentials For Recovery. Revised.

11. Exhibit 11 - Iowa Civil Jury Instruction 2200.3 - Malicious Prosecution - Probable Cause. Authority substituted.

12. Exhibit 12 - Iowa Civil Jury Instruction 2700.1 - Elements - Will Contest. Revised.

13. Exhibit 13 - Iowa Civil Jury Instruction 2700.2 - Testamentary Capacity. Revised.

14. Exhibit 14 - Iowa Civil Jury Instruction 2700.5 - Definition of Undue Influence - Person Charged With Undue Influence Need Not Be Present. Comment added.

15. Exhibit 15 - Iowa Civil Jury Instruction 2700.7 - Definition of Confidential Relationship. Revised and Comment added.

16. Exhibit 16 - Iowa Civil Jury Instruction 2100.7 - Libel (Slander) - Damages. Authority added.

17. Exhibit 17 - Iowa Criminal Jury Instruction 800.4. - Assault Causing Bodily Injury - Elements. Comment added.

18. Exhibit 18 - Iowa Criminal Jury Instruction 920.1 - Pattern, Practice, or Scheme Of Sexual Exploitation - Elements (Felony). New Instruction.

19. Exhibit 19 - Iowa Criminal Jury Instruction 920.2 - Sexual Exploitation - Elements (Aggravated Misdemeanor). New Instruction.

20. Exhibit 20 - Iowa Criminal Jury Instruction 920.3 - Sexual Exploitation - Elements (Serious Misdemeanor). New Instruction.

21. Exhibit 21 - **Iowa Criminal Jury Instruction 920.4 - Counselor or Therapist - Definition.** New Instruction.

22. Exhibit 22 - **Iowa Criminal Jury Instruction 920.5 - Mental Health Service - Definition.** New Instruction.

23. Exhibit 23 - **Iowa Criminal Jury Instruction 920.6 - Emotionally Dependent - Definition.** New Instruction.

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24. Exhibit 24 - **Iowa Criminal Jury Instruction 920.7 - Former Patient Or Client - Definition.** New Instruction.

25. Exhibit 25 - **Iowa Criminal Jury Instruction 920.8 - Patient Or Client - Definition.** New Instruction.

The Committee appreciates your support and your consideration of these Instruction changes. If these Instructions are approved, the table of contents and index will be changed to conform. The Committee is continuing its effort to update and revise Instructions as necessary and to add Instructions as the law develops.

Very truly yours,

Mark McCormick, Chair

MM/lj
Enclosures

200.9 Loss Of Future Earning Capacity. The present value of loss of future earning capacity. Loss of future earning capacity is the reduction in the ability to work and earn money generally, rather than in a particular job.

Authority

Trushcheff v. Abell-Howe Company, 239 N.W.2d 116 (Iowa 1976)

Ehlinger v. State, 237 N.W.2d 784 (Iowa 1976)

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Comment

Note: The following should be given only if evidence of business profits is admitted:

Future loss of earning capacity is not measured by future loss of profits from a business, but is measured by the value of the person's own labor. Profits represent the gain from an investment in capital or business and the labor of others, after payment of expenses. You may consider evidence of past profits of the business in determining the plaintiff's earning capacity prior to the injury only if the evidence shows the value of plaintiff's services to the business as distinct from the profits derived from invested capital and the labor of others.

Authority for Comment

Iowa-Des Moines Nat'l Bank v. Schwerman Trucking Co., 288 N.W.2d 198 (Iowa 1980)

Exhibit 1

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210.2 Special Interrogatories - Punitive Damages.

Question No. 1: Do you find by a preponderance of clear, convincing and satisfactory evidence the conduct of the defendant constituted willful and wanton disregard for the rights or safety of another?

Answer "Yes" or "No"

ANSWER: ________

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[If your answer to Question No. 1 is "No" do not answer Question Nos. 2 and 3]

Question No. 2: What amount of punitive damages, if any, do you award?

ANSWER: ________

[If your answer to Question No. 2 is "None" do not answer Question No. 3]

Question No. 3: Was the conduct of the defendant directed specifically at (name)?

Answer "Yes" or "No"

ANSWER ________

Authority

Iowa Code section 668A.1

Comment

Note: When the issue of punitive damages against a principal or employer is submitted to the jury, add the following special interrogatory:

Question No. 4: Is (principal or employer) liable for punitive damages?

Answer "Yes" or "No"

ANSWER: ________

Exhibit 2

6/92

600.7 Control - Common Law. A driver must have his or her vehicle under control. It is under control when the driver can guide and direct its movement, control its speed and stop it reasonably fast.

A violation of this duty is negligence.

Authority

Matuska v. Bryant, 260 Iowa 726, 150 N.W.2d 716 (1967)

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Exhibit 3

600.61 Stopping On Traveled Way - Exception - Disabled Vehicle. The duties required by Instruction __________ shall not apply to the driver of any vehicle which will not operate while on the [paved] [improved] [main traveled] portion of a highway if it is impossible to avoid stopping and temporarily leaving the unoperable vehicle in that position.

Authority

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Iowa Code section 321.355

Meyer v. City of Des Moines, 475 N.W.2d 181 (1991)

Comment

Note: As to "stopping on traveled way" and "disabled vehicle," See Clark v. Umbarger, 247 Iowa 938, 75 N.W.2d 243 (1956); Uhlenhopp v. Steege, 233 Iowa 368, 7 N.W.2d 195 (1942); Smith v. Pust, 232 Iowa 1194, 6 N.W.2d 315 (1943); Tuhn v. Clark, 241 Iowa 441, 41 N.W.2d 13 (1950).

Note: For definition of "impossible," See McBeth v. Merchants, 248 Iowa 320, 79 N.W.2d 303 (1956); Henneman v. McCalla, 260 Iowa 60, 148 N.W.2d 447 (1967).

Note: For what is contemplated by "temporary," See: Boger v. Kellner, 239 Iowa 1189, 33 N.W.2d 369 (1948); and Reed v. Willison, 245 Iowa 1066, 65 N.W.2d 440 (1954).

600.72 Lookout. "Proper lookout" is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of the operation of the driver's vehicle in relation to what the driver saw or should have seen. [A driver need not keep a lookout to the rear all the time, but must be aware of the presence of others when the driver's actions may be dangerous to others.]

A violation of this duty is negligence.

Authority

Matuska v. Bryant, 260 Iowa 726, 150 N.W.2d 716 (1967)

Comment

Note: Duty to maintain a proper lookout includes the duty to stop if a driver has lost visibility entirely. Coulthard v. Keenan, 256 Iowa 890, 129 N.W.2d 597 (1964). For a duty of lookout to the rear, see McCoy v. Miller, 257 Iowa 1151, 136 N.W.2d 332 (1965).

600.74 Legal Excuse. (Name) claims that if you find that [he] [she] violated the law in the operation of [his] [her] vehicle, [he] [she] had a legal excuse for doing so and, therefore, is not negligent. "Legal excuse" means that someone seeks to avoid the consequences of [his] [her] conduct by justifying acts which would otherwise be considered negligent. The burden is upon (name) to establish a legal excuse.

1. Anything that would make complying with the law impossible.

2. Anything over which the driver has no control which places [his] [her] vehicle in a position contrary to the law.

3. Failure to obey the law when the driver is confronted with an emergency not of [his] [her] own making.

4. An excuse or exception provided by the law.

If you find that (name) has violated the law as submitted to you in other instructions, and that [he] [she] has established a legal excuse for doing so under any one of the four definitions set forth above, then you should find that (name) was not negligent for violating the particular law involved.

Authority

Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991)

Miller v. Eichhorn, 426 N.W.2d 641, 644, 645 (Iowa Ct. App. 1988)

Comment

Note: Submit only the proposition(s) supported by the evidence, and make reference to the statutory or common law specification of fault for which the excuse is claimed.

Exhibit 6

900.2 Essentials For Recovery - Condition Of Premises - Duty To Licensees. The Plaintiff must prove all of the following propositions:

1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.

2. The condition was one that a person in the defendant's position should have expected would not have been discovered or realized by the plaintiff.

3. The plaintiff did not know or have reason to know of the condition and the risk involved.

4. The defendant was negligent in failing to [make the condition safe] [or] [warn the plaintiff of the condition and the risk involved].

5. The negligence was a proximate cause of the plaintiff's damage.

6. The nature and extent of damage.

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

Authority

Sullivan v. First Presbyterian Church, 260 Iowa 1373, 152 N.W.2d 628 (1967)

Restatement (Second) of Torts sections 341 and 342

Exhibit 7

6/92

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1000.10 Affirmative Defense - State Of The Art. (Defendant) claims it complied with the state of the art.

"State of the art" is what feasibly could have been done. It means what technologically and practically could have been done at the time, based on the latest scientific knowledge and discoveries in the field, to [design] [manufacture] (product) that would have prevented plaintiff's injuries while meeting the user's needs. Custom in the industry is not necessarily state of the art, nor is every [alternate design] [safety device] for which tecnhology exists necessarily feasible.

To establish this defense, the defendant must prove its product conformed to the state of the art in existence at the time the product was [designed] [tested] [manufactured] [formulated] [packaged] [provided with a warning] [labeled].

Even if a product initially complies with the state of the art, a defendant has a continuing duty to warn users concerning product defects of which a defendant acquires knowledge after the product is [manufactured] [sold]. If a defendant later learns its product is defective or unreasonably dangerous, then the defendant has a duty to warn those it knows or should know will be affected by its use.

If a defendant proves its product conformed to the state of the art [and complied with the continuing duty to warn users], then the defendant is not at fault and your answer to interrogatory number _________ will be "no".*

If the defendant fails to prove its product conformed to the state of the art, you will consider whether the plaintiff is entitled to recover under the other instructions.

Authority

Fell v. Kewanee Farm Equipment Company, 457 N.W.2d 911, 921 (Iowa 1990)

Chown v. USM Corp., 297 N.W.2d 218, 221, 222 (Iowa 1980)

Iowa Code section 668.12

Comment

Note: The paragraph on subsequently acquired knowledge may be deleted if that is not an issue.

*Submit by interrogatory in the verdict form as to whether a defendant has proved state of the art. Hillrichs v. Avco Corp., 478 N.W.2d 70, 76 (Iowa 1991).

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

1. The plaintiff has a prospective [contractual relationship] [business relationship] with (name of third person).

2. The defendant knew of the prospective relationship.

3. The defendant intentionally and improperly interfered with the relationship by (set forth the particulars supported by the evidence).

4. a. The interference caused (name of third person) not [to enter] [to continue] the relationship; or

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

5. The amount of damage.

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

Authority

Preferred Marketing Associates Co. v. Hawkeye National Life Insurance Co., 452 N.W.2d 389 (Iowa 1990)

Nesler v. Fisher and Company, Inc., 452 N.W.2d 191 (Iowa 1990)

Exhibit 9

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1410.1 First-Party Bad Faith - Essentials For Recovery. The plaintiff must prove all of the following propositions:

1. The defendant [denied plaintiff's claim] [refusing to defend the plaintiff].

2. There was no reasonable basis for [denying the claim] [refusing to defend].

3. The defendant knew or had reason to know that there was no reasonable basis for [denying the claim] [refusing to defend].

4. The [denial] [refusal to defend] was a proximate cause of damage to the plaintiff.

5. The nature and extent of damage.

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

Authority

North Iowa State Bank v. Allied Mut. Ins. Co., 471 N.W.2d 824, 829 (Iowa 1991)

Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990)

Dolan v. Aid Ins. Co., 431 N.W.2d 790 (Iowa 1988)

Comment

Note: Element 2, the lack of a reasonable basis for denying the claim, is an objective element. This element will usually be determined by the court as a matter of law. Reuter v. State Farm Mut. Auto. Ins. Co., 469 N.W.2d 250, 255 (Iowa 1991).

Exhibit 10

6/92

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2200.3 Malicious Prosecution - Probable Cause. Probable cause for filing a criminal charge means having a reasonable ground. Probable cause exists where the defendant knew enough about the facts and circumstances and had reasonable trustworthy information, including what someone else told [him] [her] so that a reasonable person would believe that the plaintiff was guilty of the crime charged.

Probable cause does not require absolute certainty or proof beyond a reasonable doubt. It is to be determined by the factual and practical considerations of everyday life on which reasonable and careful persons [not legal experts] act.

G

Authority

Sisler v. City of Centerville, 372 N.W.2d 248 (Iowa 1985)

Restatement (Second) of Torts section 662

Exhibit 11

2700.1 Elements - Will Contest. The law presumes a person [has the mental ability to make a will] [is free from undue influence when making a will]. To overcome [this] [these] presumption[s], the Plaintiff must prove the following proposition[s] were true at the time the will was made:

1. [Testator] did not have the mental ability to make a will.

2. [Testator's] will was the result of undue influence.

If the plaintiff has failed to prove [either of] the above proposition[s] your verdict will be for the defendant. If the plaintiff has proved [one or more of] the above proposition[s], your verdict will be for the plaintiff.

Authority

In re Estate of Adams, 234 N.W.2d 125 (Iowa 1975)

In re Estate of Huston, 238 Iowa 297, 27 N.W.2d 26 (1947)

Comment

Caveat: Delete any proposition not supported by the evidence.

Exhibit 12

2700.2 Testamentary Capacity. A person has the mental ability to make a will if [he] [she]:

1. Knows a will is being made.

2. Knows the kind and extent of [his] [her] property.

3. Is able to identify and remember those persons [he] [she] would naturally give [his] [her] property to.

4. Knows how [he] [she] wants to distribute [his] [her] property.

A will is valid if the person making the will meets the above tests, even if [his] [her] mental or physical powers are impaired. A person does not have to be able to make contracts or carry on business generally. However, you may consider physical weakness or infirmity, the rational natue of the distribution, along with any other evidence in deciding if a person has the mental ability to make a will.

Authority

In re Estate of Adams, 234 N.W. 2d 125 (Iowa 1975)

Drosos v. Drosos, 251 Iowa 777, 103 N.W.2d 167 (1960)

In re Estate of Kenny, 233 Iowa 600, 10 N.W.2d 73 (1943)

Exhibit 13

2700.5 Definition of Undue Influence - Person Charged With Undue Influence Need Not Be Present. Undue influence means a person substitutes his or her intentions for those of the person making the will. The will then expresses the purpose and intent of the person exercising the influence, not those of the maker of the will. Undue influence must be present at the very time the will is signed and must be the controlling factor. The person charged with exercising undue influence need not be personally present when the will was being made or signed but the person's influence must have been actively working at the time the will was being made and signed.

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Authority

In re Estate of Cory, 169 N.W.2d 837 (Iowa 1969)

Walters v. Heaton, 223 Iowa 405, 271 N.W. 310 (1937)

Comment

Note: Where the person charged with exerting undue influence is a spouse, consider prefacing 2700.5 with the following statement:

"Undue influence means something more than and different from the natural, wholesome, relationship between wife and husband concerning their mutual interests. The influence growing out of such relation is manifestly not ordinarily 'undue' or improper."

Authority for Comment

Johnstone v. Johnstone, 190 N.W.2d 421, 426 (Iowa 1971);

Gillete v. Cable, 248 Iowa 7, 79 N.W.2d 195 (1956).

Exhibit 14

2700.7 Definition of Confidential Relationship. A confidential relationship is present when one person has gained the complete confidence of another and purports to act or advise with only the interest of the other party in mind.

Authority

Matter of Estate of Herm, 284 N.W.2d 191, 199 (Iowa 1979)

Burns v. Nemo, 252 Iowa 306, 105 N.W.2d 217, 220 (1960)

Merritt v. Easterly, 226 Iowa 564, 284 N.W. 397, 399 (1939)

Comment

Note: There is a distinction between a "confidential" and a "fiduciary relationship". Burns v. Nemo and Merritt v. Easterly, supra. If a "fiduciary" relationship is involved, it should be defined as stated in these cases.

A confidential relationship may exist between a husband and wife where one spouse is dominant and the other subservient or disabled. In re Estate of Lundwall, 242 Iowa 430, 46 N.W.2d 535 (1951).

Exhibit 15

PRINTED 7/92

2100.7 Libel (Slander) - Damages. If you find (injured party) is entitled to recover damages, it is your duty to determine the amount. In doing so, you shall consider the following items:

1. General damages. General damages are presume to result from the communication of a [libelous] [slanderous] statement. These are the kind of damages the law presumes naturally and necessarily result from the communication of [libelous] [slanderous] statements.*

2. The reasonable value of any loss of reputation suffered by (injured party). In determining this item of damage, you may consider (injured party)'s reputation before the statement was made. You may also consider the extent to which the statement was communicated.**

3. [Any other items of damage in Chapter 200 which are supported by the evidence.]

Damages must be limited to those which naturally result from the defendant's statement.

Authority

Rees v. O'Malley, 461 N.W.2d 833 (Iowa 1991)

Kelly v. Iowa State Education Association, 372 N.W.2d 288 (Iowa Ct. App. 1985)

Vinson v. Linn-Mar Community School District, 360 N.W.2d 108 (Iowa 1984)

Brown v. First National Bank, 193 N.W.2d 547 (Iowa 1972)

Comment

Note: * This item of damage should only be given in cases of libel or slander per se.

**This item of damage should only be given if supported by the evidence.

Exhibit 16

6/92

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800.4 Assault Causing Bodily Injury - Elements. The State must prove all of the following elements of assault causing a [bodily injury] [disabling mental illness]:

1. On or about the ____ day of __________, 19___, the defendant did an act which was meant to [cause pain or injury] [result in physical contact which was insulting or offensive] [place name of victim) in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive] to [him] [her].

2. The defendant had the apparent ability to do the act.

3. The defendant's act caused a [bodily injury] [disabling mental illness] to (name of victim) as defined in Instruction No. _______.

If the State has proved all of the elements, the defendant is guilty of Assault Causing [Bodily Injury] [Disabling Mental Illness]. If the State has failed to prove any one of the elements, the defendant is not guilty.

Authority

Iowa Code section 708.1

Iowa Code section 708.2

State v. McKettrick, 480 N.W.2d 52 (Iowa 1992)

Comment

Caveat: If the defendant is charged with Assault with Intent to Inflict Serious Injry and Assault Causing Bodily Injury relating to the same assault, the following element should be added: "4. The defendant did the act without the intent to inflict serious injury." State v. McKettrick, 480 N.W.2d 52 (Iowa 1992).

Note: It may be appropriate to give the jury a separate instruction which indicates the defendant cannot be convicted of both Assault With Intent to Inflict Serious Injury and Assault Causing Bodily Injury if the charge is for a single assault. State v. McKettrick, 480 N.W.2d 52 (Iowa 1992).

Exhibit 17

6/92

PRINTED 7/92

920.1 Pattern, Practice, or Scheme Of Sexual Exploitation - Elements (Felony). The State must prove all of the following elements of Pattern, Practice, or Scheme of Sexual Exploitation:

1. On or about the ____ day of __________, 19___, the defendant:

   a. Kissed (victim); or

   b. Touched the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals of (victim); or

   c. Performed a sex act with (victim); or

   d. Engaged in [specify sexual conduct] with (victim).*

2. The defendant engaged in this conduct as part of a pattern, practice, or scheme.

3. The defendant did so with the specific intent to arouse or satisfy the sexual desires of the defendant or (victim).

4. The defendant was then a counselor or therapist.

5. (Victim) was then:

   a. A patient, client or emotionally dependent former patient or client; or

   b. A former patient or client, and the conduct occurred within one year of the termination of the mental health serices provided by the defendant.

6. The defendant's conduct was not part of a necessary examination or treatment provided (victim) by the defendant while acting within the scope of the practice or employment in which the defendant was engaged.**

If the State has proved all of the elements, the defendant is guilty of Pattern, Practice, or Scheme of Sexual Exploitation. If the State has failed to prove any one of the elements, the defendant is not guilty of Pattern, Practice, or Scheme of Sexual Exploitation, and you will then consider the crime of Sexual Exploitation explained in Instruction No. _______.

Authority

Iowa Code section 709.15(1)(f)(1)

Comment

Note: * Use only specifications supported by the evidence.
**Use only when this statutory affirmative defense is raised by the defendant and supported by the evidence.

Iowa Criminal Jury Instruction 200.2 (Specific Intent).

Iowa Criminal Jury Instruction 900.8 (Sex Act).

G

Exhibit 18

6/92

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920.2 Sexual Exploitation - Elements (Aggravated Misdemeanor). The State must prove all of the following elements of Sexual Exploitation:

1. On or about the ____ day of ___________, 19___, the defendant:

   a. Kissed (victim); or

   b. Touched the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals of (victim); or

   c. Performed a sex act with (victim); or

   d. Engaged in [specify sexual conduct] with (victim).*

2. The defendant did so with the specific intent to arouse or satisfy the sexual desires of the defendant or (victim).

3. The defendant was then a counselor or therapist.

4. (Victim) was then a patient, client or emotionally dependent former patient or client.

5. The defendant's conduct was not a part of a necessary examination or treatment provided (victim) by the defendant while acting within the scope of the practice or employment in which the defendant was engaged.**

If the State has proved all of the elements, the defendant is guilty of Sexual Exploitation. If the State has failed to prove any one of the elements, the defendant is not guilty.

Authority

Iowa Code section 709.15(1)(f)(2)

Comment

Note: * Use only specifications supported by the evidence.
**Use only when this statutory affirmative defense is raised by the defendant and supported by the evidence.

Iowa Criminal Jury Instruction 200.2 (Specific Intent)

Iowa Criminal Jury Instruction 900.8 (Sex Act)

Exhibit 19 6/92

G

920.3 Sexual Exploitation - Elements (Serious Misdemeanor). The State must prove all of the following elements of Sexual Exploitation:

1. On or about the ____ day of __________, 19___, the defendant:

   a. Kissed (victim); or

   b. Touched the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals of (victim); or

   c. Performed a sex act with (victim); or

   d. Engaged in [specify sexual conduct] with (victim).*

2. The defendant did so with the specific intent to arouse or satisfy the sexual desires of the defendant or (victim).

3. The defendant was then a counselor or therapist.

4. (Victim) had been a patient or client within one year of the termination of the mental health services provided by the defendant.

5. The defendant's conduct was not part of a necessary examination or treatment provided (victim) by the defendant while acting within the scope of the practice or employment in which the defendant was engaged.**

If the State has proved all of the elements, the defendant is guilty of Sexual Exploitation. If the State has failed to prove any one of the elements, the defendant is not guilty.

Authority

Iowa Code section 709.15(1)(f)(3)

Comment

Note: * Use only specifications supported by the evidence.
**Use only when this statutory affirmative defense is raised by the defendant and supported by the evidence.

Iowa Criminal Jury Instruction 200.2 (Specific Intent)

Iowa Criminal Jury Instruction 900.8 (Sex Act)

920.4 Counselor Or Therapist - Definition. Concerning element number ____ of Instruction No. _______, the State must prove that the defendant was a physician, psychologist, nurse, professional counselor, social worker, marriage or family therapist, alcohol or drug counselor, member of the clergy, or any other person, whether or not licensed or registered by the State, who provides or purports to provide mental health services.

Authority

Iowa Code section 709.15(1)(a)

G

Exhibit 21

920.5 Mental Health Service - Definition. Concerning element number ___ of Instruction No. _______, the State must prove that the defendant provided or purported to provide treatment, assessment, or counseling of another person for a cognitive, behavioral, emotional, mental or social dysfunction, including an intrapersonal or interpersonal dsyfunction.

Authority

Iowa Code section 709.15(1)(b)

G

Exhibit 22

6/92

920.6 Emotionally Dependent - Definition. Concerning element number ____ of Instruction No. _______, the State must prove that (victim's) emotional condition or the nature of the treatment provided by the defendant was such that the defendant knew or had reason to know* that (victim) was significantly impaired in the ability to withhold consent to sexual conduct by the defendant.

You may but are not required to infer that a former patient or client is dependent for one year following the termination of mental health services.

G

Authority

Iowa Code section 709.15(1)(c)

Comment

Note: Iowa Criminal Jury Instruction 200.3 (Knowledge).

Caveat: *The Committee takes no position on whether State v. Hutt, 330 N.W.2d 788 (Iowa 1983) (proof of actual knowledge required in prosecution for possession of stolen property) has any application to this statute.

Exhibit 23

920.7 Former Patient Or Client - Definition. Concerning element number ____ of Instruction No. _______, the State must prove that (victim) received mental health services from the defendant.

Authority

Iowa Code section 709.15(1)(d)

G

Exhibit 24

6/92

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920.8 Patient Or Client - Definition. Concerning element number ____ of Instruction No. _______, the State must prove that (victim) was receiving mental health services from the defendant.

Authority

Iowa Code section 709.15(1)(e)

Exhibit 25

6/92

Outline

GOD, RED LIGHT DISTRICTS AND CHANGING THE DEFENSE POSTURE TO WHERE THE SUN DOES SHINE

Angela C. Simon
of
Hammer, Simon & Jensen

If we shadows have offended,
Think but this, and all is mended,
That you have but slumb'red here
While these visions did appear.
And this weak and idle theme,
No more yielding but a dream,
Gentles, do not reprehend.
If you pardon, we will mend.

A Mid Summer Nights' Dream

H

I. Introduction.

As Lincoln said, "*I am not an accomplished lawyer. I find quite as much material for a lecture on those points wherein I have failed, as those wherein I have been moderately successful.*"

As lawyers, we share a commitment to zealous, ethical advocacy on behalf of our clients. That is our contribution to the administration of justice.

As trial lawyers, we become effective contributors by adapting to applicable circumstances, building on available alternatives and working with varied strategies.

As defense lawyers we recognize that approaches to advocacy are colored by obvious and usually distinct biases—the color of our particular bias is "defense."

Our consensus of commitment, however, does not equal a consensus of method. Llewellyn says that "*The more conscious portions of ones' thieving should find some record.*"[1] Well, I can't find the record, but at least one federal judge preaches what my senior partner practices—know yourself, your case, your community and your court. As I discuss with you a few ideas that sometimes work for me and more often work for him, remember there is no one-size-fits-all effective defense. I ask only that you try these on for size.

II. Changing the Defense Posture to Where the Sun Does Shine.

If you have tried but one case as a defense lawyer and listened to the jury instructions on comparative fault (no more contributory negligence bars all), strict liability (why not write the check now?), consortium (unlike real life, in an Iowa courtroom plaintiff spouses aren't held accountable for their actions to the consortium-seeking spouse), and the litany of damages (that doesn't end until you get to the blank with the dollar sign before it!), then you must have felt, as I have, that the sun can never shine on defendants because they are always in a position where the sun can't shine. Yet there are defense verdicts and there are ways to posture our cases to get at least our share of the sun.

A. Jury Selection.

1. Notes:

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[1] Llewellyn on Legal Realism

— Each potential juror brings to the courtroom a lifetime of experience, opinions, and prejudices.

— Seventy to seventy-five percent of jurors have a definite opinion about the case by the conclusion of voir dire.[2]

— There is a relationship between juror's feelings of likability toward the attorney and their pre-deliberation conclusions and final verdicts.[3]

— A survey of cases in which businesses or corporations were defendants found jurors in wide-spread agreement with the following statements: there are too many frivolous lawsuits today, 83% agreed, 5% disagreed; people are too quick to sue, 81% agreed, 9% disagreed; damage awards from jurors are too high, 39% agreed, 23% disagreed; the threat of lawsuits is so prevalent today that it interferes with the development of new and useful products, 57% agreed, 15% disagreed.[4]

— Two-thirds of prospective jurors believe a lawyer is likely to lie to them in court, and the gender of the attorney has no bearing on credibility. Jurors tend to be more cynical about the credibility of defense attorneys than plaintiff attorneys, with 60% believing that the plaintiff's attorneys are likely to lie, and 75% believing that defense lawyers lie.[5]

(Incidentally noted, a new study reports that judges, not juries, are more likely to side with plaintiffs in several major categories of litigation, and specifically suits involving medical malpractice claims, claims of defective products, and automobile accident claims. In medical malpractice claims and automobile injury claims, judges were also found to be more generous than juries in the damage awards. Judges More than Juries Side With Personal Injury Plaintiffs, Wall Street Journal, Milo Geyelin, Thursday, July 23, 1992, citing a

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[2]V. Hale Starr and Mark McCormick, Jury Selection, 223 to 224 (1985)

[3]T. Sannito and Peter McGovern, Courtroom Psychology for Trial Lawyers, 170 (1985)

[4]Valerie P. Hans, University of Delaware.

[5]Metricus, Inc., National Juror Opinion Survey, Presented to the American Bar Association, Litigation Section Counsel and Committee Chairs.

study conducted by Cornell University Law Professors Theodore Eisenberg and Kevin Clermont.)

2. Authority:

— Iowa Rule of Civil Procedure 187.

— Selection is statutory. Chapter 607A, Code of Iowa.

— Statute regulating the selection of jurors is directory only and selection is sufficient if the statute is substantially complied with. Iowa v. Williams, 243 N.W.2d 658 (Iowa 1976). The basic purpose attending the juror-drawing process is to obtain a representative cross-section of the community while prohibiting systematic exclusion of any identifiable eligible group. It also equitably distributes jury duty among the inhabitants of a county. Iowa v. Lohr, 266 N.W.2d 1 (Iowa 1978). Whenever the juror's own interests, or those of the public, will be injured by attendance, he or she may be excused from service. This is discretionary with the court and should be granted only upon showing good cause. Iowa v. Critelli, 237 Iowa 1271, 24 N.W.2d 113 (1946). A challenge to the array must be in writing and can be exercised under Chapter 609 and Rule 187 only if the departure occurred from the statutory requirements for drawing the panel or returning the jury. Iowa v. Sallis, 262 N.W.2d 240 (Iowa 1978).

— Bias and prejudice are not recognized challenges. Iowa v. Staker, 220 N.W.2d 613 (Iowa 1974). The primary function of voir dire is to allow the parties, by questioning the panel, to obtain an impartial jury, which is defined as one unaffected by outside influences and neutral toward all parties. It is not necessary, however, that the jury be totally ignorant of the facts and issues in the case; a presumption of impartiality exists. There is generally sufficient impartiality if a person can lay aside impressions or opinions and render a verdict on the evidence given in court. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878); United States v. Wood, 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936), cited in Iowa Trial Practice Manual, John Roehrick.

— Wide latitude should be allowed in questioning jurors to determine their qualifications and to provide counsel with sufficient information to assist in exercising challenges.

Schwickerath v. Maas, 230 Iowa 329, 297 N.W. 248 (1941); Elkin v. Johnson, 260 Iowa 46, 148 N.W.2d 442 (1967); Iowa v. Windsor, 316 N.W.2d 684 (Iowa 1982). However, the latitude allowed is within the sound discretion of the court, but so long as voir dire remains within bounds, it should not be unduly restricted. Lamaak v. Brown, 259 Iowa 1324, 147 N.W.2d 915 (1967); Wilson v. Ceretti, 210 N.W.2d 643 (Iowa 1973). The law may not be read to the jury, nor may voir dire be used to make an opening statement. [In this case, brought under the Iowa Dram Shop Act, the court held there was no abuse of discretion by the trial court in restricting the plaintiff's attorney from questioning the panel members regarding prior verdicts in which they had participated. Sauer v. Scott, 238 N.W.2d 339 (Iowa 1976)]. Voir dire may not be used to place evidence before the jury which counsel knows would be inadmissible. Mead v. Scott, 256 Iowa 1285, 130 N.W.2d 641 (1964). For the purposes of determining juror prejudice, the crucial question is not what the juror has been exposed to, but whether the juror holds such fixed opinions on the merits of the case that he or she cannot judge the case impartially. Iowa v. Lanscak, 404 N.W.2d 192 (Iowa App. 1987).

3. Discussion: That which is first, shall be last.

B. Opening Statement.

1. Notes:

— Eighty percent of jurors decide your case by the conclusion of opening statements.[6]

2. Authority:

— Iowa Rule of Civil Procedure 191.

— The opening statement may not be used as an instruction as to the law of the case nor to make an elaborate argument of the case. Iowa v. Kendall, 200 Iowa 483, 203 N.W. 806 (1925). Iowa v. Williams, 63 Iowa 135, 18 N.W. 682 (1884). It is improper to: address jurors by first names [Johnson v.

[6] H. Kalven, Jr. & H. Zeisel, The American Jury, 352-372 (1966)

Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942)]; to comment on wealth of the defendant [Vanarsdol v. Farlow, 200 Iowa 495, 203 N.W. 794 (1925)]; to suggest that defendant is insured [McCornack v. Pickerell, 225 Iowa 1076, 283 N.W. 899 (1939)]; to inject prejudicial matter into the minds of the jury [Mead v. Scott, 256 Iowa 1285, 130 N.W.2d 641 (1964)]; to describe the conduct of a party being a criminal act [Pose v Roosevelt Hotel Co., 208 N.W.2d 19 (Iowa 1973)]; to refer to prior trials or the amount of the verdict [Justis v. Union Mutual Casualty Co., 219 Iowa 213, 257 N.W. 581 (1934)]; to refer to witnesses who will testify as to who was at fault in an accident [Kester v. Bruns, 326 N.W.2d 279 (Iowa 1982)].

— The party having the burden of proof has the right to present the first opening statement. Early v. Bremer County Farmers Mutual Fire Insurance Association, 201 Iowa 263, 207 N.W. 117 (1926). The trial court has the authority to impose reasonable limitations on the length or content of opening statements, but the court should exercise caution in so doing so that neither side is prevented from fully presenting its case. 3 A.L.R.3d 1341, 71 A.L.R.4th 130.

3. Discussion: Opening statement is an "opening," not just a beginning.

C. Closing Argument.

1. Notes:

— The German philosopher, Arthur Schopenhauer, provided 38 stratagems or ways to win an argument. Fortunately my partner was able to convince me before I memorized all 38, that those stratagems alone a good argument don't make, and I am convinced that if I confine my closing arguments to the unresonant vacuum of the law in tandem with a dispassionate discourse of the testimony and exhibits offered as evidence, the only fitting conclusion will be a transfer of my particular talents to the tax division of our practice.

— Nearly 60% of Americans think of the courtroom as a moral arena where it is more important for the jury to do what is morally right than what is legally correct.[7]

2. Authority:

— Iowa Rule of Civil Procedure 195.

— It is proper summation to draw conclusions from the testimony even if the deductions be erroneous and the logic faulty as long as the conclusions do not go outside the record or appeal to prejudice and passion. Lawyer v. Stansell, 217 Iowa 111, 250 N.W. 887 (1933). Counsel may draw conclusions and argue all permissible inferences which may reasonably flow from the record and which do not misstate the facts, though counsel may not create evidence nor interject personal beliefs. Counsel is entitled to latitude during closing argument in analyzing evidence admitted in the trial. Iowa v. Williams, 334 N.W.2d 742 (Iowa 1983); Iowa v. Phillips, 226 N.W.2d 16 (Iowa 1975).

— It is proper to read extracts from the evidence of witnesses taken from the record, Willis v. Shertz, 188 Iowa 712, 175 N.W. 321 (1919); comment on failure of the opposing party to produce testimony within his control unless such unproduced testimony constitutes a privileged communication, Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942); Howard v. Porter, 240 Iowa 153, 35 N.W.2d 837 (1949); to comment on the failure of the adverse party to testify in explanation of testimony against him and to employ the oratorical privilege of an advocate to make sympathetic appeals to the jury if it is based upon the record, Bohen v. North American Life Insurance Company of Chicago, 188 Iowa 1349, 177 N.W. 706 (1920).

— It is improper summation to unfairly appeal to juror prejudice against corporations, Lawyer v. Stansell, 217 Iowa 111, 250 N.W. 887 (1933); refer to the relative wealth or poverty of the parties, Mongar v. Barnard, 248 Iowa 899, 82 N.W.2d 765 (1957); suggest that damages sued for are covered by

[7]Litigation News, April 1992, Vol. 17, No. 4, Survey of Prospective Jurors Shows Preconceptions Trial Lawyers Need to Consider, Mark E. Staib.

insurance, Price v. King, 255 Iowa 314, 122 N.W.2d 318 (1963); comment or read from evidence or proceedings not a part of the record, Iowa v. Mayes, 286 N.W.2d 387 (Iowa 1979); assert belief in the justice of the client's case, Canon 15, Canons of Professional Ethics; and argue the Golden Rule for determination of damages, Oldsen v. Jarvis, 159 N.W.2d 431 (Iowa 1968).

— In exceptional cases, such as where the defendant has the only disputed fact to prove, or where there are several affirmative defenses, the Court may allow that party to open and close. General Motors Acceptance Corporation v. Whiteley, 217 Iowa 998, 252 N.W. 779 (1934); First State Bank of Riverside v. Tobin, 204 Iowa 456, 215 N.W. 767 (1927); and Early v. Bremer County Farmers Mutual Fire Insurance Association, 201 Iowa 263, 207 N.W. 117 (1926). In a civil trial by jury, the court is prohibited from limiting the time of closing argument under Rule 195.

3. Discussion: "*And summed it up so well that it came to far more than the witness ever had said.*" Lewis Carroll, Through the Looking Glass.

D. Proximate Cause.

1. Notes:

— Proximate cause, or legal cause, may serve to limit responsibility, but has been described as an illusive concept incapable of being precisely defined to cover all situations. Modern Tort Law, Liability and Litigation, Revised Edition, Lee & Lindahl, Vol. 1 (1988).

2. Authority:

— The general rule is that a defendant's conduct is the proximate cause of injury or death to another if: (1) that conduct is a substantial factor in bringing about the harm and, (2) there is no other rule of law relieving the defendant of liability because of the manner in which the conduct resulted in the harm. Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991).

— Interrogatories on causation of damages must be submitted. Hollingshead v. Watkins, 186 Iowa 582, 173 N.W. 4 (1919). Interrogatories may be asked on the issue of proximate cause. Schlinkert v. Skaalia, 203 Iowa 672, 213 N.W. 219 (1927).

3. Discussion: Proximate cause as the cause—the most telling weapon in the diminishing defense armory, and probably the most misunderstood legal concept.

III. Red Light Districts.

— In one of our firm's books, peopling what my senior partner calls my "*how to*" section, Professor Edmund Morgan of Harvard juxtaposes the Palaces of Justice with the Red Light Districts of the Law. What I've had to learn from practice is that it may be a short fall from the palaces to the pits!

H

A. Spoilation. (Hoisting plaintiffs on their own petard.)

1. Authority:

— While certain appellate courts have recognized the new tort of intentional spoilation of evidence in certain actions, and also indicated there may be grounds for stating a negligent cause of action, there has yet been no recognition of a general common law duty to preserve evidence. Modern Tort Law, Liability & Litigation, Lee & Lindahl, Vol. 2 (1988).

2. Discussion: Et tu, Brute?

B. Judicial Admissions. (The wrong words at the right time.)

1. Authority:

— An inadvertent mistake or characterization of the case will probably not be binding on the party. Frederick v. Gasten, 1 Greene 401 (1848). A deliberate admission, however, is binding. Iowa v. Wilson, 166 Iowa 309, 144 N.W. 47, rehearing denied, 166 Iowa 309, 147 N.W. 739 (1914). 5 A.L.R.3d 1405.

— The rule is well-settled that admissions in the pleadings, if not amended or withdrawn, stand as conclusive proof of the admitted facts, and the party making them is bound thereby.

No evidence is needed to establish them. Long v. McAllister, 319 N.W.2d 256 (Iowa 1982); Hanson v. Lassek, 261 Iowa 707, 154 N.W.2d 871 (1967); Smith v. Bitter, 319 N.W.2d 196 (Iowa 1982). When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission limiting the issues and putting certain facts beyond dispute. Nevertheless, it exists as an utterance once deliberately made and may be used as a quasi-admission like any other utterance of the party as an item of evidence, not final or conclusive. The opponent whose utterance it is, may nonetheless proceed with his proof in denial of its correctness; it is merely an inconsistency which discredits in greater or lesser degree his present claim and his other evidence. Katcher v. Heidenwirth, 254 Iowa 454, 118 N.W.2d 52 (1962), and Clubb v. Osborn, 260 Iowa 223, 149 N.W.2d 318 (1967), citing 4 Wigmore on Evidence, 3d Edition, Sections 1059 and 1067.

2. Discussion: Mea culpa, mea culpa.

C. Bifurcation. (Divided we conquer or fall.)

1. Authority:

— Iowa Rule of Civil Procedure 186.

— Whether the circumstances warrant bifurcation of trial is a matter within the discretion of the trial court. Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991).

2. Discussion:

— General Rule No. 1, the adversary system seems to work better when the entire case is tried at one time.

— General Rule No. 2, general rules are made to be broken

— So when and why?

D. The Professional Witness (or Ray Stefani's Want-ad Warrior).

1. Authority:

— Section 622.72, Code of Iowa.

— Iowa Rules of Evidence No. 702 and 704.

— Opinions expressed by an expert witness on the truthfulness of a witness are not admissible. They may not, either directly or indirectly, render opinions on the credibility or truthfulness of witnesses. Iowa v. Brotherton, 384 N.W.2d 375 (Iowa 1986).

— If scientific evidence is reliable and will assist the trier of fact to determine an issue or understand evidence, the court need not await general acceptance of the scientific community to allow testimony on the subject. Iowa v. Klindt, 389 N.W.2d 670 (Iowa 1986). The ultimate determination of what is or is not the proper subject matter of expert testimony lies in the discretion of the court. Smith v. Cedar Rapids Country Club, 255 Iowa 1199, 124 N.W.2d 557 (1963).

— In a strict liability case, the requirement of unreasonable danger is a legal standard on which no witness, expert or non-expert, may express an opinion as to whether the person or conduct or product measures up to the standard. Aller v. Rodgers Machinery Manufacturing Co., Inc., 268 N.W.2d 830 (Iowa 1978).

— Opinions may not be given on matters which involve questions of law, nor are opinions on mixed questions of law and fact the proper subject of opinion evidence. Briney v. Tri-State Mutual Grain Dealers Fire Insurance Co., 254 Iowa 673, 117 N.W.2d 889 (1962) and Higgins v. Blue Cross of Western Iowa and South Dakota, 319 N.W.2d 232 (Iowa 1982); however, Iowa is committed to the liberal rule which allows opinion testimony if it is of a nature to aid the jury and is based on special training, experience or knowledge with respect to the issue in question, provided there is sufficient data upon which an expert opinion can be made. Iowa v. Galloway, 275 N.W.2d 736 (Iowa 1979).

2. Discussion: Comme ci, comme ça.

E. Animation. (Is it Mickey Mouse or Mighty Mouse?)

1 Authority:

H

H

— Determination of admissibility of demonstrative evidence rests in the discretion of the trial court. Iowa v. Zaehringer, 280 N.W.2d 416 (Iowa 1979). Where demonstrative evidence is sought to be introduced into evidence at trial, the following questions control the trial court's discretion in adjudicating admissibility. Is it relevant, has it been properly authenticated, is there a specific reason of policy or principle weighing against admission, does its probative value outweigh the danger of prejudice, is the evidence so cumbersome as to threaten interference with the orderly progress of the trial, and is the evidence inordinately offensive or indecent? Hansen v. Franklin County, 247 Iowa 1287, 78 N.W.2d 805 (1956).

— Photographs are admissible to show occasions, surroundings and both before and after changes in the condition. Law v. Hemmingsen, 249 Iowa 820, 89 N.W.2d 386 (1958). Enlarged photographs or slides may be used to illustrate testimony, and photomicrographs and photomacrographs are generally treated as enlargements. Iowa v. Cooper, 180 N.W.2d 424 (Iowa 1970); Iowa v. Jones, 233 Iowa 843, 10 N.W.2d 526 (1943). Where the appearance and condition of a particular item is sought to be shown, photos taken after a material change of time which show a change in condition are not admissible unless the change is fully set out and explained. Wendling v. Community Gas Company, 254 Iowa 1158, 120 N.W.2d 401 (1963). The basic principles which govern admission of photographs also apply to admission of motion picture films taken without artificial reconstruction. Iowa v. Deering, 291 N.W.2d 38 (Iowa 1980). Proper foundation for admission into evidence of a motion picture film demands only that fidelity of the film's portrayal be established. Id.

— Models, when relevant and material to the facts sought to be demonstrated by their use, and when shown to be substantially like the real thing or substantially similar in operation and function, are admissible. Davis v. Walter, 259 Iowa 837, 146 N.W.2d 247 (1966).

— Admission of testimony regarding experiments is a matter peculiarly within the discretion of the trial court. Palleson v. Jewell Cooperative Elevator, 219 N.W.2d 8 (Iowa 1974). Conditions and circumstances of evidence of experiments sought to be adduced must be substantially similar, but do not have to be identical, and in some instances, evidence of

experiments may be admitted for some purposes despite failure to show similarity. Hubby v. Iowa, 331 N.W.2d 690 (Iowa 1983). It has been held that without regard to scientific reliability or expert opinion, a witness may describe relevant information produced by an experiment or comparison involving physical evidence in the case. Iowa v. Barrett, 401 N.W.2d 184 (Iowa 1987).

2. Discussion: Animated use or simulated abuse?

F. Unfair Tactics. (Is this where the gloves come off?)

Civil trials originated as substitutes for private brawls, but to your dismay you may have found yourself, as I have, embroiled not only in a trial, but in a private brawl, as well.

H

G. Objections. (Up to your aspect in alligators.)

1. Authority:

— As a rule, an objection must state specific grounds rather than the general form that the evidence is incompetent, irrelevant and immaterial. Iowa v. Davis, 196 N.W.2d 885 (Iowa 1972). To be sufficient an objection must reasonably alert the trial court to the claimed error to give the court an opportunity to correct it. Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980). In order for there to be proper preservation of errors, objections to evidence must be timely and must be raised at the earliest time the error becomes apparent. Iowa v. Reese, 259 N.W.2d 771 (Iowa 1977).

2. Discussion: You have to cross the river to make a record, so must you aggravate the alligator on the way?

IV. God.

As we all know, our Supreme Court has now ruled God faultless in Iowa. Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991). So what has God to do with lawyers, lawsuits and the legal system? The popular suspicion is "*very little,*" but I'm happy to report that even if God has not often shown the beneficence of His light on defense lawyers, He has shown it on at least one member of that protected class, the plaintiff's lawyers. This I have on good authority. We recently appeared before an experienced trial judge who told us that when he practiced law, his partner always ended his summations by telling juries how he and his wife

got on their knees each night and prayed to God about the outcome of the case. Perhaps it worked for him, as he is a well-known plaintiff's lawyer.

But there is another way to get God on the defense side of the table. If the evidence in your case involves a force of nature, an unusual or extraordinary occurrence, and is an occurrence which under normal conditions could not have been anticipated or expected, then you may affirmatively raise an act of God defense as the sole proximate cause of the harm in question. Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991). Thus, it appears that even though God may not be a party, He may be a cause.

V. Conclusion.

H

The king's a beggar, now the play is done;
All is well ended, if this suit be won. . .

All's Well That Ends Well

BANKRUPTCY AUTOMATIC STAY AND INSURANCE: SELECTED PROBLEMS

Eric W. Lam

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Cedar Rapids, Iowa

Iowa Defense Counsel Association
Annual Meeting
October 1, 1992

I

This outline addresses problems faced by insurers when an insured files bankruptcy. Specifically, the effect of the bankruptcy automatic stay on litigation involving bankrupt insureds is discussed, with a particular focus on Iowa and Eighth Circuit case law.

I. Automatic Stay

A. 11 U.S.C. §362(a): What is Stayed?

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of --

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) The setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

B. **Case Law**

1. Section 362(a)(1)

Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991). An Eighth Circuit panel held that 11 U.S.C. §362(a)(1) does <u>not</u> apply to judicial proceedings that were initiated <u>by</u> the debtor.

2. Section 362(a)(3)

Insurance company prohibited by automatic stay from post-cancellation of insurance policy. *E.g., In re Pester Refining Co.*, 58 B.R. 189, 191 (Bankr. S.D. Iowa 1985).

3. *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation*, 140 B.R. 969 (N.D. Ill. 1992).

4. Lam, Cancellation of Insurance: Bankruptcy Automatic Stay Implications, 59 Am. Bankr. L.J. 267 (1985).

C. **Void or Voidable?**

Some courts have held that actions taken in violation of the stay are not void, but merely voidable. *E.g., Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir. 1990); *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989); *In re Sports & Science Industry, Inc.*, 95 B.R. 745 (Bankr. C.D. Calif. 1989); *In re Oliver*, 38 B.R. 245 (Bankr. D. Minn. 1984). The majority rule, however, is that actions taken in violation of the stay are void ab initio. *E.g., In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *Ellis v. Consolidated Diesel Electric Corp.*, 894 F.2d 371 (10th Cir. 1990); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *In re Krueger*, 88 B.R. 238 (Bankr. App. 9th Cir. 1988); *In re Garcia*, 109 B.R. 335 (N.D. Ill. 1989).

D. **What is <u>NOT</u> Stayed? 11 U.S.C. §362(b)**

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay --

(1) under subsection (a) Of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or

continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's policy or regulatory power;

(6) under subsection (a) Of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) Of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) Of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [*sic*]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively);

(14) under subsection (a) of this section, of the setoff by a swap

participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement.

(15) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution; or

(17) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the HIgher Eduction Act of 1965 (20 U.S.C. 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.

E. **Sanctions for Willful Violation. 11 U.S.C. §362(h).**

1. The statute.

11 U.S.C. §362(h) provides: An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

2. Case Law.

In re Knaus, 889 F.2d 773 (8th Cir. 1989). Court awarded punitive damages when a creditor refused to surrender property in its possession, and when creditor's president attempted to persuade the debtor's church elders to excommunicate the debtor from the church because of the debtor's bankruptcy filing. In *In re Ketelsen*, 880 F.2d 990 (8th Cir. 1989), the court held that "appropriate circumstances" in 11 U.S.C. §362(h) required "egregious, intentional misconduct on the violator's part" to support a punitive damages award. In *United States v. McPeck*, 910 F.2d 509 (8th Cir. 1990), the Internal Revenue Service's

claim exceeded the debtor's damages for violation of the stay. The "proper procedure" was therefore to offset the debtor's recovery against the Internal Revenue Service's claim, pursuant to 11 U.S.C. §106(b). Note that in *In re Reinehart*, 887 F.2d 165 (8th Cir. 1989), the Eighth Circuit, relying on the United States Supreme Court's "narrow interpretation" of 11 U.S.C. §106 in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), held that punitive damage award could *not* be awarded against the Small Business Administration.

3. Individual vis-a-vis Corporation.

The express language of 11 U.S.C. §362(h) refers to "an individual" and makes no reference to corporations or other entities. Some courts therefore have held that punitive damages are not available against corporations. *E.g., In re Chateaugay Corp.*, 920 F.2d 183 (2d Cir. 1990); *In re Versar Architects and Engineers, Inc.*, 138 B.R. 620 (Bankr. D. Colo. 1992); *In re Prairie Trunk Railway*, 125 B.R. 217 (Bankr. N.D. Ill. 1991). Other courts have not so construed §362(h), and have held that punitive damage awards are available against non-individuals. *In re Atlantic Business and Community Corp.*, 901 F.2d 325 (3d Cir. 1990); *In re Jim Nolker Chevrolet-Buick-Oldsmobile, Inc.*, 121 B.R. 20 (Bankr. W.D. Mo. 1990); *Budget Service Co. v. Better Homes, Inc.*, 804 F.2d 289 (4th Cir. 1986); *In re Millard Pond Partners*, 113 B.R. 420 (Bankr. W.D. Tenn. 1990); *In re Tell-A-Communications Consultants, Inc.*, 50 B.R. 250 (Bankr. D. Conn. 1985).

mk/ewl/outline.ins/1055/82892

In the Matter of MAHURKAR DOUBLE LUMEN HEMODIALYSIS CATHETER PATENT LITIGATION.

No. MDL 853.

United States District Court,
N.D. Illinois, E.D.

May 28, 1992.

In multidistrict patent litigation brought against Chapter 11 debtor and nondebtor codefendant prepetition, plaintiff requested damages and injunction against debtor, debtor requested declaratory judgment, and plaintiff filed motion seeking order that debtor cease its interference with discovery. After bankruptcy filing, temporary restraining order was issued by the Delaware Bankruptcy Court. The District Court, Easterbrook, Circuit Judge, sitting by designation, held that: (1) district court had authority to interpret automatic stay; (2) enforcement of temporary restraining order issued by Delaware Bankruptcy Court was suspended; (3) automatic stay barred claims against debtor, and debtor's counterclaim for declaratory relief was also suspended; and (4) automatic stay did not bar discovery to extent it was calculated to lead to evidence admissible against nondebtor codefendant.

So ordered.

See also 781 F.Supp. 1295.

1. Bankruptcy ⚖2061

Federal district court in which patent infringement action was pending against debtor and others at time of debtor's Chapter 11 filing in another district had authority to construe automatic stay provision of Bankruptcy Code and decide what effect stay had on multidistrict patent litigation. Bankr.Code, 11 U.S.C.A. § 362(a).

2. Bankruptcy ⚖2061

Bankruptcy court and court in which other litigation involving debtor exists may construe automatic stay. Bankr.Code, 11 U.S.C.A. § 362(a).

3. Bankruptcy ⚖2374

Enforcement of temporary restraining order issued by Bankruptcy Court in Delaware restraining plaintiffs in multidistrict patent litigation in federal district court in Illinois from taking any action with respect to patent litigation, including filing of briefs, participating in any type of discovery, and even participating during hearing scheduled in district court would be enjoined by district court, to ensure that collateral bar doctrine imposed no risk to lawyers who had done no more than ask for a decision by district court. Bankr.Code, 11 U.S.C.A. §§ 105(a), 362(a); 28 U.S.C.A. § 157(b)(2).

4. Bankruptcy ⚖2048(5)

Enforcement of automatic stay against fresh litigation or continuation of old litigation on merits is core proceeding, in which bankruptcy judge possesses authority to issue injunctions, but extension of automatic stay to forbid any other court from determining meaning of stay provision and from proceeding to extent that statute allows, is not core proceeding. Bankr.Code, 11 U.S.C.A. §§ 105(a), 362(a); 28 U.S.C.A. § 157(b)(2).

5. Federal Courts ⚖10

Statute permitting district court to issue all writs necessary or appropriate in aid of jurisdiction gave Illinois federal district court authority to enjoin parties to multidistrict patent litigation from enforcing temporary restraining order issued by bankruptcy court in Delaware forbidding patent litigation, in which debtor was a defendant, from proceeding, as issue and claim preclusion as result of bankruptcy judge's decision did not apply because temporary restraining order lacked preclusive effect as an unreviewable order. 28 U.S.C.A. § 1651(a); Bankr.Code, 11 U.S.C.A. §§ 105(a), 362(a).

6. Injunction ⚖219

Because of collateral bar doctrine, even legally erroneous injunctions must be obeyed until vacated or stayed.

7. Bankruptcy ⚖2395

Literal meaning of automatic stay did not bar district court from proceeding to decision on declaratory judgment action brought by debtor seeking determination that it had not violated patent, but, because

litigation on plaintiff's patent infringement action and request for injunctions were barred by automatic stay, debtor's action for declaratory judgment would also be stayed. Bankr.Code, 11 U.S.C.A. § 362(a)(1), (b).

8. **Bankruptcy ⇐2052**

Only bankruptcy court in which debtor's case was pending, and not district court in which multidistrict patent litigation was pending against debtor, had equitable power to release or modify automatic stay. Bankr.Code, 11 U.S.C.A. § 362(a, b, d, f).

9. **Bankruptcy ⇐2395**

Whether action is by or against debtor for automatic stay purposes is determined by debtor's status at time action was begun, not by who was ahead when bankruptcy petition was filed. Bankr.Code, 11 U.S.C.A. § 362(a)(1).

10. **Bankruptcy ⇐2395**

Action seeking injunction against debtor's ongoing sale of catheters, allegedly infringing patent, was subject to automatic stay. Bankr.Code, 11 U.S.C.A. § 362(a)(1).

11. **Bankruptcy ⇐2871**

Damages for wrongs done during bankruptcy case are administrative claims, and thus paid in full most of the time.

12. **Bankruptcy ⇐2395**

Automatic stay did not bar discovery in multidistrict patent litigation case against Chapter 11 debtor and nondebtor codefendant to extent discovery was calculated to lead to evidence admissible against codefendant and has utility other than to facilitate recovery against debtor, even if witness from whom discovery was sought formerly or presently worked for debtor. Bankr.Code, 11 U.S.C.A. § 362(a).

13. **Bankruptcy ⇐3046(2)**

Chapter 11 debtor's prebankruptcy instruction to witness formerly employed by it not to answer certain financial questions in discovery in multidistrict patent litigation violated district court order in that litigation that only privilege was ground for issuing such instructions, and as sanction debtor would be required to make such witness available for redeposition at its own expenses, including legal fees borne by plaintiff's counsel; to extent such remedy was barred by automatic stay, discovery sanctions could run against its counsel personally. Fed.Rules Civ.Proc.Rule 37(a)(4), 28 U.S.C.A.

Joseph N. Hosteny, Raymond P. Niro, John C. Janka, and Michael P. Mazza, Niro, Scavone, Haller & Niro, Chicago, Ill., for Sakharam D. Mahurkar.

Marvin A. Glazer, Cahill, Sutton & Thomas, Phoenix, Ariz., and Granger Cook, Jr. and Mark J. Murphy, Cook, Egan, McFarron & Manzo, Ltd., Chicago, Ill., for IMPRA, Inc.

H. Ross Workman, Brent P. Lorimer, and John C. Stringham, Workman, Nydegger & Jensen, Salt Lake City, Utah, for Kendall Med–West.

OPINION

EASTERBROOK, Circuit Judge.*

After a settlement between Vas–Cath and Mahurkar, the initial adversaries in this patent case, only two accused infringers remain as parties: IMPRA and Kendall Med–West, a division of The Kendall Company. We are in the final stages of discovery, with depositions by the dozen. Trial is set for August 10.

On May 20 Kendall and its parent filed bankruptcy petitions in the bankruptcy court for the District of Delaware. Kendall had been planning the step for more than a year in consort with its major lenders. Kendall filed a bankruptcy petition "prepackaged" with a plan of reorganization to which these creditors had assented. The proposed plan restructures Kendall's debt obligations, which bear a rate of interest exceeding the going rate for money in the economy, while allowing all to avoid recognizing income (and paying tax) on the reduction of indebtedness.

Sakharam Mahurkar and Quinton Instruments Co., Kendall's adversaries in this patent litigation, hold contingent debt claims against Kendall. They were left out

* Of the Seventh Circuit, sitting by designation.

of the negotiations for the bankruptcy proceeding, first learning of the plans when they read an article in the *Wall Street Journal*. This court, too, was taken aback. Kendall did not mention the preparations at any time while the schedule was being discussed and set—did not mention it even by a secret filing that would have preserved whatever confidences were important to the plan. Instead Kendall took everyone by surprise, filing its papers in Delaware, walking out of the ongoing deposition of Dr. Mahurkar, and faxing this court (and its adversaries) a notice.

Kendall is standing on its rights under the automatic stay, 11 U.S.C. § 362, even though it says it expects the plan of reorganization to be approved by the end of June. According to the plan of reorganization, claims such as Mahurkar's will pass through unaffected. Kendall's action nonetheless throws the schedule in this court out of whack, awarding itself the extension that I have repeatedly refused to grant and raising questions about whether Kendall will be able to catch up in time to join the trial in August.

Although the automatic stay halts only litigation against the debtor in bankruptcy, Kendall instructed a *former* employee not to attend his deposition. Apparently in anticipation of the filing in Delaware, Kendall's lawyer instructed one of its current employees not to answer certain financial questions during a deposition, although this court, consonant with Fed.R.Civ.P. 30(c) ("Evidence objected to *shall be taken* subject to the objections."), had told counsel not to instruct witnesses to refrain from answering on any ground other than an assertion of privilege. I had offered to resolve disputes of any other kind by telephone to avoid exactly the sort of interruption that has occurred. Kendall's instruction not to answer had no support in § 362, for Kendall had not yet filed its petition in bankruptcy.

Disturbed by these tactics, Dr. Mahurkar filed a motion on May 21 seeking an order that Kendall cease its interference with discovery pertinent to the ongoing litigation with IMPRA. Recognizing the force of § 362, Mahurkar conceded that his dispute in this forum with Kendall is in stasis, insofar as he seeks damages. But, citing numerous cases, Mahurkar asked me to rule that the automatic stay does not bar continued proceedings concerning Kendall's request for a declaratory judgment (on the ground that this is an action by rather than against the debtor) or his own counterclaim for an injunction, to the extent that Kendall's (asserted) infringement continues during the pendency of the bankruptcy proceeding. Naturally the first question is whether the forum in which an action is pending may decide for itself the effect of the automatic stay or instead whether the bankruptcy court has exclusive jurisdiction. Mahurkar cited a number of cases holding that the original forum may interpret § 362 and proceed to the extent that statute allows. Mahurkar asked me to do so.

On the afternoon of May 21 my staff called counsel for Kendall and instructed it to file a response by the close of business on May 26. Further conversations on May 22 conveyed to all counsel two additional decisions: Mahurkar's reply brief would be due on May 27, and I would hold oral argument at 10:00 A.M. on May 28.

Kendall filed its brief on May 26, disputing Mahurkar's interpretation of § 362. An orderly process was in train, leading to an orderly decision. Preferring a soliloquy to a dialog, Kendall began an adversary proceeding against Mahurkar and Quinton and at 2:30 P.M. on May 27 sought an *ex parte* order from the bankruptcy judge in Delaware. Mahurkar's counsel in Chicago had enough notice to engage a lawyer in Wilmington and fax him some papers, which arrived at 1:00 P.M. on May 27. This lawyer appeared at the hearing but conceded that he lacked time to read the papers and knew next to nothing about the patent litigation. Quinton was unrepresented. Kendall asked the bankruptcy judge to enjoin Mahurkar from filing his reply brief or presenting his request for decision to this court. Kendall presented a draft order to bankruptcy judge Helen S. Balick, who dated and signed the draft, giving no written reasons. (Her brief oral statement also is sketchy.)

What Kendall drafted for the bankruptcy judge contains formulaic and unreasoned recitations of irreparable harm (unfathomable, given that the expense of litigation is not irreparable injury, see *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 222, 58 S.Ct. 834, 841, 82 L.Ed. 1294 (1938); *FTC v. Standard Oil Co.*, 449 U.S. 232, 244, 101 S.Ct. 488, 495, 66 L.Ed.2d 416 (1980); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 1040, 39 L.Ed.2d 123 (1974)) and contains these commands:

> Defendants [Quinton and Mahurkar] are hereby ordered and/or restrained from taking any action or doing any act, other than by proper motion or other application before this Court to commence or continue any action against The Kendall Company, *et al.* in either the United States District Court for the Northern District of Illinois, Eastern Division, the United States District Court for the Central District of Utah, or the United States Bankruptcy Court for the District of Delaware with respect to the matters set out in the Patent Infringement Action, including, but not limited to, filing any reply brief, motions or memorandum of law, or conducting or participating in any type of discovery, except as to forthwith notify the Clerks of the courts listed above of the entry of an Order of this Court restraining any application by Quinton Instruments Company and/or Sakharam D. Mahurkar for any relief or discovery against The Kendall Company whatsoever with respect to the Patent Infringement Action. . . .

In other words, the bankruptcy judge in Delaware not only asserted exclusive jurisdiction to determine the meaning of § 362 but also instructed counsel to remain silent during the hearing scheduled in this court. (Perhaps even showing up would be a prohibited "act" to "continue" the proceeding.) In forbidding Mahurkar and Quinton from "conducting or participating in any type of discovery" in the entire "Patent Infringement Action," this TRO also apparently halts the litigation with IMPRA. It did not, however, issue in time to prevent Mahurkar from filing his reply brief.

On learning of this preposterous order (I practically fell out of my chair, and I have a sturdy chair), I entered the following order of my own:

> Lest there be any misunderstanding about the telephonic instructions that have previously issued, I now issue my order in writing.
>
> Counsel for Kendall and Mahurkar are to be present in court tomorrow morning at 10:00 a.m. This is an order, not an invitation. Failure to appear will lead to sanctions.
>
> My instructions to appear and argue this case were issued last week. Any subsequent order from any other court is ineffectual. Kendall's ex parte application to the bankruptcy judge in Delaware appears to be an abuse of process. No bankruptcy court is authorized to instruct litigants in this court not to obey this court's orders. Any court has jurisdiction to determine its own jurisdiction, and this court unquestionably has the authority to determine what effect the bankruptcy stay has on the litigation. For the purpose of making that decision, the hearing will proceed as scheduled, and counsel for all parties are free to make whatever presentations they deem appropriate.

At the oral argument on May 28, Kendall's lawyers asserted that the TRO forbade Mahurkar's lawyers from making any oral argument in support of their motion. I ruled that any attempt to enforce Judge Balick's prohibition against the participation of Mahurkar's counsel in the ordinary course of proceedings here would be treated as a violation of my order of May 27, and thus contempt of court.

I shall have more to say about that rogue TRO. The first issue I take up, however, is whether I have any authority to interpret the automatic stay and decide for myself which actions may proceed here. Part II of this opinion discusses the TRO and explains why I am enjoining its enforcement. Part III discusses the effect of the automatic stay on this patent action. The final section sets out a formal injunction, binding on Kendall and all those in privity with it,

which will be entered in compliance with Fed.R.Civ.P. 65(d).

I

[1] Section 362(a) provides that a petition in bankruptcy "operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial ... action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title". This statutory prohibition requires no judicial enforcement. But it requires interpretation. What is the "continuation ... of a judicial ... action or proceeding against the debtor"? Does it include declaratory judgment actions filed *by* the debtor? Discovery that may be relevant not only to actions against the debtor but also to actions against other parties? Actions against the debtor on account of violations of law (such as infringement of patents) that continue after the filing of the petition?

Someone must decide these questions. It might make sense to commit their decision exclusively to bankruptcy judges, who not only have greater familiarity with bankruptcy law but also alone possess the power to coordinate the many actions that may be pending against the debtor throughout the nation. (Surely this is not the only suit against Kendall, a substantial firm.) So, too, it might make sense to commit their decision to the forums in which the cases are pending, which may have the perspective needed to manage litigation that involves other parties—as this multidistrict action does—or may be in the best position to decide whether one of the numerous exceptions in § 362(b) pertains.

[2] However such matters might come out on first principles (the statute itself is silent on the question), it is settled that both the bankruptcy court and the court in which the other litigation exists may construe the automatic stay. E.g., *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir.1990); *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 387 (3d Cir.1987); *In re Baldwin-United Corporation Litigation*, 765 F.2d 343, 347 (2d Cir. 1985). Cf. *Board of Governors of the Federal Reserve v. MCorp Financial, Inc.*, — U.S. —, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991); *NLRB v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir.1991) (assuming that bankruptcy courts do not have exclusive authority to construe § 362, but without separate discussion). *Baldwin-United* even held that a district court may forbid the resolution of such issues by the bankruptcy court, although the second circuit thought the exercise of that power imprudent in the case at hand.

Morysville, rendered by the court of appeals with jurisdiction over bankruptcy judges in Delaware, is of particular interest. Mahurkar's bankruptcy lawyer did not have time to read the papers, but he did cite *Morysville* (doubtless having been put on the trail by Chicago counsel, who had cited it in papers filed here). Kendall's lawyer did not deign to reply, and Judge Balick did not mention that case.

To be sure, most of the cases holding that bankruptcy judges lack exclusive jurisdiction to interpret § 362 involve suits by public agencies, seeking relief excluded by § 362(b)(4). But the reason why the automatic stay may (or does) not apply is unrelated to the question: "Which court decides?" All the cases I have found hold that each court may decide for itself. So far as I am aware, there is no contrary authority. This court accordingly not only has jurisdiction to determine its jurisdiction, *Willy v. Coastal Corp.*, — U.S. —, 112 S.Ct. 1076, 1080, 117 L.Ed.2d 280 (1992); *Harmon v. Brucker*, 355 U.S. 579, 582, 78 S.Ct. 433, 435, 2 L.Ed.2d 503 (1958); *Land v. Dollar*, 330 U.S. 731, 739, 67 S.Ct. 1009, 1013, 91 L.Ed. 1209 (1947); but actually possesses the authority to construe § 362 and decide what effect that statute has on the multidistrict patent litigation.

II

[3] Kendall sought and obtained a TRO based on the opposite premise. Kendall's adversary complaint asserts that the very filing of a motion in this court seeking an interpretation of § 362 violates that section, and that "[t]hese violations of the automatic stay by the Defendants are will-

ful and entitle Kendall to recover actual damages, including but not limited to, costs, attorneys' fees, interest and punitive damages." Kendall did not bring *Morysville* to the attention of the bankruptcy court. At oral argument before Judge Balick, Kendall's lawyers repeatedly treated litigation to determine the extent of the automatic stay as identical to a violation of § 362, which could be true only if the bankruptcy judge possesses exclusive jurisdiction

[4] Bankruptcy judges possess authority, by a combination of 11 U.S.C. § 105(a) and 28 U.S.C. § 157(b)(2), to issue injunctions in core proceedings. Enforcement of the automatic stay against fresh litigation or the continuation of old litigation on the merits is a core proceeding. *In re Johns–Manville Corp*, 801 F.2d 60 (2d Cir.1986); cf. *In re Davis,* 730 F.2d 176 (5th Cir.1984) (declining to issue a writ of prohibition against such an injunction). But extension of the statute to forbid any other court from cogitating the meaning of § 362, and proceeding to the extent that statute allows, is not a core proceeding. This multidistrict patent litigation is not a core proceeding by any stretch of the imagination, and I think it beyond cavil that I have authority to decide, for example, whether Mahurkar is entitled to take discovery from former Kendall employees that may be relevant to the action against IMPRA Yet Judge Balick issued an order forbidding Mahurkar to file a reply brief addressing that subject (among others) or argue his motion orally.

For one federal court to issue an injunction forbidding litigation in another is extraordinary, given principles of comity among coordinate tribunals. E.g., *Kerotest Mfg. Co. v. C–O–Two Fire Equipment Co.*, 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952); cf. *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942). For a bankruptcy judge to issue an injunction with the effect of preempting resolution of a pending motion in a district court is unheard of Well, perhaps not *un*-heard of. I found one case in which a bankruptcy court did so, and the district judge brushed the order aside in derision, treating the order as so patently unauthorized that no further explanation was warranted *Lower Brule Construction Co. v. Sheesley's Plumbing & Heating Co.*, 84 B.R. 638, 644 (D.S.D.1988).

For reasons I elucidate below, Mahurkar asked for too much in this court The automatic stay blocks most of the relief he wants Yet arguing for a generous view of one's entitlements under the law is not the same as violating the law. There is all the difference in the world between a litigant who barges ahead as if the bankruptcy filing never took place and a litigant who conscientiously brings the filing to the attention of the court and asks for interpretation and instruction Mahurkar honorably took the latter course. Kendall, by contrast, treated the two as identical and attempted to avoid decision by a tribunal where the issues had been fully briefed in favor of a decision elsewhere after a one-sided spiel. Kendall's course is an abuse of the judicial process and will not be tolerated.

[5] Section 1651(a) of the judicial code permits district courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" An injunction forbidding interference with ongoing proceedings is appropriate (indeed, necessary) in aid of this tribunal's jurisdiction. The only potential bar lies in principles of issue and claim preclusion (res judicata and collateral estoppel) as a result of the bankruptcy judge's decision But this is not a final decision, and unreviewable orders (a TRO is not reviewable by appeal) lack preclusive effect I conclude that § 1651 gives me authority to enjoin the parties from enforcing the TRO, and that no other legal principle forbids such relief

[6] Because of the collateral bar doctrine, even legally erroneous injunctions must be obeyed until vacated or stayed *Pasadena City Board of Education v Spangler*, 427 U.S. 424, 439–40, 96 S.Ct. 2697, 2706–07, 49 L.Ed.2d 599 (1976). It was to free Mahurkar's counsel from their (justified) fear that they had been forbidden to present oral argument in this court that I issued my order the afternoon of

May 27. When at oral argument bankruptcy counsel for Kendall insisted that *despite* my order Mahurkar's lawyers still could not speak, I replied that I would enjoin enforcement of the TRO, if that was what it took. To ensure that the collateral bar doctrine poses no risk to lawyers who have done no more than ask for a decision by a court, I shall make that order formal at the end of this opinion. I shall, moreover, direct Kendall to withdraw its ludicrous demand for punitive damages and other relief said to be in order to redress the sin of asking me to construe an act of Congress.

This unseemly war between two federal courts was occasioned by an unnecessary, incomplete, and deceptive filing by Kendall in the bankruptcy case. Lawyers who make *ex parte* applications have a special duty of candor in light of the one-sided nature of the presentation. Yet counsel sought to (and did) confuse rather than enlighten the bankruptcy judge. Shame on the lawyers responsible.†

III

[7] Mahurkar asks me to hold that three subjects lie outside the automatic stay: Kendall's request for a declaratory judgment, its own request for an injunction against ongoing sales of catheters, and its demand that Kendall not interfere in discovery bearing on IMPRA. Mahurkar also contends that I have the authority to make equitable exceptions to the automatic stay and should use that authority to keep discovery going while a prepackaged bankruptcy—which is not supposed to disrupt the debtor's business—winds up.

[8] Section 362(a) admits of no "equitable" exceptions; it says that the stay applies "[e]xcept as provided in subsection (b) of this section", and subsection (b) contains no grant of equitable power to disregard subsection (a). There *is* an equitable power to release or modify the stay, § 362(d), (f), but only the bankruptcy court may exercise this power. Mahurkar should present his request for modification to the only tribunal that can entertain it. (Given the prepackaged nature of the reorganization, the parties should be able to agree that discovery can continue here, leading to a modification of the stay. But this is for Judge Balick, not me.)

Declaratory relief is the first issue. Kendall began this litigation, seeking a declaratory judgment that its catheters do not infringe Mahurkar's patents. Counterclaims for damages and an injunction came later. Section 362(a)(1) forbids continuation of an "action or proceeding *against* the debtor" (emphasis added), and Kendall's own suit is not an action "against" the debtor. See *Martin–Trigona v. Champion Federal Savings*, 892 F.2d 575, 577 (7th Cir.1989); James McCafferty, *The Effect of Bankruptcy on the Debtor's Pending Litigation*, 93 Comm.L.J. 214, 218–21 (1987) (citing other cases). Once again a case from the third circuit (whose jurisdiction includes Delaware) is instructive. After reciting the language of the statute, the court continued:

> All proceedings in a single case are not lumped together for purposes of automatic stay analysis. ... Within a single case, some actions may be stayed, others not. Multiple claim and multiple party litigation must be disaggregated so that particular claims, counterclaims, cross-claims and third-party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay.
>
> Thus, within one case, actions *against* a debtor will be suspended even though closely related claims asserted *by* the debtor may continue.

Maritime Electric Co. v. United Jersey Bank, 959 F.2d 1194, 1205 (3d Cir.1992) (emphasis in original). Disaggregating this case produces three claims: by Kendall for declaratory relief, against Kendall for damages, and against Kendall for an injunction.

[9] True enough, Mahurkar's counterclaims have become the center of attention. But "whether an action is by or against a debtor is determined by the debtor's status at the time the action was begun, not by

† In the interest of protecting reputations, I note that Kendall's lawyers in the patent action do not represent it in the bankruptcy action. Kendall is represented in the bankruptcy case by Hale & Dorr of Boston and by Young, Conaway, Stargatt & Taylor of Wilmington.

who was ahead when the bankruptcy petition was filed." *In re Berry Estates, Inc*, 812 F.2d 67, 71 (2d Cir 1987). Accord, *Maritime Electric*, slip op 20; *St. Croix Condominium Owners v. St. Croix Hotel Corp*, 682 F.2d 446, 449 (3d Cir.1982) So far as the literal meaning of § 362(a)(1) is concerned, this court may proceed to decision on the declaratory judgment action as if no bankruptcy proceeding were pending. And the Supreme Court champions literalism in interpretation of the bankruptcy code. E.g., *Taylor v. Freeland & Kronz*, — U.S. —, 112 S.Ct 1644, 118 L.Ed.2d 280 (1992); *Connecticut National Bank v. Germain*, — U.S —, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

[10] That a court has the raw power to do something does not imply that it should, however Section 362(a)(1) distinguishes actions against a debtor from actions by the debtor because actions by the debtor usually produce recovery for the estate (or leave its value unaffected) No-risk propositions with the debtor in control do not present any of the concerns that lead to collective proceedings, such as races among creditors to dismember assets or jump the priority queue. As a practical matter, however, Kendall's declaratory judgment action exposes the estate to exactly the same risk as Mahurkar's counterclaims: to lose the action is to suffer a judgment that Kendall infringed the patents. Concrete relief might await the lapse of the automatic stay, but the writing on the wall would be as ominous as a formal opinion deciding the entire case on the merits in Mahurkar's favor Whether I ought to proceed on the declaratory judgment action depends, then, on whether Mahurkar is right in saying that injunctive actions lie outside of § 362(a)(1)

Mahurkar has two theories: first, that a suit seeking an injunction is not a "judicial ... action or proceeding" within the meaning of § 362(a)(1); second, that even if it is, a court may issue injunctive relief against wrongs that continue after the filing of the petition, because such post-petition conduct does not entail an action that "was *or could have been* commenced before the commencement of the case under this title" (emphasis added).

These two approaches collapse to the same thing, because an injunction should not issue unless wrongful conduct is ongoing or impending Only post-bankruptcy acts (or threats) need concern us. A reading of § 362 leads me to reject Mahurkar's arguments whichever way they are phrased

Distinctions between law and equity were abolished with the institution of the Rules of Civil Procedure in 1938 See Fed R.Civ P. 2 The Bankruptcy Code of 1978, following modern practice, speaks of an "action or proceeding" rather than an action at law or equity Nothing in § 362(a)(1) suggests any difference between legal and equitable relief Section 362(b) supports this conclusion, for a number of its subsections exclude from the stay certain equitable proceedings. These exceptions are unnecessary if § 362(a) does not apply in the first place to requests for injunctions And the continuation during bankruptcy of conduct (such as the sale of catheters) begun beforehand is most certainly one in which an action "was or could have been commenced before the commencement of the case under this title" *This* action could have been, and was, commenced before Kendall filed its petition in bankruptcy.

For what it is worth, I think that this literal interpretation is not only good law but also good sense. Bankruptcy is a collective proceeding, one in which creditors divide claims while the court attempts to maximize the total value of the assets. *Covey v. Commercial National Bank of Peoria*, 960 F.2d 657, 661–62 (7th Cir 1992); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir.1989); *In re Iowa R.R.*, 840 F.2d 535 (7th Cir.1988); *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562 (7th Cir 1986) One pressing task is to prevent creditors' actions that grab one aspect of the business and squeeze it for value that, while assisting a single creditor, may depress the collective value of the assets. Injunctions requiring debtors to abandon one part of their business or dramatically change their methods of doing business have a high holdup value for creditors and therefore may lead to this unfortunate consequence.

[11] None of this implies that debtors in bankruptcy may violate federal law with impunity, selling patented products or, say, going into the cocaine distribution business. Cf. Douglas G. Baird, *The Elements of Bankruptcy* 194–98 (1992). Damages for wrongs done during the bankruptcy proceeding are administrative claims, and thus paid in full most of the time. The bankruptcy judge may enjoin ongoing wrongs, or release the automatic stay to allow another court to consider claims that debtors are violating the law. Public agencies may seek redress under § 362(b)(4). But the bankruptcy court is the clearinghouse for private actions, and it has yet to approve Mahurkar's request to pursue his demand for an injunction. I hold that litigation on Mahurkar's request for an injunction is barred by the automatic stay. From the discussion above it follows that I also will stay proceedings in Kendall's action for a declaratory judgment.

Having resolved the "which court?" issue in Part I on the basis of precedent, I owe the parties a few words about the precedents they have earnestly pressed on me. A number of district courts hold that the stay does not bar injunctions, but almost all of these decisions rely either on the 1898 Act (which distinguished "debts" and "damages" from other claims) or on cases interpreting the 1898 Act. E.g., *Bambu Sales, Inc v. Sultana Crackers, Inc.,* 683 F.Supp. 899 (E.D.N.Y.1988); *Steak & Brew, Inc v Makris,* 177 U.S.P.Q. 412 (D.Conn.1973); *In re Shenberg,* 433 F.Supp. 677 (N.D.Ill.1977); *Brennan v. T & T Trucking, Inc.,* 396 F.Supp. 615 (N.D.Okla.1975). These cases are uninformative in litigation under a portion of the 1978 Code, § 362(a)(1), that changed dramatically. Although *Bambu* was decided under § 362(a), it relied only on older cases and is unpersuasive. Two other cases under the 1978 Act, *Doskocil Cos. v. C & F Packing Co.*, No. 89 C 600 (N.D.Ill. July 26, 1990) (Holderman, J.), and *In re Vylene Enterprises, Inc.*, 63 B.R. 900, 906–07 (Bankr.C.D.Cal.1986), also are incompletely reasoned, and I am unpersuaded.

No authority at the appellate level supports Mahurkar's argument. Cases such as *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir.1989), do not support a general rule that the automatic stay does not apply to post-bankruptcy acts. The FAA canceled Gull Air's landing slots at an airport on account of non-use. Using the slots was a condition of the property interest and the court held, consistent with many cases showing that bankruptcy takes property interests as it finds them, that this non-bankruptcy rule applies within the bankruptcy case. See *Butner v. United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *Chicago Board of Trade v. Olsen,* 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (1923). Moreover, the non-use began (if a "non" something can be said to "begin") and the slots were reallocated after the filing of the bankruptcy petition, and thus could not have been the subject of pre-bankruptcy administrative action. Kendall has been making these catheters for years, and the litigation long antedates the bankruptcy. I hold, therefore, that the automatic stay applies to the request for an injunction.

We come, then, to discovery in the multidistrict patent case. Section 362(a)(1) applies only to actions against the debtor. At oral argument, counsel for Kendall conceded that the automatic stay does not affect discovery regarding IMPRA, and that Kendall is obliged to participate to the extent it would be as a non-party. Related litigation goes on without the debtor. *Landis v. North American Co.,* 299 U.S. 248, 254–55, 57 S.Ct. 163, 165–66, 81 L.Ed. 153 (1936); *Wedgeworth v. Fibreboard Corp.,* 706 F.2d 541 (5th Cir.1983).

[12] That concession, which I believe correctly states the law (although there are no cases on point), means that Mahurkar is entitled to at least some of the relief he seeks. Kendall has no ground to interfere with or disrupt discovery that is calculated to lead to evidence admissible against IMPRA. That a given witness used to work for Kendall (or still works for Kendall) is irrelevant, if the discovery has utility other than to facilitate recovery against Kendall.

Working out the details will require a degree of cooperation among counsel that is sadly missing at the moment. Bickering has been at a high level throughout the

case, and Kendall's effort to forbid me from even considering Mahurkar's request (and to penalize its lawyers if they argued their motion) did not exactly endear Kendall's lawyers to Mahurkar's. I will be available by telephone to resolve any disputes as they arise, and will issue orders as the need arises clarifying the permitted scope of discovery.

[13] One final issue. Kendall's pre-bankruptcy instructions to the witness Scahill not to answer certain financial questions violated my order that only privilege is a ground for issuing such instructions. Kendall attempts to justify this by insisting that Scahill's answers would have revealed terms of the proposed reorganization in violation of the securities laws. Kendall does not specify which of the many securities laws, and this defense of its instructions is risible. The securities laws forbid withholding certain material information, or trading while information is unavailable to the public, but never forbid *revealing* information! If disclosing details of a reorganization plan violates the securities laws, how did Kendall manage to negotiate terms with its (other) creditors?

I can see Kendall's concern that financial information not be disclosed prematurely, but (a) the deposition was being conducted under the terms of my protective order, and (b) Kendall was at liberty to apply to me by telephone for additional protection. Instead it engaged in self-help. That violation of my orders (and of the Rules of Civil Procedure) cannot go unnoticed. I therefore direct Kendall to make Scahill available for re-deposition, at its own expense (including the legal fees borne by Mahurkar's lawyers). Kendall can, I suppose, contend that even this remedy for a pre-bankruptcy delict is barred by the automatic stay. But I remind Kendall, and its lawyers, that sanctions in discovery may run against counsel personally. Fed. R.Civ.P. 37(a)(4). Kendall's lawyers are not debtors in bankruptcy and so are outside the stay. I am indifferent to whether Kendall pays these costs or its lawyers pay; one way or the other, Mahurkar is entitled to be reimbursed, and without waiting for the conclusion of the bankruptcy proceeding.

IV

I now make the following orders, which will also be entered as a separate injunction complying with Rule 65(d).

1. The Kendall Company, its officers, agents, and all those acting in concert with them and having actual knowledge of this order, are permanently enjoined from enforcing or attempting to enforce the temporary restraining order issued by the United States Bankruptcy Court for the District of Delaware on May 27, 1992, in adversary proceeding No. A-92-57.

2. The Kendall Company shall withdraw adversary proceeding No. A-92-57.

3. The Kendall Company shall institute no further litigation in any court designed to prevent Sakharam D. Mahurkar or Quinton Instruments Company from filing motions in this court seeking an interpretation of 11 U.S.C. § 362 and any relief allowed by that statute and otherwise authorized by law.

4. The Kendall Company shall immediately transmit copies of this opinion and injunction to the United States Bankruptcy Court for the District of Delaware, to be lodged in bankruptcy case No. 92-667 as well as adversary proceeding No. A-92-57.

5. The Kendall Company, its officers, agents, and all those acting in concert with them and having actual knowledge of this order, are permanently enjoined from interfering with or obstructing discovery in the ongoing litigation among IMPRA, Mahurkar, and Quinton.

As for this litigation: (a) Mahurkar's request for damages and an injunction against Kendall is stayed by virtue of § 362(a) until its automatic expiration (following confirmation of the plan of reorganization) or its modification by the bankruptcy court. (b) Kendall's request for a declaratory judgment is not automatically stayed, but I nonetheless halt all proceedings in that action so long as the automatic stay bars litigation of the counterclaim seeking damages and an injunction. (c) Discovery and all other proceedings shall continue in the litigation among IMPRA, Mahurkar, and Quinton as if Kendall were

an interested non-litigant. In particular, this means that Mahurkar may take depositions of Kendall's former (and current) employees, other than depositions under Fed. R.Civ.P. 30(b)(6), limited to the discovery of evidence bearing on the IMPRA litigation. Motions for summary judgment in the dispute among IMPRA, Mahurkar, and Quinton will be resolved in the ordinary course, just as if Kendall were no longer a party to the litigation. Kendall is free, however, to file any briefs it wants in these matters, just as if it were an *amicus curiae*. All discovery and other proceedings against Kendall and its experts are stayed until the lifting or modification of the automatic stay. Mahurkar shall give Kendall timely notification of any depositions that might collaterally affect its interests during the period of this stay, and shall promptly notify IMPRA of any depositions, already noticed, that Kendall believes may proceed under this order to obtain evidence concerning IMPRA.

In the Matter of Rose K. THOMPSON, Debtor-Appellant.

In the Matter of Janet E. SHILL, Debtor-Appellant.

Patrick T. MURPHY, Public Guardian of Cook County, and Independent Administrator of the Estate of Joseph Cunningham, and Office of the State Guardian, Guardian of the Estate of Richard Cunningham, Plaintiffs-Appellees,

v.

Rose K. THOMPSON and Janet E. Shill, Defendants-Appellants.
(Two Cases)

Nos. 90 C 5180, 90 C 5181.

United States District Court,
N.D. Illinois, E.D.

June 1, 1992.

In nondischargeability proceeding, judgment was entered against Chapter 7 debtor by the Bankruptcy Court, Robert E. Ginsberg, J., and debtors appealed. The District Court, Alesia, J., held that debtors were negligent in failing to perfect appeal, thus warranting dismissal.

Appeal dismissed.

1. Federal Civil Procedure ⇐656

Pro se litigants' pleadings are entitled to less strict construction than that accorded pleadings of litigants represented by counsel.

2. Bankruptcy ⇐3777

Failure to comply with bankruptcy rule on designation of issues is not jurisdictional, but such failure may be basis for dismissal of appeal. Fed.Rules Bankr.Proc.Rule 8006, 11 U.S.C.A.

3. Bankruptcy ⇐3777

Burden of providing bankruptcy appellate court with adequate record on appeal is squarely on appellant. Fed.Rules Bankr. Proc.Rule 8006, 11 U.S.C.A.

4. Bankruptcy ⇐3773

Adequate designation of issues on appeal is necessary to put appellee on notice as to which issues it must defend against and whether appellant's designation of issues will produce adequate record for appellate court. Fed.Rules Bankr.Proc.Rule 8006, 11 U.S.C.A.

5. Bankruptcy ⇐3777

Court may dismiss bankruptcy appeal for failure to file designation of record or statement of issues on appeal; failure to take steps necessary to allow clerk to transmit record on appeal to appellate court may also warrant dismissal. Fed. Rules Bankr.Proc.Rule 8006, 11 U.S.C.A.

6. Bankruptcy ⇐3778

When considering whether to dismiss bankruptcy appeal, district court must consider whether alternative measures in lieu of dismissal are available and whether conduct giving rise to dismissal was caused by party's attorney.

7. Bankruptcy ⇐3778

Chapter 7 debtors were negligent in failing to perfect appeal by failing to file

Cancellation of Insurance: Bankruptcy Automatic Stay Implications

by

*Eric W. Lam**

Unlike straight liquidation under chapter 7 of the Bankruptcy Code,[1] the purpose of a chapter 11 business reorganization bankruptcy proceeding[2] "is to restructure a business's finances so that it may . . . provide its employees with jobs, pay its creditors, and produce a return for its stockholders."[3] To effectuate this purpose, 11 U.S.C. § 1108[4] authorizes the debtor to continue its business operation.[5] During this period of operation, various actions against the debtor[6] are automatically stayed by 11 U.S.C. § 362(a).[7] Cognizant of the somewhat precarious posture of a chapter 11 debtor in possession, an insurer may desire to cancel its insurance policy with the debtor.[8] Such a cancellation may, however, violate the automatic stay provisions of section 362.[9] To provide insurers with an overview of the conflict between the automatic stay and cancellation of insurance policies, this article will examine the section 362 implications of insurance cancellation.[10]

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[1]*See* 11 U.S.C. §§ 701–728 The Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98–353, was promulgated after the preparation of this article. However, the several changes contained in the Act do not appear to affect the substantive issues discussed in this article

[2]*See id.* §§ 1101–1174.

[3]H.R. REP. No. 595, 95th Cong., 1st Sess 220 (1977)

[4]*See also* 11 U.S.C. § 1107(a) ("a debtor in possession shall have all the rights . . . of a trustee").

[5]H.R. REP. No. 595, *supra*, at 404.

[6]A debtor operating under chapter 11 of the Bankruptcy Reform Act, Pub. L. No. 95–598, 92 Stat. 2549 (1978), is placed in the shoes of a trustee, *see supra* note 4, and is technically termed a "debtor in possession." *See* 11 U.S.C. § 1101(a) For the remainder of this article, the terms "debtor" and "debtor in possession" will be used interchangeably, with an understanding that the reader is mindful of the taxonomic difference between the two terms. *Compare* 11 U.S.C. § 109(a), (b), (d) *with id.* § 1101(a)

[7]*See* 11 U.S.C. § 103(a) Chapter 3 of title 11 applies in a case under chapter 11

[8]*See, e.g.*, *In re* Douglas, 18 Bankr. 813, 814 (Bankr. W.D. Tenn. 1982) (insurer "has a business policy, ipso facto, not insuring petitioners under the Bankruptcy Code").

[9]*See infra* text accompanying notes 47–80

[10]For a detailed section-by-section analysis of 11 U.S.C. § 362, see COLLIER ON BANKRUPTCY ¶¶362.01–11 (15th ed 1983) and 1 W. NORTON, BANKRUPTCY LAW AND PROCEDURE §§ 20.01–36 (1981).

Part I of this article will explore briefly the policies and provisions of 11 U.S.C. § 362.[11] Part II will focus on the few reported decisions dealing with the automatic stay consequences of an insurer's cancellation of insurance.[12] Practice pointers for the insurer's counsel will then be suggested in Part III,[13] followed by a conclusion in Part IV.[14]

I. 11 U.S.C. § 362: THE AUTOMATIC STAY

A. THE STATUTE

The filing of a chapter 11 bankruptcy petition[15] "operates as a stay, applicable to all entities,"[16] of:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> . . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.[17]

In enacting 11 U.S.C. § 362, Congress sought to achieve two purposes.

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[11]*See infra* text accompanying notes 15–46.

[12]*See infra* text accompanying notes 47–88.

[13]*See infra* text accompanying notes 89–96.

[14]*See infra* text following note 96.

[15]Section 362 comes into play when a petition–*voluntary or involuntary*–is filed. *See* 11 U.S.C. § 362(a) (petition filed under 11 U.S.C. § 301 (voluntary) or 11 U.S.C. § 303 (involuntary) operates as a stay).

[16]The term "entity" is defined in 11 U.S.C. § 101(14). This definition is the "broadest of all definitions," 1 COLLIER, *supra*, ¶101.14, at 101-31, and includes an insurance company. *See generally In re* Butcher, 32 Bankr. 572, 574–76 (Bankr. E.D. Tenn. 1983) (Corporate insurer is an "entity" as defined in § 101(14)).

[17]11 U.S.C. § 362(a)(1), (3), (6). Subsections (a)(2) (enforcement of judgment against debtor), (a)(4) (perfection of lien against property of the estate), (a)(5) (perfection of lien against property of the debtor), (a)(7) (setoff), and (a)(8) (Tax Court proceedings) are not germane to this article and will not be discussed. Suffice it to say that an entity contemplating any action against the debtor should examine *each* subsection of § 362(a) and the applicable exceptions listed in § 362(b) before taking any action. Indeed, only when none of the subsections in § 362(a) is applicable may a creditor act. In other words, an action not stayed by, for example, § 362(a)(1) may nonetheless be stayed by, for example, § 362(a)(3). *See generally* 2 COLLIER, *supra*, ¶362.04, at 362-27.

First, the stay provides a "fundamental protection" by giving the debtor a "breathing spell" from its creditors.[18] Second, the stay protects creditors by ensuring an orderly and equitable liquidation of all assets.[19] The stay is "automatic" in that it is effective upon the filing of the petition,[20] and no formal service of notice of its operation is necessary.[21]

B. Relief

The bankruptcy court is authorized by 11 U.S.C. § 362(d) to grant relief[22] from the stay:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganiztion.

Under the bankruptcy rules in effect before August 1, 1983, a request for

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[18] H R. Rep. No. 595, *supra*, at 340.

[19] *See id*; *In re* Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982); Triangle Management Services v Allstate Savings & Loan Ass'n, 21 Bankr. 699, 700 (N.D Calif. 1982).

[20] *E.g.*, *In re* Eisenberg, 7 Bankr. 683, 686 (Bankr. E D N Y 1980).

[21] *E.g.*, *In re* Miller, 22 Bankr 479, 481 (D. Md. 1982) In *In re* Carter, 691 F.2d 390, 391 (8th Cir. 1982), the Court of Appeals for the Eighth Circuit held that a creditor's attorney "if apprised of the existence of the [stay] order, was obligated to obey the order and cannot attack its validity collaterally" *Accord In re* Dennis, 17 Bankr. 558, 560 (Bankr. M.D. Ga. 1982) (when creditor's attorney learned of institution of bankruptcy proceeding, there was an "affirmative duty" on his part to dismiss garnishment proceedings).

[22] Other than filing a request seeking relief, a creditor may, of course, await termination of the stay by operation of law. 11 U S.C § 362(c)(1) provides that "the stay of an act against property of the estate under [§ 362(a)] . . . continues until such property is no longer property of the estate" In addition, 11 U S.C. § 362(c)(2) states that "the stay of any other act under [§ 362(a)] . . . continues until the *earliest* of the time the case is closed or dismissed and the granting of a discharge. In the chapter 11 context, a case may be dismissed "in the best interest of creditors and the estate" for cause. 11 U.S.C. § 1112(b). Likewise, a discharge is granted a chapter 11 debtor upon confirmation of a reorganization plan. 11 U S.C. § 1141(d) This article envisions a scenario wherein the insurer seeks to cancel the policy *while* the debtor is operating as a debtor in possession, i e., before dismissal or confirmation The lifting of the stay by operation of § 362(c) and § 1112(b) or § 1141(d) would be outside the context of this article Section 362(c) will therefore not be addressed further

relief from the stay was initiated by the filing of an adversary complaint.[23] The new Bankruptcy Rules now provide that such request should be initiated by motion.[24]

As indicated in the statute, section 362(d) provides two grounds upon which relief may be granted. In a hearing on a section 362(d)(2) request, the party seeking relief bears the burden of proof on the issue of equity.[25] On the other hand, the party resisting the relief request bears the burden of proof on all other issues, including the "not necessary to an effective reorganization" requirement under section 362(d)(2)(B).[26]

A party requesting relief under section 362(d)(1) has a different burden to shoulder, *viz.*, that of showing "cause." The legislative guideline given for determining "cause" is "lack of adequate protection." This guideline is qualified, however, by use of the word "including," which signifies Congress' intent that lack of adequate protection "is one cause for relief, but is not the only cause."[27] Other statutory provisions[28] and decisional law have delineated several "causes" that may justify relief. Perhaps the most often-cited "cause" is found in Judge Learned Hand's opinion that the stay should be lifted unless the creditor is afforded the "indubitable equivalence" of its interest by the debtor.[29] Stated succinctly, the term "indubitable equivalence" may mean that the creditor be accorded protection of its impaired interest that is at least as good as that provided by the security held by the creditor prior to bankruptcy filing.[30] What constitutes the "indubitable equivalence" of an interest must, of course, be decided upon the facts of each particular case.[31]

The stay may also be terminated or modified without a hearing. Such ex parte relief will be granted "as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing."[32] Unlike a routine request for relief, an ex parte petition must be accompanied by an affidavit

[23]*See* Bankruptcy Rule 701(6), *reprinted in* 93 S. Ct. 8147 (1973) (superseded by Order of the Supreme Court of the United States, April 25, 1983, *reprinted in* 51 U.S.L.W. 4461).

[24]Bankruptcy Rule 4001(a), 9014.

[25]11 U.S.C. § 362(g)(1); *e.g.*, *In re* Pappas, 17 Bankr. 662, 669 (Bankr. D. Mass. 1982).

[26]11 U.S.C. § 362(g)(2); *e.g.*, *In re* East Redley Corp., 4 Bankr. 288, 290 (Bankr. E.D. Pa. 1980).

[27]*See In re* Steffens Farm Supply, Inc., 35 Bankr. 73, 75 (Bankr. N.D. Iowa 1983) (quoting H.R. Rep. No. 595, *supra*, at 343).

[28]*E.g.*, 11 U.S.C. § 361.

[29]*See In re* Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935).

[30]*See, e.g.*, *In re* Paradise Boat Leasing Corp., 1 Collier Bank. Cas. 2d (MB) 413 (Bankr. D. V.I. 1979).

[31]*See generally* First National Bank of Denver v. Turley, 705 F.2d 1024, 1026 (8th Cir. 1983); 2 Collier, *supra*, ¶362.07[1], at 362–49.

[32]11 U.S.C. § 362(f).

and conform to the special notice requirements imposed by the Rules.[33] Such ex parte relief will, however, not be granted "in any but the most infrequent cases."[34]

C. Violation

Of particular interest to an insurer contemplating cancellation of policy is the sanction imposed for violation of section 362. First, it should be noted that any action violative of section 362 is *void ab initio*.[35] This is so even though the violator acted without knowledge of the imposition of the stay.[36]

Second, a debtor aggrieved by a creditor's violation of section 362 may apply to the court for a citation of contempt against the violator.[37] Sanctions, ranging from a restraining order,[38] expenses,[39] attorney fees,[40] and fines,[41] to punitive damages,[42] may also be imposed. As with other contemptuous conduct, such sanctions will not be imposed unless there is evidence of willfulness,[43] bad faith,[44] or malicious intent.[45] Nonetheless, one charged with violating the automatic stay cannot utilize as a defense a claim that it acted upon the advice of counsel.[46]

II. CANCELLATION OF INSURANCE POLICIES: AUTOMATIC STAY IMPLICATIONS

In *In re Cahokia Downs, Inc.*,[47] the insurer "without prior consent of . . . Court and after filing of the [bankruptcy] petition . . . attempted to cancel the policy . . . pursuant to a clause in the contract allowing cancel[lation] upon thirty days written notice."[48] Full premium on the policy had

[33]Bankruptcy Rule 4001(c).

[34]2 Collier, *supra*, ¶362.09, at 362–57.

[35]*In re* Young, 14 Bankr. 809, 811 (Bankr. N.D. Ill 1981); *accord* Borg-Warner Acceptance Corp v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982); *In re* Wheeler, 5 Bankr. 600, 604 (Bankr. N.D. Ga. 1980)

[36]*See, e.g.*, *In re* Van Ripper, 25 Bankr 972, 978 (Bankr. W.D. Wis. 1982)

[37]*See, e.g.*, *In re* Shropshire, 25 Bankr 128, 130 (Bankr. W.D. Wash. 1982)

[38]*See, e.g.*, *In re* Carter, 691 F.2d at 391.

[39]*E.g.*, *In re* Bray, 17 Bankr. 152, 153 (Bankr. N.D. Ga. 1982).

[40]*E.g.*, *In re* Houts, 23 Bankr. 705, 707 (Bankr W.D. Mo. 1982).

[41]*See generally* 1 W. Norton, *supra*, § 20.36.

[42]*E.g.*, *In re* Augustino Enterprises, Inc., 13 Bankr 210, 212 (Bankr. D. Mass. 1981) *But see In re* Thacker, 24 Bankr 835, 838 n.1 (Bankr S.D. Ohio 1982).

[43]*E.g.*, *In re* Miller, 22 Bankr. at 481.

[44]*E.g.*, *In re* Walker, 7 Bankr. 216, 222 (Bankr D.R.I. 1980).

[45]*In re* Augustino Enterprises, Inc., 13 Bankr at 212

[46]*In re* DePoy, 29 Bankr 471, 476 (Bankr N.D. Ind 1983).

[47]5 Bankr 529 (Bankr S.D. Ill 1980)

[48]*Id.* at 530

been paid, and the coverage would have terminated by expiration three months after the attempted cancellation.[49] According to the *Cahokia* court, "the real reason for the attempted cancellation of the insurance was the filing of the bankruptcy proceeding under Chapter 11."[50] Reasoning that maintenance of insurance on the debtor's property was essential for rehabilitation of the debtor and the protection of creditors,[51] the court opined that "cancellation of the insurance would certainly come within the provisions of the automatic stay under Sec. 362(a)(3)."[52] In addition, the court found "no proof" to support the insurer's assertion that the vacancy of the debtor's building and the inadequacy of protection justified cancellation.[53] Thus holding, the court denied the insurer's petition for termination.[54]

While no actual cancellation occurred in *Cahokia*, the court's reasoning and opinion formed the basis of latter decisions in which cancellation had indeed been effected. In *In re Augustino Enterprises, Inc.*,[55] the debtor requested the bankruptcy court to reinstate its business insurance coverage that was cancelled one month after it had filed a petition for reorganization. Under the insurance policy in effect in *Augustino*, the insurance financer was authorized to cancel insurance if the debtor was in default.[56] After failing to pay the premium as scheduled, the debtor filed for bankruptcy.[57] Two days later the debtor was notified that "due to . . . default . . . the insurance would be cancelled."[58]

Agreeing with the debtor's section 362 argument, the *Augustino* court held: "[The] notice of cancellation, which is allowed under the contract with this debtor, occurred after the debtor filed its petition and is in effect an effort to collect a claim that arose before the petition."[59] Thus finding section 362(a)(6) violation, the court nonetheless awarded no damages to the debtor.[60] The court reasoned that the insurer was inadvertently not notified of the bankruptcy filing,[61] and that the debtor "has not demonstrated that the [insurer's] activities . . . were done . . . with deliberate intent to violate the stay."[62] The insurance policy was, however, reinstated by court order.[63]

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[49] *See id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 531
[53] *Id.* at 532.
[54] *Id.*
[55] 13 Bankr. 210, 211 (Bankr. D. Mass. 1981)
[56] *Id.*
[57] *See id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 212
[61] *Id.* at 211.
[62] *Id.* at 212.
[63] *Id.* at 211

The debtor in *In re Hatcher*[64] "fell behind" in his car insurance monthly payments. After the filing of a bankruptcy petition, the insurer twice sent notices of cancellation to the debtor.[65] Faced with cancellation, the debtor sought to hold the insurance financer in contempt for violation of the automatic stay. Reasoning that the cancellation "could be seen [as] seeking to recover its debt by threatening to cancel," the court found that section 362(a)(6) was violated.[66] No contempt citation was issued, however, as the court found no willful or malicious violation of the automatic stay provisions.[67]

An atypical insurance policy was involved in the case of *In re Advent Corp*.[68] There a bonding company issued the debtor a bond to cover the debtor's transactions involving the United States Customs Service. Three months after the debtor's chapter 11 petition was filed, the bond was cancelled by the bonding company.[69] Faced with the bonding company's resistance to an order reinstating the bond, the First Circuit Bankruptcy Appellate Panel observed: "Generally, a bankruptcy court may not extend a contract beyond its original terms. The Bankruptcy Code neither enlarges the rights of a debtor under a contract, nor prevents the termination of a contract by its own terms."[70] Because the bond cancellation occurred before the termination date specified in the bonding agreement,[71] however, the court, apparently relying on section 362(a)(1), found that the cancellation was a "proceeding" against the debtor stayed by the bankruptcy filing.[72] Accordingly, the court concluded that the cancellation was of no effect, and that "the bond continued to cover shipments until it expired by its own terms."[73]

Like *Advent*, the court in *In re R.O.A.M., Inc.*[74] enjoined the cancellation of a bond. Of particular interest is the court's conclusion that

> [i]nasmuch as these bonds are continuous obligations in which [the bonding company] has already reached the limit of its liability and there is no expiration date, there is every reason to enjoin cancellation which will not injure [the bonding company] further and will *aid the debtor in reorganization* to propose a plan under Chapter 11.[75]

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[64] 14 Bankr. 757, 758 (Bankr. W.D. La. 1981).
[65] *Id.*
[66] *Id.* at 759.
[67] *Id.*
[68] 24 Bankr. 612 (Bankr. App. 1st Cir. 1982).
[69] *Id.* at 613.
[70] *Id.* at 614.
[71] *See id.* at 613 (bond by its terms effective through three months after the cancellation).
[72] *Id.* at 619.
[73] *Id.*
[74] 15 Bankr. 616, 617 (Bankr. D. Nev. 1981).
[75] *Id.* (footnote omitted) (emphasis added).

In re Gladding Corp.[76] is the only reported decision in which a bankruptcy court rejected the argument that "the automatic stay in any way defeats the insurer's right to cancel its policy." *Gladding*, however, was a decision based on the now repealed[77] Bankruptcy Act.[78] Since the repeal, courts have consistently held that "[c]ases decided under the old Bankruptcy Act on the stay cannot be applied to the [Code] Sec. 362 stay."[79] Moreover, the *Gladding* court recognized that "[t]his court, under its broad equity powers, could certainly enjoin the termination of the insurance until such alternative insurance could be found."[80]

Last, one court, invoking its broad equity power,[81] has stayed an insurer from cancelling a policy. In *In re Amber Lingerie, Inc.*,[82] the debtor filed a chapter 11 bankruptcy petition in October 1982. At that time the debtor had fully paid its premium on the insurance policy, the term of which extended to July 1983.[83] On December 9, 1982, however, the insurer "notified the debtor that it would terminate the . . . insurance."[84] Upon receipt of this notification, the debtor filed an order to show cause and an application to enjoin cancellation. After a hearing, the court held: "A Bankruptcy Court has the *inherent equitable power*, in proper circumstances, *to enjoin* the *cancellation* of a contract in order to preserve the continuation of the debtor's business . . . . This power may be exercised where such cancellation would 'seriously impair' the reorganization."[85]

While so holding, the *Amber* court was not unmindful that the underlying policy provided that "it may be cancelled by [the insurer] by . . . thirty days' written notice of cancellation to the insured."[86] Nonetheless, the court reasoned that if the debtor were to continue in business without insurance coverage, it would be subject to such a great risk that its reorganization would be jeopardized.[87] The insurer's argument that it would be inequitable to enjoin cancellation was thus rejected, and an injunction enjoining cancellation was issued.[88]

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[76]22 Bankr. 632, 636 (Bankr. D. Mass. 1982).

[77]Pub. L. No. 95-598, § 401(a), 92 Stat. 2549 (1978) ("The Bankruptcy Act is repealed.").

[78]22 Bankr. at 633 n.1.

[79]*E.g.*, *In re* Johnson, 8 Bankr. 371, 373 (Bankr. D. Minn. 1981).

[80]22 Bankr. at 636.

[81]*See, e.g.*, Bank of Marin v. England, 385 U.S. 99 (1966); Pepper v. Litton, 308 U.S. 295 (1939); 11 U.S.C. § 105; *see also* 28 U.S.C. § 1481.

[82]30 Bankr. 736 (Bankr. S.D.N.Y. 1983).

[83]*Id.* at 736.

[84]*Id.*

[85]*Id.* at 737 (emphasis added).

[86]*Id.* at 736.

[87]*Id.* at 737.

[88]*Id.*

III. PRACTICE POINTERS AND SUGGESTIONS

The analyses and decisions of the several courts that have examined the question of insurance cancellation in a chapter 11 context suggest one conclusion: the unilateral cancellation of a chapter 11 debtor's insurance policy by an insurer without prior court approval violates the automatic stay provisions of 11 U.S.C. § 362. A defense that the policy allows such cancellation is of no avail. Moreover, independent of the provisions of section 362, a unilateral cancellation may be enjoined by the bankruptcy court's invocation of its equity power to protect the debtor in its reorganization efforts. Not only may the insurer be embarrassed by the court declaring the cancellation null and void, the insurer may also be penalized with a contempt citation and attendant sanctions. The proper procedure to follow, therefore, is to file a motion for relief from the stay, requesting court permission to cancel the policy or increase the premium.[89] At the hearing on the motion,[90] the insurer should be prepared to demonstrate that there exists "cause"[91] for granting the relief requested. Bearing in mind that an assertion that cancellation is justified solely because of the chapter 11 filing will be insufficient,[92] the

[89]The insurer, of course, may simply choose to await expiration of the policy by its terms. Once the policy has expired, the debtor is faced with a *refusal to renew*, not a unilateral *cancellation*. In the context of refusal to renew vis-a-vis cancellation, the implications of 11 U.S.C § 362 may be significantly different than those examined in this article *See generally In re* Hubler, Bkcy No. 83-00065, Motion for Protective Order Enjoining Refusal to Renewal Insurance (Bankr. N D Iowa 9/12/83) Suffice it to say that as a general proposition, "where property rights have terminated automatically after the petition in bankruptcy has been filed, such rights cannot be revived by the Court If no act of the creditor is required or involved, there is nothing stayed by the automatic stay provisions of Sec. 362" *In re* Jenkins, 13 Bankr. 721, 724 (Bankr. D. Colo 1981). Therefore, at least in a situation where an insurance policy is not subject to automatic renewal, the expiration arguably terminated any rights of the debtor under the policy. Such rights "cannot be revived [and] . there is nothing stayed by the automatic stay provisions of Sec 362." A discussion of the automatic stay implications of an insurer's refusal to renew, however, deserves more detailed treatment and is beyond the scope of this article

[90]It should be noted that the Bankruptcy Code and Rules treat requests to modify the stay with expediency 11 U.S C. § 362(e) provides that "[t]hirty days after a request for relief , such stay is terminated . . . unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing" Further, 11 U.S.C § 362(e)(2) provides that if the stay were to remain in effect after a preliminary hearing, a "final hearing shall be commenced within thirty days." Last, Bankruptcy Rule 4001(b) states that "[t]he stay . . . expires 30 days after a final hearing . . unless within that time the court denies the motion for relief." A 30-30-30-day time table is thus imposed on the court: preliminary hearing within 30 days of filing of motion; final hearing within 30 days of preliminary hearing; decision within 30 days of final hearing Stated in practical terms, an insurer seeking relief should be fairly comforted by the fact that relief is usually accorded within 90 days of filing of the motion for relief from the stay

[91]*See* 11 U S C § 362(d)(1); *supra* text accompanying notes 27-31.

[92]*See generally, e g* , *In re* Rath Packing Co 35 Bankr. 615 (Bankr. N D Iowa 1983); *supra* text accompanying note 50 *Rath* involved a situation where the State Insurance Commissioner revoked the employer's self-insurance status under Iowa Code ch 87 (1983). The decision focuses on two aspects: (i) the State Insurance Commission, being a "governmental unit," is prohibited by 11 U S C. § 525 from

following factors are suggested as arguments that may convince the bankruptcy court to grant relief.

First, the insurer may present proof that as a result of a chapter 11 filing, the debtor has curtailed its operation such that, for example, the building being insured has been vacated and thus subject to vandalism and deterioration.[93] Second, the insurer may emphasize that since the bankruptcy filing, the debtor has failed to pay premiums.[94] Third, the insurer may present the court with actuarial studies, if available, that demonstrate the greater risks involved in insuring a debtor operating under chapter 11.[95] Last, the insurer should intimate that were the court to allow cancellation, alternative insurance from another insurer is available to the debtor.[96] Armed with proof of these four factors, a strong argument may be made that the insurer will not be adequately protected if cancellation is not authorized. In the alternative, the insurer should urge the court to allow it to raise the premium to cover the added risk. Stated otherwise, the insurer would argue that the four factors outlined above constitute sufficient "cause" for modification or termination of the automatic stay imposed by 11 U.S.C. § 362(a).

IV. CONCLUSION

A prudent insurer contemplating cancellation of a chapter 11 debtor's insurance policy should recognize the Bankruptcy Code's concern that a debtor in possession deserves protection from unilateral cancellation by the insurer. This concern is embodied in the automatic stay provisions of 11 U.S.C. § 362(a) and accompanying case law. By the same token, debtors in possession and the courts should be cognizant of the Code's attempt to assure that the insurer not be deprived of adequate protection. The balance between the need for debtor protection and assuring the "indubitable equivalence" of an insurer's interest is struck by the availability of a motion for relief from the stay. In the absence of prior court approval allowing relief pursuant to a motion, however, the balance tips in favor of the debtor in possession. An insurer would be well advised, therefore, to demonstrate, via a motion for relief from the stay, reasons that may convince a bankruptcy court to permit cancellation. Hopefully, the factors suggested in this article will aid the insurer in its quest.

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discriminating against a debtor, 35 Bankr. at 618, and (ii) The Commissioner's action does not fall under the 11 U.S.C. § 362(b)(4) exception to the automatic stay. *Id.* at 620. Germane to this article is the bankruptcy court's conclusion that the Commissioner's revocation–motivated solely because of a chapter 11 filing–violated § 362(a)(1). *Id.* at 622.

[93]*Cf. In re* Cahokia Downs, Inc., 5 Bankr. at 532 (building vacated; protection inadequate); *In re* Amber Lingerie, Inc., 30 Bankr. at 736 (debtor discontinued sprinkler service).

[94]*Cf. In re* Augustino Enterprises, Inc., 13 Bankr. at 211 (debtor did not pay monthly insurance premium).

[95]*Cf. In re* R.O.A.M., Inc., 15 Bankr. at 617 (debtor liable for an amount that 'exceeds the face of both bonds').

[96]*Cf. In re* Gladding Corp., 22 Bankr. at 636 (debtor may be unable to obtain alternative insurance).

MEDICAL MALPRACTICE UPDATE

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I. INTRODUCTION

The law involving medical malpractice litigation has been impacted by an increase in statutory mandates; an expansion of common law theories of liability, and an erosion of traditional rules governing expert witnesses in medical cases.

II. EXPERT WITNESSES - TO DESIGNATE OR NOT TO DESIGNATE, OR DOES IT REALLY MAKE A DIFFERENCE?

A. Section 668.11, The Code provides:

"1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the Court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

a. The plaintiff within one hundred eighty days of the defendant's answer unless the Court for good cause not ex parte extends the time of disclosure.

b. The defendant within ninety days of plaintiff's certification.

2. If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the Court for good cause shown.

3. This section does not apply to Court appointed experts or to rebuttal experts called with the approval of the Court."

This Code Section sets forth statutory mandates regarding the timely identification of expert witnesses in licensure cases involving licensed professionals, including medical professionals.

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B. The cases initially interpreting Section 668.11 strictly construe the statute.

Donovan v. State, 445 N.W.2d 763 (Iowa 1989)

Medical negligence case against physicians and University of Iowa Hospitals and Clinics. Suit commenced July 7, 1986. Answer filed November 18, 1986. Defendant Interrogatories served December 3, 1986. May, 1987 - 180 days pass, no identity of experts. August, 1987 summary judgment filed seeking to preclude identity of any late experts and seek dismissal of suit. Supreme Court affirmed dismissal of the case. In dismissing, stated, "highly technical questions of diagnoses and causation which lie beyond the understanding of a lay person, require introduction of expert testimony".

Farley v. Ginther, 450 N.W.2d 853 (Iowa 1990)

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Orthopaedic malpractice case. Suit filed March 26, 1986 with timely answer. April 11, 1986 Defendant filed interrogatories requesting expert witnesses. Motion to Compel Answers to Interrogatories filed May 5, 1987. August 17, 1987 hearing set to show cause why case should not be dismissed. December 8, 1987 trial set for November 17, 1988. October 20, 1988 move to bar experts. Later summary judgment granted. Case affirmed on appeal premised on Iowa Rules of Civil Procedure 134(d) imposing discovery sanctions with recitation of Section 668.11 and citation to Donovan.

Thomas v. Fellows, 456 N.W. 2d 170 (Iowa 1990)

Orthopaedic negligence case. Strict construction of Chapter 668. Statute withstood equal protection and due process challenges. The Court stated: "The problems surrounding medical liability, liability insurance, and the attendant availability and cost of medical services to the public are, at least arguably, rational reasons for the enactment of Section 668.11". Also ..."we do not agree with the Plaintiffs that Section 668.11 was a trap for the unweary. It is, rather, a procedure for the orderly and expeditious handling of malpractice litigation".

Cox v. Jones, 470 N.W.2d 23 (Iowa 1991)

Claim that ophthalmologist committed malpractice relating to a cataract removal and implantation of intraocular lens. Action filed May, 1988. Answer filed June, 1988. 180 day deadline for expert designation, December, 1988. January 9, 1989 Plaintiff filed designation. Defendant

moved to strike designation as untimely. District Court struck expert designation. Affirmed on appeal.

The Court also stated treating physicians whose testimony includes opinions of reasonable standards of care and/or causation must be expressly designated and certified. The Court stated "in establishing a deadline by which both parties must have named their experts, the legislature obviously intended to provide an element of certainty in professional liability cases. As a result, speculation about the identity of experts and last minute dismissals are prevented when an expert cannot be found. Allowing a treating doctor to testify as an expert, without prior designation as an expert, defeats the legislature's purpose in enacting Section 668.11." The granting to summary judgment affirmed.

C. Several cases have retreated from strict interpretation of designation requirements.

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Day v. McIlrath, 469 N.W.2d 676 (Iowa 1991)

This is not a strict Section 668.11 case. The Court interprets Rule 125 and holds absent certification of a treating physician as an expert, the treating physician's factual knowledge, mental impressions and opinions are not required to be disclosed.

The district court has discretion to bar or permit late designated experts. Compare Kilker by Kilker v. Mulry, 437 N.W.2d 1 (Iowa App. 1988). Obstetrical malpractice case with late designation less than one month before trial. Expert witness barred both in case-in-chief and as claimed rebuttal. However, see Preferred Marketing v. Hawkeye National Life Insurance Co., 452 N.W.2d 389 (Iowa 1990). A non-medical case where Court permitted expert witness to testify although witness identified one week before trial and seven months after Court imposed deadline. The Court, however, did limit, to some degree, the scope of testimony.

Provenzano v. Wetrich, McKeown & Haas, 481 N.W.2d 536 (Iowa App. 1991)

The case was filed July 20, 1987. Plaintiff designated experts January 21, 1988. Defendants identified initial expert within the 90 days. Subsequently the parties agreed orally that they each could identify additional experts outside the time constraints of Section 668.11. Defendant later sought to add an additional damage witness, an annuitist. Order barred other witnesses. Appeals Court held permitting the late designation of one

defense expert abuse of discretion; the case reversed. Incidentally, the trial court had conditioned prior ruling on granting continuance if Plaintiff so desired. This invitation was declined.

Carson v. Webb, 486 N.W.2d 278 (Iowa 1992)

Trial Court precluded treating physician from giving expert opinions because of failure to supplement interrogatories. Case reversed on appeal. The Court holding the paramount criteria is whether this evidence, irrespective of the expert's testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it involved expert opinion testimony for purposes of issues in pending or intended anticipated litigation.

Oswald v. Legrand, 453 N.W.2d 634 (Iowa 1990)

Obstetrical negligence case. The Trial Court strictly construed Section 668.11 granting summary judgment for failure to identify expert witnesses. The Supreme Court reversed, stating a colorable claim of severe emotional distress proximately caused by equivocation of health care professionals could proceed without expert witnesses.

III. WHO CAN BE DESIGNATED AS EXPERT WITNESSES - AND, DOES THIS MAKE A DIFFERENCE?

A. Section 147.139 provides:

"If the standard of care given by a physician and surgeon licensed pursuant to Chapter 148, or osteopathic physician and surgeon licensed pursuant to Chapter 150A, or a dentist licensed pursuant to Chapter 153, is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case."

This special legislation mandates specific competency requirements in professional cases. It is legislation intended to enhance predictability of opinions and is a supplement to Rules 701-703, Iowa Rules of Evidence.

B. Two recent opinions construing statute:

1. Tappe v. Iowa Methodist Medical Center, 477 N.W. 2d 396 (Iowa 1991)

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Medical negligence case wherein Plaintiff suffered stroke while undergoing cardiac bypass surgery. Medical perfusionist (a tech who assists in heart surgeries by operating heart/lung machine) not qualified to testify regarding cause of brain damage during surgery.

2. Wick v. Henderson, 485 N.W.2d 645 (Iowa 1992)

Medical negligence case against anesthesiologist and hospital. Later post-surgery patient developed ulnar nerve problem. Trial Court struck testimony of neurologist who testified as expert witness against anesthesiologist applying Section 147.139, holding he was not qualified to express an opinion on standard of care. The Supreme Court reversed holding Trial Court committed a manifest abuse of discretion by striking testimony and stating we are committed to a liberal rule on admissibility of opinion testimony. (A copy of this case is appended).

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IV. IS ANY EXPERT WITNESS REQUIRED?

A. Traditional view

Usually evidence of the requisite skill and care exercised by a physician must be given by experts. See Buckroyd v. Bunten, 237 N.W.2d 808 (Iowa 1976).

B. Erosion of Traditional Requirement

1. Emotional Distress Claims

Oswald v. Legrand, 453 N.W.2d 634 (Iowa 1990)

Obstetrical negligence case. The Trial Court strictly construed 668.11 granting summary judgment for failure to identify expert witnesses. The Supreme Court reverses stating a colorable claim of severe emotional distress proximately caused by equivocation of health care professionals can proceed without expert witnesses.

2. Informed Consent

Pauscher v. Iowa Methodist Medical Center, 408 N.W.2d 355 (Iowa 1987)

The Iowa Supreme Court adopted patient rule - patient has the right to control his or her body by making an informed decision whether or not to submit to a particular medical procedure. The Court does state only material risks as measured by an objective standard need be explained (life threatening procedure with 1 in 100,000 chance patient can die need not be disclosed).

3. Res Ipsa Loquitur

Historically, the doctrine has been applied sparingly in medical negligence cases. Plaintiff must establish two foundational facts:

a. Defendant had exclusive control and management over instrumentality that caused Plaintiff's injuries; and

b. the injuries were of such a type that in the ordinary course of events they would not have happened if reasonable care had been used.

In Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396 (Iowa 1991) the District Court affirmed on directed verdict of res ipsa loquitur claim as second element not established.

Welte v. Bello, 482 N.W.2d 437 (Iowa 1992)

Medical patient admitted to hospital for surgery on her nose and was unintentionally burned on the arm when anesthetic infiltrated surrounding tissue. Majority holds that second foundational element that an injury would not have been caused in the ordinary course of events if reasonable care had been used does not lay outside the common knowledge of lay persons. That is, common knowledge of lay persons apparently indicates an understanding of the nature of sodium pentothal or what would happen if the sedative escaped from a vein to the surrounding tissue. Jury question generated for submission.

Dissent states: "We have held that the mere fact that an occurrence is rare does not alone warrant an application of res ipsa loquitur.... Further, the common experience exception to the expert testimony rule applies only where the injury suffered is an obvious violation of accepted medical standards".

Wick v. Henderson, 485 N.W.2d 645 (Iowa 1992)

Foundational facts of res ipsa loquitur may be established by common experiences of lay persons. The requirement of exclusive control may be satisfied by concurrent or joint control, based on vicarious liability or may apply when responsibility is unallocated.

Dissent states: "The reluctance proceeds from a recognition that fundamental physical conditions and reactions of patients, even those of tragic dimensions, are often beyond the control of any physician.... To say that res ipsa should be applied with reluctance in medical malpractice cases means it should not be applied in close cases".

V. INSTRUCTIONAL ISSUES

A. "Mistake in Diagnosis"

Perkins v. Walker, 406 N.W.2d 189 (Iowa 1987)

Instruction: "You are instructed that a doctor cannot be found negligent merely because he makes a mistake in the diagnosis and treatment of a patient. Any error in diagnosis and treatment, if you find any, does not in and of itself constitute negligence. For a doctor to be found negligent, it must be shown by a preponderance of the evidence that the doctor, in making his diagnosis and treatment, failed to follow the customary practice and procedure of doctors in his specialty. This is the standard by which the doctor is to be judged."

"We agree the giving of this type of instruction does not constitute error when the facts indicate the physician is confronted with a judgment call. We caution trial courts to exercise restraint in giving this instruction, however, and to give it only when the exercise of the physician's judgment is clearly put in issue by the parties."

Marquis v. Nuss, 451 N.W.2d 833 (Iowa 1990)

Above quoted Instruction given - defense verdict. Plaintiff appeals challenging mistake in diagnosis instruction. Affirmed. Court hold "accurate statement of the law in Iowa and did not confuse or mislead the jury."

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Hutchinson v. Broadlawns Medical Center, 459 N.W.2d 273 (Iowa 1990)

Defendants requested above quoted Instruction; instruction not given. Plaintiffs' verdict. Defendant appealed. Affirmed. Supreme Court holds theories "adequately covered in the Court's instruction when they are considered as a whole". No citation of Nuss case filed four months previous.

Vachon v. Broadlawns Medical Center, ___ N.W.2d ___ (Iowa ____)

Instruction given. Defense verdict. Appeal by Plaintiff. Appeal pending.

VI. CORPORATE NEGLIGENCE

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The Iowa Court has applied general respondeat superior - imputed negligence doctrine - to given fact patterns. The Court has rejected more all encompassing "captain of the ship" doctrines, and will most likely limit application of similar theories in the future. Despite attempts to characterize the practice of medicine as an impersonal corporate process, the fact remains medical care is delivered by physicians to individual patients.

A. Respondeat Superior

General Rule

Under general agency principles, a hospital may be liable for the negligent acts of employees acting within the scope of their employment.

B. Determination of Employment Status

1. Selection
2. Wages
3. Control
4. Termination

See Dobson v. Jewell, 189 N.W.2d 547 (Iowa 1971)

C. Scope of Employment

Employees must be acting within the scope of their employment in order to find liability (the act must be necessary to accomplish the purpose of the employment and it must be intended to accomplish that purpose). Peterson v. Pittman, 391 N.W. 2d 235 (Iowa 1986).

D. Borrowed Servant Doctrine

Where a servant directed or is permitted by his master to perform services for another he may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others. The Court may, in some cases, find joint liability. E.g. Somerset v. Hart, 549 S.W.2d 814 (Ky. 1977). However, recent cases nationally have restricted applicability. See Honeywell v. Rogers, 251 F. Supp. 841 (WD Pa 1966), Bria v. St. Joseph's Hospital, 153 Conn. 626, 220 A.2d 29 (1966), Bain vs. Owens, 459 S.W.2d 303 (Mo. 1970), Dessauer v. Memorial General Hospital, 628 P.2d 337 (N.M. App. 1981).

Generally, see Iowa Civil Jury Instructions 720.2, 730.2, 730.3, and 730.4.

E. Representative Iowa Cases - Employees

Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417 (Iowa 1985)(hospital could be held liable for nurse's failure to timely notify doctor of patient's condition).

Hospitals are liable in tort for injuries to patients caused by the negligence of hospital employees. E.g., Clites v. State, 322 N.W.2d 917 (Iowa 1982); Speed v. State, 240 N.W.2d 901 (Iowa 1976)(state liability for negligent acts of physicians at University Hospitals - abolish locality rule); Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974)(hospital held to be vicariously liable along with the pathologists who worked in the hospital's laboratory and the pediatrician who treated a child with erythroblastosis); Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98, 101-02 (Iowa 1971) (patient fall - stating standard of care); Shepard v. McGinnis, 257 Iowa 35, 131 N.W.2d 475, 479 (1964) (providing defective equipment); Cardamon v. Iowa Lutheran Hospital, 256 Iowa 506, 128 N.W.2d 226 (1964)(patient fall - failure to supervise and attend to patient); Christensen v. Des Moines Still College of Osteopathy & Surgery, 248 Iowa 810, 82 N.W.2d 741, 745 (1957) (student intern and resident negligence). In all probability, with the variety of facts surrounding an individual residency program including control, compensation, affiliation of both the resident and the supervising attending physician, courts may not automatically assume an agency relationship with the hospital but, rather, consider each case on its merits. See Shepard v. Sisters of

Providence, 102 Or. App. 196, 793 P.2d 1384 (1990) in which a surgical resident participating in a university residency program was held to be the agent of the university and not the hospital at which the alleged negligence occurred. Wittmer v. Letts, 248 Iowa 648, 80 N.W.2d 561, 564 (1957) (patient fall); Haynes v. Presbyterian Hosp. Ass'n., 241 Iowa 1269, 45 N.W.2d 151, 152-54 (1950) (nursing negligence).

Also see, Bethards v. Shivvers, Inc., 355 N.W.2d 39 (Iowa 1984)(for general discussion of agency principles).

F. INDEPENDENT CONTRACTORS

1. General Rule

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Hospitals are not responsible for the actions of independent contractors performing professional services. Utilization of facilities does not create agency.

a. Definition of independent contractor (right to control is primary test). See Peterson v. Pittman, 391 N.W.2d 235 (Iowa 1986). Also see Mermigis v. Servicemaster Industries, Inc., 437 N.W.2d 242 (Iowa 1989); Lunde v. Winnebago Industries, Inc., 299 N.W.2d 473 (Iowa 1980) (general rule - employer not generally liable for acts of independent contractor).

2. Rationale for Rule

a. Iowa hospitals are not licensed to practice medicine. See Iowa Code §135B.1(1) (1991).

b. Hospitals cannot intervene in or engage in activities that lie at the very heart of the doctor-patient relationship. Pauscher v. Iowa Methodist Medical Center, 408 N.W.2d 355 (Iowa 1987) (informed consent).

c. Iowa Rule is majority rule followed throughout the United States.

The practice of holding hospitals liable for the negligence of an independent physician, even in limited circumstances, is not widely accepted. The general rule, nationwide, is that a hospital may not be held liable for the negligence of a physician who is an independent contractor with

respect to the hospital. Annot., 51 A.L.R.4th 235, §5. Recent cases in other jurisdictions holding to the majority rule include Public Health Trust v. Valcin, 507 So.2d 596 (Fla. 1987); Royer v. St. Paul Fire & Marine Ins. Co., 502 So.2d 232 (La. App. 3d Cir.), cert. denied, 503 So.2d 496 (La. 1987); Brackens v. Detroit Osteopathic Hospital, 174 Mich. App. 290, 435 N.W.2d 472 (1989); Baltzell v. Baptist Medical Center, 718 S.W.2d 140 (Mo. App. 1986); Oehler v. Humana, Inc., 775 P.2d 1271 (Nev. 1989); Brusco v. St. Claire's Hospital & Health Center, 128 App. Div. 2d 390, 512 N.Y.S.2d 675, app. dismissed, 70 N.Y.2d 692, 512 N.E.2d 553, app. denied, 70 N.Y.2d 606, 514 N.E.2d 388 (1987); Shumaker v. United States, 714 F.Supp. 154 (M.D. N.C. 1988) (applying North Carolina law); and Nicholson v. Memorial Hospital System, 722 S.W.2d 746 (Tex. App. 1986).

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3. Representative Iowa Cases Reflecting Majority Rule

Sinkey v. Surgical Associates, 186 N.W.2d 658, 661 (Iowa 1971)(Radiologist is independent contractor, not employee of hospital).

Dickinson v. Mailliard, 175 N.W.2d 588 (Iowa 1970) (Radiologist is independent contractor and not an agent of hospital whose facilities he uses).

Shepard v. McGinnis, 257 Iowa 35, 131 N.W.2d 475 (1964) (Physician surgeon is independent contractor and not employee).

Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960)(Doctors were independent contractors for whose negligence defendant hospital is not liable).

4. Intentional Torts

Employers are not generally liable for intentional torts of employees unless it can be shown that "the servant's" purpose, however misguided, is wholly or in part to further the master's business. W. Prosser, Handbook of Law of Torts §70 at 465. Sandman v. Hagan, 261 Iowa 560, 154 N.W.2d 113 (1967)(no respondeat superior where assault and battery by employee).

5. Apparent Authority (Agency by Estoppel)

General Rule - The Majority Rule

No basis exists for extending respondeat superior responsibility for non-employee physicians. The independent contractor rule is still the law in Iowa.

a. Also note: Burden of proving an agency is upon party asserting its existance. Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777 (Iowa 1985).

Minority Rule

This has been limited to where claimed hospital "holds out" to public that certain services provided by hospital e.g. emergency room service (Irving v. Doctors Hospital, 415 So.2d 55, (Petition Denied); 422 So.2d 842 (Fla. App. 1982).

Arthur v. St. Peters Hospital, 169 N.J. Sup. 575, 405 A.2d 443 (1979)(radiologist)(Liability where no attempt to put the patient on notice that a contract for care exists between the patient and the physician.

But, see Milliron v. Francke, 793 P.2d 824 (Mont. 1990) (Where Court declined to hold hospital liable for acts of radiologist).

6. No present Iowa cases - some are pending on appeal.

Caveat:

To limit application of the "apparent authority" doctrine hospitals should consider putting patient on notice (initial exchange of information between doctor and patient, posting of signs outlining separate identity of physician groups, separate designation of patient records as noted by physician groups).

G. "CAPTAIN OF THE SHIP" DOCTRINE

There is an attempt to impose on hospitals and perhaps primary physicians ultimate responsibility for conduct of all other persons involved in medical procedures.

"Because of wide sweep of the rule and the modern view that [physicians] are leaders of a team of specialists rather than captains of a crew, its application has been widely 'discredited'". The Iowa Supreme Court has recently rejected the doctrine. See Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396 (Iowa 1991).

H. CORPORATE NEGLIGENCE DOCTRINE

Application of this doctrine to impose direct duties owed to patients is generally neither followed nor is there any basis to do so.

1. This theory has not been adopted by the Iowa Supreme Court and under present law, there is no basis to do so.

   a. Iowa hospitals are not licensed to practice medicine. See Iowa Code §135B.1(1) (1991).

   b. Hospitals cannot intervene in or engage in activities that lie at the very heart of the doctor-patient relationship. Pauscher v. Iowa Methodist Medical Center, 408 N.W.2d 355 (Iowa 1987) (informed consent).

      Iowa Court follows common sense appreciation that hospital provides physical facility and accommodations where medical care may be rendered by physicians.

2. The Illinois case of Darling v. Charleston Community Memorial Hospital, 133 Ill.2d 326, 211 N.E.2d 253, 14 ALR 3d 873, 12 ALR 4th 57 (1965), cert. denied, 383 U.S. 946, 16 L.Ed.2d 209, 86 S. Ct. 1204 (1966) provided first application of doctrine adopting an independent duty of hospital to patient.

3. Post-Darling Developments

   a. Hospitals are not considered guarantors of the adequacy of medical care rendered "within its walls."

   b. Isolated acts of otherwise competent physicians remain the sole responsibility of the physician.

4. "Possible" Limited Applicability - Staff Competency" Issues

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See, Natale v. Sisters of Mercy of Council Bluffs, 243 Iowa 582, 52 N.W.2d 701 (1952). (Supporting hospital's right to regulate and monitor the medical staff); Koelling v. Board of Trustees of Mary Frances Skiff Memorial Hospital, 259 Iowa 1185, 146 N.W.2d 284 (1966) (affirming right of hospital to suspend doctor's staff privileges); Locksley v. Anesthesiologists of Cedar Rapids, 333 N.W.2d 451 (Iowa 1983)(refused to impose duty as a matter of law on hospital for not ensuring anesthesia services provided to surgeon).

I. QUERY?

1. Where qualifications or competency of staff physician is the issue (not simply claim of negligence) is doctrine viable?

   No Iowa cases, but see Johnson v. Misericordian County Hospital, 99 Wis.2d 708, 301 N.W.2d 156 (1981)(Failure to check credentials led to negligent granting of orthopedic privilege to unqualified physician and the hospital was directly liable for its negligence when a patient was permanently injured by the doctor's negligence).

2. Patient "Dumping"

   Dumping patients unable to pay medical expenses to public hospital can amount to serious federal liabilities for a hospital. In addition, some courts have allowed allegations of COBRA violation to stand in medical malpractice suit. Sorrelle v. Babcock, 733 F.Sup. 1189 (N.D. Ill. 1990).

3. HMOs

   The fact that an HMO is involved is not necessarily a basis for imposing corporate negligence doctrine. See, Williams v. Good Health Plus - Health America, 743 S.W.2d 373 (Tex. Ct. App. 1987).

4. Spoliation of Records

   At least one Court has recognized Rogers v. St. Mary's Hospital of Decatur, 198 Ill.

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App.3d 871, 556 N.E.2d. 913 (1990) (Failure to retain x-rays).

J. CONCLUSION

While hospitals may be liable in a given fact situation when the principle of respondeat superior for negligent employees, there is generally no basis to extend liability beyond traditional guidelines. Attempts to suggest a hospital practices medicine or in some way has an independent duty to patients apart from those owed by practicing physicians should be rejected, as has been done in the majority of jurisdictions throughout the United States.

Bibliography

For further review of pending cases in Iowa on all theories see Northwestern Digest, Physicians and Surgeons, Hospitals, Master & Servant, Principal and Agent, Corporations, ALR2d - ALR4th, Iowa Civil Jury Instructions, Chapter 1600 - Medical Malpractice, Chapter 700 - Negligence-Vicarious Liability; various publications of American Academy of Hospital Attorneys, American Society of Law and Medicine, Iowa Society of Hospital Attorneys, Iowa Hospital Association

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VII. STATUTE OF LIMITATIONS - DISCOVERY RULE

Schultze v. Landmark Hotel Corp., 463 N.W.2d 47 (Iowa 1990)

Issue whether the statute of limitations for medical negligence action and wrongful death under Section 614.1(9) begins to run on the discovery of the death or the discovery of the wrongful act that caused the death. The Court holds all of the information from which the cause of death could be ascertainable was available at the time of death. Case filed two weeks beyond the second anniversary of decedent's death. Case dismissed. Affirmed.

Plaintiff fractured hip, sustained at fall at hotel. Later, patient died from complications in hospital.

VIII. DISCOVERY MATTERS

Berg v. Des Moines General Hospital, 456 N.W.2d 173 (Iowa 1990)

Medical malpractice case against physician and hospital relating to treatment on October 31, 1985. November 5, 1985 emergency room nurses prepared a "confidential record of evidence" containing some matters outside of medical record. Later, Plaintiffs sought production of this information. Trial Court overruled request. The Supreme Court required production of nurses statements. See Berg v. Des Moines General Hospital (unreported per curiam opinion). Case after remand, Trial Court still did not require production of nurses statements. Supreme Court again affirms requiring production of what otherwise might have been perceived to be work product or otherwise protected material.

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IX. REMEDIAL MEASURES - RULE 407, IOWA RULE OF EVIDENCE

Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991)

Malpractice case brought against orthopaedic surgeon after patient contracted AIDS as a result of a blood transfusion following total hip replacement surgery. Rule of Evidence 407 strictly applied to preclude after-the-fact remedial measure to prove negligence. The triggering event is the actual claimed negligent act, not when physician becomes "aware of injury by filing of claim or suit."

X. PROFESSIONAL DISCIPLINE

Administrative Discipline Procedures

A. Burden of Proof: Regarding disciplinary actions against doctors, such actions at common law required proof of a preponderance of evidence. Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 237 (Iowa 1991) (citing State v. Brown, 218 Iowa 166, 170, 253 N.W. 836, 838 (1934). This preponderance of the evidence standard satisfies the constitutional due process requirements. Id. at 237 (citing In Re Polk, 90 N.J. 550, 567-69, 449 A.2d 7, 16 (1982)). Accordingly, the proper standard in medical disciplinary cases is proof by a preponderance of the evidence. Eaves, 467 N.W.2d at 237; Boswell v. Board of Veterinary Medicine, 477 N.W.2d 366, 369 (Iowa 1991).

B. Scope of Review: Judicial review of administrative proceedings is governed by the specific provisions of the Iowa Code Section 17A.19 (1991). When exercising this power of judicial review, the district court has an affirmative duty to correct administrative agency's decisions when they are not supported by substantial evidence. Dillinger v. City of Sioux City, 368 N.W.2d 176, 182 (Iowa 1985); Frost v. S.S. Kresge Co., 299 N.W.2d 646, 647 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); City of Davenport v. Pub. Emp. Rel. Bd., 264 N.W.2d 307, 311 (Iowa 1978); and/or when they are affected by an error of law, Morrison v. Century Engineering, 434 N.W.2d 874, 876 (Iowa 1989); Iowa Public Service Co. v. Iowa State Commerce Commission, 263 N.W.2d 766, 768 (Iowa 1978); Iowa Code §17A.19(8) (1991). The district court may exercise these duties and hear an appeal from an administrative agency even though a rehearing before the agency was not requested prior to the appeal for judicial review. 645 Iowa Administrative Code §180.109 (1991).

C. Charging Statutes: Civil statutes which are vague and overbroad are void and unenforceable under both the United States Constitution and the Iowa Constitution. Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); U.S. v. Dereziniski, 945 F.2d 1006, 1010 (8th Cir. 1991); Fields v. City of Omaha, 810 F.2d 830, 833 (8th Cir. 1987). A civil statute is unconstitutionally vague under the due process clause when reasonable men must guess at the statute's meaning and its applicability. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227 (1972); State v. Wedelstedt, 213 N.W.2d 652, 656 (Iowa 1973); Sloman v. Board of Pharmacy Examiners, 440 N.W.2d 609, 611 (Iowa 1989), State v. Webb, 261 Iowa 1151, 1156, 156 N.W.2d 299, 302, (1968). Additionally, a statute is unconstitutionally overbroad when it encompasses activities protected by the constitution in addition to activities subject to legitimate governmental regulation, Grayned, 408 U.S. at 114; Wedelstedt, 213 N.W.2d at 656; City of Maquoketa v. Russell, 484 N.W.2d 179, 181 (Iowa 1992); or "encourage[s] arbitrary and discriminatory enforcement." Kolender, 461 U.S. at 375; Fields, 810 F.2d at 833. Accordingly, when a statute does not have a reasonable basis and/or it invades the area of constitutionally protected freedom, its presumption of constitutionality is rebutted. Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 236 (Iowa 1991).

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D. Due Process Considerations: The due process clauses of the United States Constitution and the Iowa Constitution fundamentally require a fair proceeding before the state can affect a person's personal or property rights. In Re Murchison, 349 U.S. 33, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); Friedman et al. v. Texas Optometric Ass'n., Inc., 440 U.S. 1, 18, 99 S.Ct. 887, 898, 59 L.Ed.2d 100 (1978); Feuntes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972); Berger v. United States, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed. 481 (1921); Board of Directors of Fairfield Community School District v. Justmann, 476 N.W.2d 335, 339 (Iowa 1991); Hartwig v. Board of Nursing, 448 N.W.2d 321, 323 (Iowa 1989). A fair proceeding is insured by procedural safeguards which require notice and an opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020-1021, 25 L.Ed.2d 287, 299 (1970). Moreover, these procedures must be neutrally applied by a trier of fact who is disinterested and who is free from prejudgment. Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); Keith v. Community School District of Wilton, 262 N.W.2d 249, 260 (Iowa 1978). In Re Murchison, 349 U.S. at 136; Goldberg, 397 U.S. at 301; Justmann, 476 N.W.2d at 339. These principles apply to both administrative agencies and courts. Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973); Withrow, 421 U.S. 35 at 47; Ohio Bell Telephone Company v. Public Utilities Commission., 301 U.S. 292, 304-305, 57 S.Ct. 724, 730-731, 81 L.Ed. 1093 (1937); Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975); Eves v. Iowa Employment Security Commission, 211 N.W.2d 324, 326 (Iowa 1973); Carr v. Iowa Employment Security Commission, 256 N.W.2d 211, 215 (Iowa 1977).

Since these principles apply to administrative agencies, the Constitution forbids administrative adjudicators to combine functions in such a manner as to preclude an impartial hearing. Accordingly, when special facts and circumstances are present in a case, the combination of investigative and adjudicative functions by an administrative agency may violate due process. Withrow, 421 U.S. at 58; Wedergren, 307 N.W.2d at 17; Hartwig, 448 N.W.2d at 323. Similarly, the combination of prosecutorial and adjudicative functions by an administrative agency may be impermissible according to the dictates of due process. Withrow, 421 U.S. at 50-51, n. 16 (citing with approval cases which held that it was

impermissible to perform an advocacy and adjudicative role); Wedergren, 307 N.W.2d at 18; Eaves, 464 N.W.2d at 236; Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986). Thus, even though the courts presume the administrative adjudicators make decisions objectively, the Constitution forbids these combinations of functions when the facts show a risk of prejudgment. Justmann, 476 N.W.2d at 340.

E. Substantial Evidence Test: Iowa Code Section 17A.19 (1991) confers the power of judicial review of final decisions of the Optometry Board to the district courts. When exercising this power of Judicial Review, the district court has an affirmative duty to correct the Optometry Board's decision when it is unsupported by substantial evidence, Dillinger v. City of Sioux City, 368 N.W.2d 176, 182 (Iowa 1985); Frost v. S.S. Kresge Co., 299 N.W.2d 646, 647 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); City of Davenport v. Pub. Emp. Rel. Bd., 264 N.W.2d 307, 311 (Iowa 1978); and/or when they are affected by an error of law, Morrison v. Century Engineering, 434 N.W.2d 874, 876 (Iowa 1989); Iowa Public Service Co. v. Iowa State Commerce Commission, 263 N.W.2d 766, 768 (Iowa 1978); Iowa Code §17A.19(8) (1991). Evidence is unsubstantial when a reasonable mind would find the evidence inadequate to reach a conclusion. City of Davenport, 264 N.W.2d at 311 (quoting Grant v. Fritz, 201 N.W.2d 188, 197 (Iowa 1972)). Thus, when evidence produced at an administrative hearing is inadequate to support the agency's final decision, the reviewing court has an obligation to correct the agency's decision.

XI. SEXUAL ABUSE OR EXPLOITATION - COUNSELORS AND THERAPISTS

A. Section 614.1(12), The Code - Sexual Exploitation - Action for damages may be brought within five (5) years after the victim was last treated by the counselor or therapist. (Contained in House File 2476, 74th General Assembly, approved May, 1992).

B. Section 709.15, The Code - Crimes - Sexual Abuse or Exploitation - Felony - Aggravated or Serious Misdemeanor

C. Also see Section 614.8A, The Code - Damages for Child Sexual Abuse - Statute of limitations is four (4) years from the time of discovery by the injured person from both the injury and causal connection.

XII. CONCLUSION

There will undoubtedly be other statutory mandates imposed in the field of medical malpractice. Increasingly, the manner in which legislation is interpreted by the Courts will impact the prosecution and defense of these cases.

J

Sharalan J. WELTE and Ronald Welte, Appellants,

v.

George BELLO, Appellee.

Sharalan J. WELTE and Ronald Welte, Appellants,

v.

MERCY HOSPITAL, A Corporation, Appellee.

No. 90-1723.

Supreme Court of Iowa.

March 18, 1992.

Patient who suffered arm burn following injection of anesthetic brought medical malpractice action against anesthesiologist and hospital. The District Court, Scott County, L.D. Carstensen, J., entered summary judgment for defendants on some claims and judgment on jury verdict for defendants on remainder. On appeal, the Supreme Court, Andreasen, J., held that: (1) expert testimony was not required to establish claim against anesthesiologist, and (2) instructions on claim against hospital were improper.

Reversed and remanded.

Snell, J., dissented and filed opinion in which Harris, J., joined.

McGiverin, C.J., concurred in part, dissented in part and filed opinion.

1. Evidence ⇐538

If standard of care of physician, surgeon, or dentist is at issue, Iowa law permits only testimony upon appropriate standard of care by expert who has qualifications related directly to medical problem at issue and type of treatment administered. I.C.A. § 147.139.

2. Physicians and Surgeons ⇐18.60

Doctrine of res ipsa loquitur, as exception to general rule that negligence plaintiff must identify specifically acts or omissions constituting negligence, is applicable in medical and dental malpractice suits in Iowa.

3. Negligence ⇐121.2(6)

Requirement for establishing res ipsa loquitur claim, that occurrence is such that in ordinary course of things would not have happened if reasonable care had been used, includes common experience of both laypersons and experts.

4. Physicians and Surgeons ⇐18.80(8)

Patient, who suffered chemical burn to arm caused by sodium pentothal that anesthesiologist injected into her vein which then infiltrated or escaped from vein into surrounding tissues, was not required to present expert testimony in order to establish anesthesiologist's negligence; it was within common experience of laypersons that such occurrence in ordinary course of things would not have happened if reasonable care had been used.

5. Evidence ⇐571(3)

Even if patient who suffered arm burn following injection of sodium pentothal by anesthesiologist was required to provide expert evidence as to standard of care, such requirement was satisfied where both anesthesiologist and his retained medical expert testified that such burns do not occur when drug is properly injected.

6. Physicians and Surgeons ⇐18.100

Res ipsa loquitur instruction, which required medical malpractice plaintiff to establish negligence based on common experience "as experienced by health care professionals," effectively denied plaintiff of benefit of res ipsa inference of negligence and required her to establish common experience of health care professionals.

7. Negligence ⇐140

Where evidence shows more than one cause contributing to injury or damage, i.e., that more than one party was negligent, following sentence should be added to instruction on proximate cause: "there can be more than one proximate cause of an injury or damage."

J

8. **Trial** ⚬=202

Ordinarily, trial court should include in its instructions admissions in pleadings of party.

John J. Carlin of Carlin, Hellstrom & Bittner, Davenport, for appellants.

Robert V.P. Waterman, Jr. of Lane & Waterman, Davenport, for appellee Dr. Bello.

Ralph H. Heninger and Ralph W. Heninger of Heninger & Heninger, Davenport, for appellee Mercy Hosp.

Considered en banc.

ANDREASEN, Justice.

A medical patient who was admitted to a hospital for surgery on her nose was unintentionally burned on the arm when an anesthetic, that was to be injected into her vein, infiltrated the surrounding tissue. The patient and her husband brought malpractice actions against the anesthesiologist and the hospital. The claims alleged negligence in the administration of the anesthetic and a failure to secure informed consent of the patient. The claimants urged the doctrine of res ipsa loquitur supported submission of their general negligence claim.

Prior to trial, the district court granted partial summary judgment to the anesthesiologist upon the general negligence claim. Appeal is taken from the summary judgment and the judgments entered by the district court upon jury verdicts for the anesthesiologist and the hospital.

I. *Background.*

On April 26, 1986, Sharalan J. Welte was admitted to Mercy Hospital (Mercy) for surgery for the correction of a deviated septum. Approximately three hours before surgery, Welte conferred with her surgeon about the procedure. She then conferred with Dr. George Bello who informed her that he would be the anesthesiologist. He told her that he would be administering sodium pentothal through an IV inserted into a vein in her arm. He told her about the potential risks associated with g[illegible] anesthesia, including sore throat, br[illegible] spasms, cardiac irregularities and, in [illegible] cases, death. Welte read and sig[illegible] written "consent to operate, administ[illegible] of anesthetics, and rendering other me[illegible] services, Mercy Hospital, Daven[illegible] Iowa." The consent form provided "I [illegible] sent to the administration of anesthesia [illegible] be applied by or under the direction [illegible] control of Dr. Bello." Also on the fo[illegible] was the statement that "anesthesia and [illegible] complications have been explained and [illegible] cepted." The consent form was signed by both Welte and Dr. Bello.

After talking with the doctors, Welte was transferred to a pre-operation room. While in this room, nurse Delores Testroet inserted a catheter into the vein of Welte's right arm. To place a catheter in the vein, the nurse used a one unit needle and catheter. Welte complained of pain after the IV had been inserted. The nurse checked the IV and concluded that it was properly positioned inside the vein. Welte was then transferred from the pre-operation room to the operating room. Dr. Bello and two nurses in the operating room testified they performed tests to determine that the IV was properly positioned. Using a syringe with a plunger, Dr. Bello began injecting drugs through a port in the IV. Dr. Bello testified that after he had used the syringe to push a test dose of sodium pentothal into the vein without any problem or resistance, he then pushed two additional doses of sodium pentothal into the vein. At that time, Welte should have been unconscious but she was not. Dr. Bello then rechecked the site of the IV and, for the first time, noticed swelling on her arm near the point at which the IV had been inserted. He then ordered a nurse to start a second IV in her left arm; Welte soon became unconscious. The initial IV was disconnected and Dr. Bello treated Welte's arm. As a consequence of the sodium pentothal infiltration of the tissues surrounding the vein, Welte sustained first-, second-, and third-degree burns resulting in a large permanent scar.

aralan and her husband Ronald (who rted a loss of consortium claim) (toher Welte) commenced two separate practice actions; one against Mercy and cond against Dr. Bello. The separate s were consolidated for trial. Prior to l, Dr. Bello filed a motion for summary gment claiming Welte had failed to rea qualified expert to testify against m and, therefore, they would be precluded from offering any expert testimony at rial. Iowa Code § 668.11 (1987) (failure to esignate an expert within 180 days of defendant's answer precludes the expert from testifying at trial). Mercy also filed a motion for summary judgment.

Welte, in response to Dr. Bello's motion, argued that the tort claim of failure to obtain an informed consent did not require expert testimony, and that the general negligence claim would be preserved for trial by the doctrine of res ipsa loquitur.

The district court concluded that any alleged negligence of Dr. Bello was not so obvious as to be within the comprehension of a layperson and that the facts as disclosed in the record did not support a finding that the injury was to a part of the body not involved in treatment. Accordingly, since Welte did not retain a qualified expert to testify against Dr. Bello, the court dismissed the general negligence claim, preserving only the claim for failure to obtain informed consent.

The court denied Mercy Hospital's motion for summary judgment because Welte had offered the deposition testimony of an expert witness, nurse Nancy Copen, upon the negligence claim. In Copen's opinion, a nurse can be certain that an IV is properly inserted into the vein. A nurse can also determine if a needle had entered and exited a vein. The court felt this was sufficient evidence to generate a fact issue on whether the hospital nurses were negligent in the administration of Welte's anesthesia.

The district court submitted the issues of specific and general negligence against Mercy to the jury. The instructions on general negligence were based upon the doctrine of res ipsa loquitur. As to Dr. Bello, the court submitted only the issue of negligence based upon a failure to secure informed consent. The jury found for Mercy on all issues. As to Dr. Bello, the jury found that although he was negligent in not informing the patient of the potential for burns from sodium pentothal, his negligence was not a proximate cause of Welte's injuries. Accordingly, a verdict was returned in his favor. Welte appeals from these judgments.

II. *Res Ipsa Loquitur.*

[1] Negligence means a failure to use ordinary care. *Schalk v. Smith,* 224 Iowa 904, 907–08, 277 N.W. 303, 305 (1938). As a general rule, a party claiming negligence must identify specifically the acts or omissions constituting negligence. *Rinkleff v. Knox,* 375 N.W.2d 262, 266 (Iowa 1985). The purpose of requiring specification of negligence is to limit the determination of the factual questions arising in a negligence claim to only those acts or omissions upon which a particular claim is in fact based. *Id.* When the ordinary care of a physician is an issue, generally only experts in the profession can testify and establish the standard of care and the skill required. *Perin v. Hayne,* 210 N.W.2d 609, 613 (Iowa 1973). If the standard of care of a physician, surgeon, or dentist is at issue, Iowa law permits only testimony upon the appropriate standard of care by an expert who has qualifications related directly to the medical problem at issue and the type of treatment administered. Iowa Code § 147.139.

[2, 3] The doctrine of res ipsa loquitur is an exception to the general rule. It is now well established that the doctrine may be applied in medical and dental malpractice suits in Iowa. *Reilly v. Straub,* 282 N.W.2d 688, 693 (Iowa 1979). Our general rules relating to the doctrine are found in our prior decisions. *Id.* The basic rules were summarized in *Sammons v. Smith,* 353 N.W.2d 380, 385–87 (Iowa 1984) where we stated:

> Res ipsa loquitur is a rule of evidence which, when applied, permits but does not compel an inference that defendant was negligent. Under the doctrine the

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> happening of an injury permits an inference of negligence where plaintiff produces substantial evidence that (1) the injury is caused by an agency or instrumentality under the exclusive control and management of the defendant and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.
>
> The submission of res ipsa is a matter for the court, and when res ipsa is submitted in a medical malpractice case, the plaintiff is relieved of the burden of showing that specific acts of defendant were below accepted medical standards. The plaintiff still must prove negligence, but he or she does so by convincing the jury the injury would not have occurred absent some unspecified but impliedly negligent act.
>
> Contrary to plaintiff's contention, the court does not find these elements as a matter of law in the process of deciding whether to instruct on the matter of res ipsa loquitur theory, but only concludes there is sufficient competent evidence of the existence of the foundational facts to generate a jury question. From this it follows that defendants may introduce competent evidence tending to disprove either or both foundational elements.

(Citations omitted.) The requirement that the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used formerly relied on the common experience of laypersons; now this common experience may include the common experience of experts. *Reilly*, 282 N.W.2d at 694. With these basic rules in mind, we review Welte's claim of general negligence against Dr. Bello and Mercy.

III. *General Negligence—Dr. Bello.*

The district court granted partial summary judgment to Dr. Bello prior to trial upon the general negligence claim. If there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, the court should grant summary judgment. Iowa R.Civ.P. 237(c). The issue in this case is whether there is evidence in the summary judgment record upon which liability could be found. *Cox v. Jones*, 470 N.W.2d 23, [illegible] (Iowa 1991).

If there is sufficient competent evid[illegible] of the existence of the foundation of fa[illegible] to generate an inference of negligence [illegible]der res ipsa loquitur doctrine, then sum[illegible]mary judgment is not appropriate and the issue of general negligence should be sub[illegible]mitted to the jury. If expert testimony is required to establish general negligence or the foundational facts and expert testimony is unavailable, then summary judgment is appropriate. *Farley v. Guither*, 450 N.W.2d 853, 857 (Iowa 1991).

The court concluded the res ipsa loquitur doctrine would not apply because it was not within common knowledge whether such an occurrence would not have happened if reasonable care had been used. The court held, without expert testimony on this issue, Welte failed to provide sufficient evidence to create the inference of negligence.

We have long recognized "in most cases a layman can have no knowledge whether the proper medicine administered or the proper surgical treatment was given." *Evans v. Roberts*, 172 Iowa 653, 660–61, 154 N.W. 923, 925 (1915). However,

> If a surgeon ... undertakes to stich a wound on the patient's cheek and, by an awkward move, thrusts his needle into the patient's eye .... the charitable presumptions which ordinarily protect the practitioner against legal blame where his treatment is unsuccessful are not here available.
>
> It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. It does not need scientific knowledge or training to understand that, ordinarily speaking, such results are unnecessary and are not to be anticipated, if reasonable care be exercised by the operator.

Id. at 658–59, 154 N.W. 923.

In the following medical malpractice cases we have found the occurrence or event was so obvious as to be within the comprehension of laypersons and required

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common knowledge and experience: [illegible] v. Myerly, 210 N.W.2d 619 (Iowa [illegible] (vascular operation—burned but- [illegible] "Knowledge and experience teaches [illegible]t in the ordinary course of events one [illegible]going surgery does not sustain an [illegible]ual injury to a healthy part of his body within the area of the operation in the [illegible]ence of negligence."); *Frost v. Des [illegible]ines Still College*, 248 Iowa 294, 79 N.W.2d 306 (1957) (back surgery—ether [illegible]rn to abdomen; "It is a simple under[illegible]andable rule of circumstantial evidence with a sound background of common sense and human experience, and difficulty comes only when we attempt to transform it into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it be applied. This is such a case. We should, in applying the rule, not forget the particular force and justice of the rule."); *Stickleman v. Synhorst*, 243 Iowa 872, 52 N.W.2d 504 (1952) (insertion of needle into trachea—puncture to blood vessel in throat; "We are aware of no rule that the nature of an injury must be shown by medical testimony if the injury is such that it may satisfactorily be shown by other evidence. We think the nature of plaintiff's injury is sufficiently shown here."); *Whetstine v. Moravec*, 228 Iowa 352, 291 N.W. 425 (1940) (removal of six teeth—root of tooth found in patient's lung; "It was a mechanical job. It is common knowledge that in extracting a tooth or its roots, neither ordinarily passes into the trachea and thus into the lungs. In fact such an occurrence is most rare. In the words of the authorities it is a matter of such rare occurrence and unusual character, that its very happening carries with it a strong inherent probability of negligence.").

In contrast, in the following cases we have required expert testimony to establish a general negligence claim or the applicable standard of care: *Tappe v. Iowa Methodist Medical Ctr.*, 477 N.W.2d 396 (Iowa 1991) (heart bypass resulting in brain damage; "[B]ecause all the experts testified that stroke is an inherent risk of bypass surgery, the plaintiff was not entitled to the benefit of the res ipsa inference of negligence."); *Cox*, 470 N.W.2d at 23 (cataract removal and follow-up care resulting in detached retina; "Plaintiff's claim of inadequate follow-up care would also ultimately require expert testimony regarding (1) whether a retinal detachment was occurring at the time of the follow-up visits; and (2) the appropriate standard of follow-up care for a cataract extraction."); *Thomas v. Fellows*, 456 N.W.2d 170 (Iowa 1990) ("[T]he alleged malpractice was of a highly technical nature, and the case could therefore not be pursued without expert evidence."); *Donovan v. State*, 445 N.W.2d 763 (Iowa 1989) (replacement of heart valve resulting in staph infection damaging replacement valve; "If a doctor operates on the wrong limb or amputates the wrong limb, a plaintiff would not have to introduce expert testimony to establish that the doctor was negligent. On the other hand, highly technical questions of diagnoses and causation which lie beyond the understanding of a layperson require introduction of expert testimony."); *Forsmark v. State*, 349 N.W.2d 763 (Iowa 1984) (back surgery resulting in paralysis; "A layperson unaided by expert testimony could not say that in the ordinary course of events the injury would not have occurred if reasonable care had been use.").

[4] The chemical burn to Welte's arm was caused by sodium pentothal that Dr. Bello injected into her vein which then infiltrated or escaped from the vein into the surrounding tissues. We believe it is within the common experience of laypersons that such an occurrence in the ordinary course of things would not have happened if reasonable care had been used. The insertion of a needle into a vein is a common medical procedure that laypersons understand. It is a procedure that has become so common that laypersons know certain occurrences would not take place if ordinary care is used. *See Wolfsmith v. Marsh*, 51 Cal.2d 832, 337 P.2d 70 (1959) (misinsertion of IV needle resulting in sodium pentothal burn gives rise to res ipsa loquitur instruction.). *See also Horner v. Northern Pac. Ben. Ass'n Hosp.*, 62 Wash.2d 351, 382 P.2d 518 (1963); Annota-

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tion, *Medical Malpractice: Res Ipsa Loquitur in Negligent Anesthesia Cases,* 49 A.L.R. 4th 63 (1986). We conclude the court erred in granting partial summary judgment on the general negligence claim against Dr. Bello. The record establishes circumstances of the occurrence sufficient to defeat summary judgment without the necessity of expert medical evidence.

[5] However, even if expert evidence were required, the record was sufficient to defeat the summary judgment motion. Dr. Bello, in his answer to the petition, admitted he administered sodium pentothal by intravenous injection into Welte's arm and that while under anesthesia, she suffered burns. He admitted sodium pentothal has a caustic and burning effect if not properly injected into the vein and that if the catheter is not properly inserted into the vein that injury can occur in the surrounding area. Dr. Bello's retained medical expert, Dr. Edwin A. Maxwell, testified in his deposition that in the usual course of events, an IV instituted for purpose of anesthesia does not infiltrate the surrounding tissue.

IV. *Mercy Hospital—Instructions.*

[6] In its instruction to the jury upon the doctrine of res ipsa loquitur, the court stated:

> Sharalan J. Welte must also prove that the occurrence would not have happened if ordinary care had been used. Proof of this requirement rests on common experience as experienced by health care professionals.

Welte objected to the instruction requiring proof of the common experience *as experienced by health care professionals.* We find this instruction effectively denied Welte of the benefit of the res ipsa inference of negligence and required her to establish the common experience of the health care professional. *See Sammons,* 353 N.W.2d at 384–85.

Because of the faulty instruction, the general negligence claim against Mercy must be retried. On retrial the jury must be instructed that proof of the second foundational element rests on common experience. If expert medical evidence is offered and received upon this element, the form instruction may be tailored to provide that proof of the second foundation of res ipsa rests on common experience or the common experience of the health care provider.

V. *Other Issues.*

Welte argues communications between the court and the jury following submission of the case were improper. Because the issue is not likely to recur on retrial we decline to address it.

[7] Welte challenged the court's failure to instruct the jury as to concurrent negligence. This issue may reoccur on retrial and therefore we address it. Where the evidence shows more than one cause contributing to injury or damage, the following sentence should be added to the instruction on proximate cause: "There can be more than one proximate cause of an injury or damage." *See* comment to Iowa Civil Jury Instruction 700.3. We believe it would be appropriate to submit such an instruction where the claim alleges more than one party was negligent.

[8] The court was requested by Welte to instruct the jury as to admissions made by Dr. Bello in the pleadings. Ordinarily, the trial court should include in its instructions the admissions in the pleadings of a party. Although identical testimony may be offered at trial, the jury is not required to believe the testimony of a witness. *Burger v. Omaha & Council Bluffs St. Ry. Co.,* 139 Iowa 645, 117 N.W. 35 (1908); *see also* Iowa Civil Jury Instruction 100.9.

We have reviewed the issues raised on appeal as they relate to Welte's informed consent claim against Dr. Bello and the specific negligence claim against Mercy and find no reversible error. We reverse and remand the cases for trial on the general negligence claim.

REVERSED AND REMANDED.

All Justices concur except SNELL, J., who dissents and is joined by HARRIS, J.

McGIVERIN, C.J., concurs in part and dissents in part.

SNELL, Justice (dissenting).

I respectfully dissent.

The majority has ignored our law and has effectively expanded the application of the res ipsa loquitur doctrine well beyond its recognized purpose. Ever closer does the goal appear that any unexpected bad result from surgery must have been due to a surgeon's negligence. The "thing speaking for itself" has taken on a life of its own multiplying into the field of medicine with the self assurance of a crusader.

Because the inference of negligence is without specific proof, we have said the doctrine of res ipsa loquitur should be used sparingly. *Mogensen v. Hicks,* 253 Iowa 139, 143, 110 N.W.2d 563, 565 (1961). This is especially true in medical malpractice cases. *See Lagerpusch v. Lindley,* 253 Iowa 1033, 1038, 115 N.W.2d 207, 210 (1962) (res ipsa "should be used very rarely in medical cases" and "in many medical cases, the doctrine of res ipsa loquitur has been rejected"); *Shinofield v. Curtis,* 245 Iowa 1352, 1361, 66 N.W.2d 465, 471 (1954).

The doctrine is most often applied to medical injuries occurring when a surgeon either leaves an object in a patient's body or damages a portion of the body wholly unrelated to the surgery. See generally, 1 D. Louisell and H. Williams, *Medical Malpractice* § 14.02, at 14-37 to 14-38 (1990). Neither is the case here.

We have held that the mere fact that an occurrence is rare does not alone warrant an application of res ipsa loquitur. *Reilly v. Straub,* 282 N.W.2d 688, 695 (Iowa 1979); *Cronin v. Hagen,* 221 N.W.2d 748, 753 (Iowa 1974); *Perin v. Hayne,* 210 N.W.2d 609, 613 (Iowa 1973). Further, the common experience exception to the expert testimony rule applies only where the injury suffered is an obvious violation of accepted medical standards. *See, e.g., Oswald v. LeGrand,* 453 N.W.2d 634, 639-401 (Iowa 1990); *Daiker v. Martin,* 250 Iowa 75, 91 N.W.2d 747, 752 (1958). In *Perin,* we decided that experts will be required to establish res ipsa's second foundational fact—that the injury would not have occurred in the ordinary course of events if reasonable care had been used—where the injury sustained lies outside the common knowledge of laypersons.

The common knowledge of laypersons hardly includes an understanding of the nature of sodium pentothal or what would happen if the sedative escaped from a vein to surrounding tissue. Nor is it commonly known how a needle is inserted into a vein, or how far it should be thrust. The majority's analysis is that the common knowledge exception is satisfied because people know that intravenous injections are often done. The misapprehension here is that knowledge of the frequency of an operative procedure equals knowledge that an unfavorable medical result must have been due to negligence. These two spheres of knowledge are not correlatives.

With the standard applied by the majority, will every appendicitis operation involve an inference of negligence whenever a perfect result is not achieved? How soon will the res ipsa loquitur doctrine be applied to heart surgery cases? There are certainly many cases where a superb surgeon has performed the best operation possible and, nevertheless, experienced a tragic result. The fact that his skills were not enough to save the patient should not translate to an inference of negligence. It is for the jury to decide whether the evidence shows a negligent surgeon or not. But the surgeon hasn't promised perfection to the patient and should not have it hung like an albatross about his neck, as the inference of negligence truly does, in the courtroom.

In *Cronin,* 221 N.W.2d at 753, we said:

> There is no basis in the record for contending the occurrence would not have happened in the ordinary course of things if reasonable care had been used. Indeed, it seems this occurrence was an inherent risk of the operation and, though rare, could happen even with the exercising of due care.

The evidence is insufficient to generate a jury question as to the existence of this foundational fact. This essential of the doctrine being absent the doctrine does not apply.

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I believe that expert testimony was required in the instant case as in *Cronin*. When none was proffered by the plaintiff, Dr. Bello was entitled to summary judgment on this issue.

The majority's claim that Dr. Bello supplied the expert testimony to skewer himself is unrealistically technical. His statement in response to an interrogatory was one of scientific fact that sodium pentothal has caustic and burning effects. Dr. Maxwell's was similar. Both fell far short of supplying the expert testimony that plaintiff's injury would not occur absent negligence.

The majority's reversal of the jury's absolution of Mercy Hospital again elevates "common experience" to lofty heights. Plaintiff Welte did receive the benefit of the res ipsa loquitur doctrine in the case against Mercy Hospital. Even so, the majority decides that the jury must infer negligence without judging the resulting injury against the standard of care recognized by those most knowledgeable in the field—the health care professionals. Thus, to the majority, the jurors' "common knowledge" of negligence, even if totally erroneous, is adequate to find liability since no expert testimony is required. This construction misuses the res ipsa loquitur principle.

The trial court carefully and correctly applied the doctrine and should be affirmed.

HARRIS, J., joins this dissent.

McGIVERIN, Chief Justice (concurring in part and dissenting in part).

I concur in division IV of the majority opinion and would reverse and remand for a new trial as to defendant Mercy Hospital.

I dissent from division III of the majority opinion and would affirm as to defendant Bello for the reasons stated in Justice Snell's dissent concerning Bello.

Thus, I would affirm in part and reverse in part.

Doug CONKLIN, Plaintiff,

v.

IOWA DISTRICT COURT FOR SCOTT COUNTY, Defendant.

No. 90–1487.

Supreme Court of Iowa.

March 18, 1992.

A bankrupt who had received a bankruptcy discharge sought to recover uncondemned funds held by the district court clerk pursuant to a judgment creditor's prebankruptcy garnishment of the bankrupt's wages. The Iowa District Court for Scott County, James E. Kelley, J., found that the bankrupt had waived any right to claim the funds and condemned the funds in favor of the judgment creditor. Bankrupt applied for writ of certiorari. The Supreme Court, Schultz, J., held that: (1) bankrupt's failure to identify funds in bankruptcy petition estopped him from asserting title to the funds; (2) creditor acquired lien against debtor's garnished wages at time sheriff took possession of the wages and, thus, had a valid prepetition lien against the funds; and (3) district court's condemnation of the garnished funds did not violate the automatic stay provisions in the Bankruptcy Code.

Writ annulled.

1. **Bankruptcy ⇐3413**

A bankrupt who had received a bankruptcy discharge was estopped from asserting title to funds held by the district court clerk pursuant to a judgment creditor's prebankruptcy garnishment of the bankrupt's wages, where the bankrupt failed to report the garnished wages in his bankruptcy petition.

2. **Bankruptcy ⇐3442**

After a bankruptcy case is closed, unscheduled property may remain as property

Dorothy A. WICK and Richard S. Wick, Appellants,

v.

Marvin G. HENDERSON, Mercy Hospital, and Medical Anesthesia Associates, P.C., Appellees.

No. 90-1667.

Supreme Court of Iowa.

May 13, 1992.

Rehearings Denied June 18, 1992.

Malpractice action was filed against hospital and anesthesiologist after plaintiff incurred injury to ulnar nerve in left arm during gall bladder surgery. The District Court, Pottawattamie County, J.C. Irvin, J., directed a verdict for hospital, struck plaintiff's expert's testimony on issue of standard of care and directed verdict for anesthesiologist and his professional corporation. Plaintiff appealed. The Supreme Court, Andreasen, J., held that: (1) plaintiff's expert, a qualified neurologist, was qualified to testify as to standard of care of nurse anesthetist with respect to monitoring position, location, and pressure against patient's arm during surgery, and (2) res ipsa loquitur doctrine applied to case.

Reversed and remanded.

Harris, J., dissented and filed opinion joined by McGiverin, C.J., and Carter and Snell, JJ.

1. Evidence ⇐538

Neurologist was qualified to testify as to standard of care of nurse anesthetist with respect to monitoring of position, location, and pressure against patient's arm during surgery based upon his medical education and experience, his research and study, his review of medical publications and writings in field, and his review of facts and circumstances of case.

2. Evidence ⇐538

Physician need not be specialist in particular field of medicine to give expert opinion.

3. Evidence ⇐536

Expert witness must be not only generally qualified in field of expertise but must also be qualified to answer particular question propounded.

4. Evidence ⇐538

Statute requiring that expert's medical or dental qualifications relate directly to medical problem or problems at issue and type of treatment administered in case in order to give opinion on standard of care did not apply to opinion of standard of care of hospital and nurse anesthetist; statute applied only to professions it listed, i.e., licensed physicians and surgeons and dentists. I.C.A. § 147.139.

5. Evidence ⇐538

Expert testimony as to standard of care is not required when lay person is competent to pass judgment and conclude from common experience that injury would not have happened if proper skill and care were provided.

6. Physicians and Surgeons ⇐18.80(8)

When foundational facts of res ipsa loquitur doctrine are established, whether by expert testimony or, in proper case, by common experience of laypersons, then plaintiff is not required to present expert testimony on appropriate standard of care in medical malpractice action.

7. Negligence ⇐121.2(2)

Doctrine of res ipsa loquitur is rule of evidence rather than one of pleading or substantive law.

8. Negligence ⇐121.2(10)

Doctrine of res ipsa loquitur does not relieve plaintiff's burden to prove negligence; rather, it permits, but does not compel, fact finder to infer negligence from occurrence of injury.

9. Negligence ⇐121.2(6, 8)

Plaintiff must prove two foundational facts in order to invoke doctrine of res ipsa loquitur: defendants had exclusive control and management of instrument that caused plaintiff's injury, and it was type of injury that ordinarily would not occur if reasonable care had been used.

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10. Physicians and Surgeons ⚯18.60

Requirement of exclusive control for purpose of application of res ipsa loquitur doctrine in medical malpractice action may be satisfied by concurrent or joint control, or based in part on vicarious liability.

11. Physicians and Surgeons ⚯18.60

Under certain circumstances, res ipsa loquitur doctrine may apply in medical malpractice action when responsibility is unallocated.

12. Negligence ⚯121.2(5)

Proof of cause of injury does not necessarily avoid application of res ipsa loquitur doctrine.

13. Negligence ⚯121.2(5)

In determining whether proof of cause of injury avoids application of res ipsa loquitur doctrine, court must carefully distinguish those situations in which evidence of cause of injury is so strong and extensive as to leave nothing for inference and those which establish cause but still raise only inference as to defendant's negligence.

14. Negligence ⚯121.2(5)

Mere introduction of evidence to support specific negligence allegations does not render res ipsa loquitur doctrine inapplicable.

15. Negligence ⚯121.2(12)

Determination of whether introduction of evidence to support specific negligence allegations renders res ipsa loquitur doctrine inapplicable should be made after all evidence has been received and all parties have rested their case; court should submit and instruct jury upon those specific acts of negligence which are supported by substantial evidence.

16. Hospitals ⚯7

Physicians and Surgeons ⚯18.60

Res ipsa loquitur doctrine applied in medical malpractice action alleging that nurse anesthetist and hospital were negligent during gallbladder surgery resulting in ulnar nerve injury to left arm of plaintiff; it was within common knowledge and experience of lay person to determine that individual does not enter hospital for gallbladder surgery and come out of surgery with ulnar nerve injury to left arm.

James R. Welsh, Omaha, Neb., and Stephen A. Rubes, Council Bluffs, for appellants.

Marvin F. Heidman and John C Gray of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for appellees Marvin G. Henderson, M.D., and Medical Anesthesia Associates, P.C.

Michael F. Kinney and David A. Blagg, Omaha, Neb, for appellee Mercy Hosp.

Considered en banc.

ANDREASEN, Justice.

The trial court directed a defendants' verdict in this medical malpractice suit against an anesthesiologist, a professional corporation, and the hospital where surgery had been performed. Plaintiffs' appeal presents questions on the sufficiency of the evidence to support claims based both on allegations of specific negligence and on the theory of *res ipsa loquitur*. We reverse and remand.

Plaintiff Dorothy Wick entered defendant Mercy Hospital as a patient on August 12, 1987, for gallbladder surgery. Defendant Marvin G. Henderson, a medical doctor specializing in anesthesiology, was employed at the time by defendant Medical Anesthesia Associates, P.C (MAA). There is no claim or showing that Henderson was personally present during Wick's surgery; it was attended by James Byrk, a nurse anesthetist who was also employed by MAA. Henderson was one of three anesthesiologists employed by MAA He was on duty in a supervisory capacity in the operating area at the hospital at the time. Henderson was listed on hospital documents by Byrk as the anesthesiologist for Wick's surgery.

After Wick was taken to an operating room she was positioned with her back on the operating table and her arms outstretched in what was described as a "crucifix position." The testimony shows that it was necessary to properly position the

rm of a patient in this position to avoid damage to the ulnar nerve. Wick's arms rested on padded extensions that jutted from each side of the operating table. She testified the position caused an uncomfortable feeling to her left arm and shoulder, but she did not communicate this discomfort to anyone. Wick was then placed under anesthesia, and the operation proceeded.

The next thing Wick remembered was waking up in her hospital room. She had no recollection of being taken from the operating room nor did she remember being in the recovery room. Wick had been under a general anesthesia for two and one-quarter hours.

Wick had pain in her left arm upon awakening. She complained of pain and testified the pain was severe and continuing while she was in the hospital. When discharged from the hospital on August 17, 1987, she was told by an anesthesiologist in the hospital that her arm was "stressed" during surgery.

According to her evidence, she sustained a permanent injury to the ulnar nerve located in her upper left arm. She claims damages for a disfiguring scar, a result of corrective surgery, for pain, and for medical expenses, past and future. She sought recovery on theories of specific negligence and *res ipsa loquitur* against Henderson, MAA, and Mercy. For simplicity, we omit discussion of the loss-of-consortium claim made by Wick's husband.

At trial, Wick presented testimony of both defendant Henderson and Dr. Alfredo Socarras. Henderson testified he was a supervisor of nurse anesthetists at Mercy. As to the proper standard of care, it was his opinion that either a nurse anesthetist or anesthesiologist is responsible for the proper positioning of a patient's arm during surgery. In the instant case, Henderson believed that Byrk, the nurse anesthetist, had the responsibility to properly position and pad Wick's arm to protect against ulnar nerve injury.

Socarras completed his medical education in Cuba in 1952. He interned at Mercy Hospital in Des Moines from 1955–57 and at the Mayo Clinic in Rochester, Minnesota, from 1957–1960. He is a licensed physician and surgeon in Iowa and for the past thirty years has maintained a practice in neurology in Des Moines.

Socarras testified as to his extensive experience in the field of neurology and to his attendance at seminars, symposiums, and other meetings at which ulnar nerve problems were discussed. He was familiar with medical writings and studies relating to ulnar nerve injuries during surgery. He described the nervous system and offered a detailed description of the ulnar nerve. He stated the damage to the ulnar nerve could result if the patient were not properly positioned and monitored during surgery.

Socarras testified it was the responsibility of the anesthesiologist or anesthetist to position the patient and then monitor the position of the patient during surgery. In his opinion, the main cause of ulnar nerve injury during surgery is the mechanical compression of the nerve by improper positioning of the arm.

Based upon his review of the depositions and records in the case, Socarras offered opinions on how Wick's ulnar nerve was damaged. He concluded that Byrk failed to properly monitor the position of her arm during surgery. On cross-examination Socarras conceded the injury could also have happened if a surgeon leaned against the patient's arm for a period of time.

At the close of Wick's case, all defendants moved to strike the testimony of Socarras. Mercy also moved for a directed verdict. Before considering the motion to strike, the court granted Mercy's motion for a directed verdict and dismissed the case against it. The court then sustained, in part, the motion to strike and thereafter granted Henderson and MAA a directed verdict resulting in the dismissal of Wick's case.

I. *Directed Verdict.*

[1] The trial court granted defendants' motion for directed verdict at the close of Wick's evidence. On ruling on a motion for directed verdict, the evidence must be

viewed in the light most favorable to the party against whom the motion was made, regardless of whether it was contradicted. Iowa R.App.P. 14(f)(2). Where substantial evidence has been presented in support of each element of a claim, a motion for directed verdict should be denied. *Reuter v. State Farm Mut. Auto. Ins. Co.*, 469 N.W.2d 250, 251 (Iowa 1991). The court must draw every legitimate inference in aid of the evidence. *Id.*

The court's directed verdict rulings were influenced by the court's ruling on the defendants' motion to strike Socarras's testimony. The court found Socarras "is certainly qualified as a neurologist and qualified to give the opinions that he gave with respect to ulnar nerve injuries." However, the court found Socarras did not qualify under Iowa Code section 147.139 (1989) "to give the opinions that he gave with respect to the responsibility of the anesthetist to monitor the position, the location, and pressure against the patient's arm during surgery." This testimony was then stricken by the court with the additional comment that, if the court incorrectly assumed section 147.139 applied, the testimony would be stricken because Socarras was not qualified to express an opinion as to the standard of care of the anesthetist. We believe the trial court abused its discretion in striking the testimony of Socarras.

[2, 3] We are committed to a liberal rule on admissibility of opinion testimony. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 138 (Iowa 1986). A physician need not be a specialist in a particular field of medicine to give an expert opinion. *Id.* An expert witness must be not only generally qualified in a field of expertise; but must also be qualified to answer the particular question propounded. *Tappe v. Iowa Methodist Medical Ctr.*, 477 N.W.2d 396, 402 (Iowa 1991) We believe the trial court committed a manifest abuse of discretion by striking Socarras's testimony

[4] The trial court's reliance on Iowa Code section 147.139 also is misplaced. This statute provides:

> If the standard of care given by a physician and surgeon licensed pursuant to chapter 148, or osteopathic physician and surgeon licensed pursuant to chapter 150A, or a dentist licensed pursuant to chapter 153, is at issue, the court shall only allow a person to qualify as an expert witness and testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

It obviously applies only to the professions it lists. The hospital and the nurse anesthetist are not protected by its provisions. Socarras, a qualified neurologist, is qualified to testify as to the cause of injury to the ulnar nerve during surgery based upon his medical education and experience, his research and study, his review of medical publications and writings in this field, and his review of the facts and circumstances of this case.

[5, 6] The trial court also failed to recognize that expert testimony as to the standard of care is not required when a layperson is competent to pass judgment and conclude from common experience that the injury to the nerve would not have happened if proper skill and care were provided. *Sammons v. Smith*, 353 N.W.2d 380, 385 (Iowa 1984). When the foundation facts of *res ipsa loquitur* are established—whether by expert testimony or, in the proper case, by the common experience of laypersons—then the plaintiff is not required to present expert testimony on the appropriate standard of care. *Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992).

II. *Res Ipsa Loquitur Doctrine.*

[7–9] We were one of the first jurisdictions to hold the doctrine of *res ipsa loquitur* was applicable in medical and dental malpractice cases. *Whetstine v. Moravec*, 228 Iowa 352, 291 N.W. 425 (1940). The *Whetstine* decision was cited in the landmark case of *Ybarra v. Spangard*, 25 Cal.2d 486, 489, 154 P.2d 687, 689 (1944). We consider the doctrine to be a rule of evidence rather than one of pleading or substantive law. *Wiles v. Myerly*, 210 N.W.2d 619, 624 (Iowa 1973) The doctrine

does not relieve plaintiff's burden to prove negligence. *Id.* Rather, it permits, but does not compel, a fact finder to infer negligence from the occurrence of an injury. *Id.* The plaintiff must prove two foundational facts in order to invoke the doctrine of *res ipsa loquitur*: (1) the defendants had exclusive control and management of the instrument that caused plaintiff's injury, and (2) it was the type of injury that ordinarily would not occur if reasonable care had been used. *Welte,* 482 N.W.2d at 440; *Tappe,* 477 N.W.2d at 399. *See also Frost v. Des Moines Still College of Osteopathy & Surgery,* 248 Iowa 294, 302–03, 79 N.W.2d 306, 312 (1956) (application of the doctrine of *res ipsa loquitur* is not prevented because the injury may have been caused by the separate acts of any of the defendants).

Because the doctrine allows an inference of negligence without specific proof, we have been cautious with the doctrine's requirements before applying it. *Tappe,* 477 N.W.2d at 399–400. This has been particularly true in medical malpractice cases, in which the health care provider cannot control the physical condition and reactions of a patient. *Id.* When the requirements of *res ipsa loquitur* are met, however, we have not hesitated to apply the doctrine. *See, e.g., Wiles* 210 N.W.2d at 629.

III. *Res Ipsa Loquitur—Control.*

Our recent cases discussing *res ipsa loquitur* in medical malpractice cases, especially *Welte* and *Tappe,* have turned on the second element of the doctrine: injury of a type that ordinarily would result only from negligence. The issue raised in this case and relied upon by the trial court in its ruling related to the first element of the doctrine.

The exclusive control requirement was addressed in *Ybarra.* There, the California Supreme Court recognized that in a modern hospital a patient would quite likely come under the care of a number of persons in different types of contractual and other relationships to each other. 25 Cal.2d at 491, 154 P.2d at 690. The court expressed concern that the *res ipsa* doctrine has occasionally been transformed into a rigid legal formula. *Id.* at 489–90, 154 P.2d at 689. The court stated:

> Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the allegedly negligent act.
>
> The other aspect of the case which defendants so strongly emphasize is that plaintiff has not identified the instrumentality any more than he has the particular guilty defendant. Here, again, there is a misconception which, if carried to the extreme for which defendants contend, would unreasonably limit the application of the *res ipsa loquitur* rule. It should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make.
>
> An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of *res ipsa loquitur* would be otherwise defeated. Thus, the test has become one of right of control rather than actual control

Id. at 492–93, 154 P.2d at 690–91.

In *Frost,* we adopted the *Ybarra* reasoning:

> We think it is a just and logical conclusion that one who, while undergoing a surgical operation, sustains an unusual injury to a healthy part of his body not within the area of the operation, be not precluded from invoking the doctrine of *res ipsa loquitur* in an action against the doctors and nurses participating in the operation. The same thing must be said of the corporate hospital regarding its preceding or subsequent care of the patient. This is not altered by the fact that all the parties do not stand in such relation to one another that the acts of one may be regarded as the acts of the other,

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> and that the injury may have been caused by the separate acts of any one of them, or by the fact that there were several instrumentalities and no showing as to which caused the injury or as to the particular defendant in control of it.

Frost, 248 Iowa at 302–03, 79 N.W.2d at 312. We specifically reiterated this principle in *Wiles*. 210 N.W.2d at 629.

As is also suggested in *Prosser*:

> This element usually is stated as meaning that the defendant must be in 'exclusive control' of the instrumentality which has caused the accident. Such control of course does serve effectively to focus any negligence upon the defendant; but the strict and literal application of the formula has led some courts to ridiculous conclusions, requiring that the defendant be in possession at the time of the plaintiff's injury—as in the Rhode Island case denying recovery where a customer in a store sat down in a chair, which collapsed Of course this is wrong: it loses sight of the real purpose of the reasoning process in an attempt to reduce it to a fixed, mechanical and rigid rule. 'Control,' if it is not to be pernicious and misleading, must be a very flexible term. It may be enough that the defendant has the right or power of control, and the opportunity to exercise it.... It is enough that the defendant is under a duty which he cannot delegate to another, as in the case of a surgeon who allows a nurse to count the sponges.

W. Prosser & W. Keeton, *Prosser & Keeton on Torts* § 39, at 249–50 (5th ed. 1984).

[10, 11] The requirement of exclusive control in medical malpractice may be satisfied by concurrent or joint control, as in *Sammons*, 353 N.W.2d at 387–88, or based in part on vicarious liability, as in *Frost*, 248 Iowa at 304, 79 N.W.2d at 313. However, under certain circumstances, the *res ipsa* doctrine may apply when responsibility is unallocated, as in *Ybarra*. *See* Annotation, *Applicability of Res Ipsa Loquitur in Cases of Multiple Medical Defendants—Modern Status* 67 A.L.R.4th 544 § 9 (1989 & Supp.).

IV. *Other Issues.*

[12–15] Wick offered substantial evidence to support the submission of specific acts of negligence. However, proof of the cause of an injury does not necessarily avoid application of the *res ipsa* doctrine. *Reilly v. Straub*, 282 N.W.2d 688, 694 (Iowa 1979) The court must carefully distinguish those situations in which evidence of the cause of an injury is so strong and extensive as to leave nothing for inference and those which establish the cause but still raise only an inference as to the defendant's negligence. *Id.* The mere introduction of evidence to support the specific negligence allegations does not render the *res ipsa* doctrine inapplicable. *Id.* at 694–95 This determination should be made after all evidence has been received and all parties have rested their case. The court should submit and instruct the jury upon those specific acts of negligence which are supported by substantial evidence.

V. *Disposition.*

[16] The trial court erred in striking Socarras's testimony and in directing verdicts for all defendants. Accordingly, we reverse and remand for a new trial. On retrial, the district court should be mindful that "[t]here are [ ] medical and surgical errors on which any lay[person] is competent to pass judgment and conclude from common experience that such things do not happen if there had been proper skill and care." *Prosser & Keeton on Torts* § 39, at 256 This is such a case It is within the common knowledge and experience of a layperson to determine that an individual does not enter the hospital for gallbladder surgery and come out of surgery with an ulnar nerve injury to the left arm. *See Swierczek v Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991) (court reached same conclusion as to patient who entered hospital for extraction of his teeth and came out of surgery with an ulnar nerve injury).

REVERSED AND REMANDED

All Justices concur except HARRIS, J., who is joined by McGIVERIN, C.J., CARTER and SNELL, JJ

HARRIS, Justice (dissenting).

Because I disagree with both majority holdings, I respectfully dissent. I believe the trial court acted within its broad discretion in striking Dr. Socarras' testimony. I also think the *res ipsa loquitur* claim was correctly dismissed because defendants were not shown to be in exclusive control.

I. *Socarras testimony.* Before acting on the motion to dismiss the claims against Henderson and MAA, the trial court considered defendants' motion to strike the testimony of Dr. Socarras that nurse anesthetists and anesthesiologists have a duty to monitor the position of a patient's arm while the patient is under anesthesia. This testimony was of course crucial to plaintiff's specific negligence claim against Henderson and MAA. According to Socarras this duty includes making sure no improper pressure is placed on a patient's arm. This opinion was struck because the trial court concluded Socarras was not qualified to offer it.

I think the ruling should be affirmed under common law standards for admitting expert testimony. Under a de novo review, perhaps even under a review on error, I might agree with the majority in favoring admission. But we should pay more than lip service to the stated scope of review.

Our cases are legion that hold the standard for admissibility of expert testimony is discretionary; we have said we do not reverse in the absence of "manifest abuse of that discretion." Among cases reciting this familiar principle is the one cited by the majority, *DeBurkarte v. Louvar*, 393 N.W.2d 131, 138 (Iowa 1986).

Socarras gave only these qualifications for stating the standard of care to which an anesthesiologist or nurse anesthetist must adhere: (1) his training in medical school; (2) his internship; (3) his reading on how damage to the ulnar nerve occurs; and (4) some procedures involving anesthesia he observed. The trial court observed that, after the doctor's medical education in Cuba, "the record does not reflect any substantial experience, education or training for the past thirty years in surgery or anesthesiology or the relationship between the two sufficient to qualify him to render the opinions. . . ."

I cannot find manifest abuse in the ruling. Although Socarras did show extensive training and experience in neurology, he had little training in anesthesiology, except for the exposure which occurred during medical school in Cuba, and during his internship. His experience in anesthesia in the decades since then was limited to what he observed from his own capacity in operating rooms. Although he claimed he continued to educate himself in the field of anesthesiology, his testimony revealed only that he has studied the sources of damage to nerves, including damage to nerves during surgery.

Socarras did not testify that these sources contained any reference to the standard of care owed by an anesthesiologist or anesthetist. Neither did Socarras testify that, after the thirty years since his internship, he had taken the time to review the current standards applicable to anesthesiologists or anesthetists. It seems clear to me that the trial court did not abuse its discretion in finding he provided no substantial basis for his claim that he knew the standard of care for anesthesiologists or anesthetists.

Without the Socarras testimony there was insufficient evidence to support a jury case against Henderson or MAA on any theory of specific negligence.

II. *Res ipsa loquitur.* The *res ipsa loquitur* claim must fall in the absence of either required element. The plaintiff must prove two foundational facts in order to invoke the doctrine of *res ipsa loquitur*: (1) the defendants had exclusive control and management of the instrument that caused plaintiff's injury; and (2) it was the type of injury that ordinarily would not occur if reasonable care had been used. *Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992); *Tappe v. Iowa Methodist Medical Ctr.*, 477 N.W.2d 396, 399 (Iowa 1991).

Because the doctrine allows an inference of negligence without specific proof, we have been cautious with the doctrine's requirements before applying it, especially in

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medical malpractice cases. *Tappe,* 477 N.W.2d at 399–400 ("Because the doctrine creates an inference of negligence without specific proof, it traditionally has been applied sparingly, especially in medical malpractice cases ").

It is apparent from our recent opinions on the subject that this stated reluctance to apply the *res ipsa* doctrine in medical malpractice cases does not enjoy our unanimous endorsement. But, although we encounter obvious difficulty in reaching a consensus, I think the reluctance is grounded in sound public policy. The reluctance proceeds from a recognition that fundamental physical conditions and reactions of patients, even those of tragic dimensions, are often beyond the control of any physician. *Morgensen v. Hicks,* 253 Iowa 139, 143, 110 N.W.2d 563, 565–66 (1961) (cited in *Tappe,* 477 N.W.2d at 400). To say that *res ipsa* should be applied with reluctance in medical malpractice cases means it should not be applied in close cases. This is a close case.

I think the directed verdicts should be affirmed because the plaintiff did not establish exclusive control on the part of any defendants. This is because of the other medical personnel present in the operating room who were not named as defendants (the surgeon and the assistants). Wick's own expert testified it was just as likely that Wick's injury was caused by one of these other persons as it was by any failing on the part of the nurse anesthetist, Jim Byrk. The rule has been explained:

> If it appears that the [injury] was, or might have been, in part due to the act of a third person over whom the defendant had no control, the doctrine is not applicable.

57B Am.Jur.2d *Negligence* § 1876, at 543 (1989). *See also* Annotation, *Medical Malpractice: Res Ipsa Loquitur in Negligent Anesthesia Cases,* 49 A.L.R.4th 63, 192 § 68 (1986). The majority claims the exclusive element was met on the basis of Byrk's duty to monitor. As previously mentioned, I would affirm the trial court ruling striking the testimony of Dr. Socarras that Byrk had such a duty.

The trial court correctly reasoned that because people other than defendants might well have caused Wick's injury, the element of exclusive control was not met.

I would affirm.

STATE of Iowa, Appellee,

v.

Rick L. HOLLAND, Appellant.

No. 90–1211.

Supreme Court of Iowa.

May 13, 1992.

Defendant was convicted of burglary by the District Court, Scott County, James R. Havercamp, J., and defendant appealed. The Iowa Court of Appeals reversed, and the Supreme Court granted further review. The Supreme Court, Andreasen, J., held that: (1) defendant's work release card was improperly admitted; (2) defendant was not prejudiced by admission; and (3) admission of tools found in defendant's car was not reversible error.

Decision of Court of Appeals vacated and district court judgment affirmed.

1. Criminal Law ⟹1144.18, 1156(1)

The presumption is that trial court properly exercised its discretion in granting or denying new trial based on fair trial considerations, and the Supreme Court will reverse trial court's ruling only upon showing of abuse of discretion. Rules App. Proc., Rule 14(f)(3)

2. Criminal Law ⟹1134(1)

The Supreme Court applies objective test in evaluating asserted misconduct at trial and in determining whether reasonable probability exists that misconduct in-

SELECTED PROBLEMS CREATED BY PASSAGE OF THE AMERICANS WITH DISABILITIES ACT ("ADA")

Constance A. Schriver
Lane and Waterman

October 2, 1992
1992 Iowa Defense Counsel Annual Meeting

I. INTRODUCTION

A. Background.

B. Law prohibits discrimination against qualified individuals with disabilities in:

1. Employment

2. Public services

3. Privately Operated Public Accommodations and Services, and

4. Telecommunications Relay Services.

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II. EMPLOYMENT - TITLE I OF ACT
29 CFR Part 1630 - 56 Fed. Reg. 35726 (1991)

A. Employers with +25 employees - effective July 26, 1992; +15 employees - effective July 26, 1994

B. Provides generally that an employer shall not discriminate against a qualified individual with a disability, because of the disability of such individual, in regard to job application procedures; hiring, advancement or discharge of employees; employee compensation; job training; and other terms, conditions and privileges of employment. Sec. 102.

1. Does not require discrimination be based solely on disability--a violation occurs where discrimination on basis of disability is <u>a</u> factor.

2. ADA does not require employer to affirmatively seek out and hire disabled individuals.

C. Definitions.

1. "Qualified individual with a disability" Sec. 101(8).

a. A disabled individual who can perform the essential functions of the position with or without a reasonable accommodation.

b. Essential functions

(1) in general means primary job duties

(2) reason job exists to perform those functions

(3) consideration given to employers judgment, written job descriptions, amount of time spent in performing the function, consequences of not requiring the function, work experience of past incumbents in the job and the current work experience of incumbents in similar jobs

c. Drug users - Sec. 104.

(1) limited exception - not currently engaging in illegal use.

(2) does not include any employee or applicant who is currently engaging in the illegal use of drugs--when covered entity acts on the basis of such use.

(3) employers may hold drug users and abusers and alcoholics to same qualifications and job performance standards as other employees even if unsatisfactory work performance is related to alcoholism or drug use.

d. Reasonable accommodation - Sec. 101(9).

(1) defined broadly - actions an employer or covered entity must take before an individual with a disability can be found not to be qualified.

(2) can include: making existing facilities readily accessible, job restructuring, modified work schedules, reassignment to a vacant position (not bumping) acquisition or modification of equipment, modifications of examinations and training materials, the provision of readers or interpreters, and other similar accommodations.

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(3) the reasonable accommodation process is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed--Senate Report.

(4) undue hardship--facts that alter or diminish employer's obligation to accommodate - Sec. 101(10).

  (a) an action requiring significant difficulty or expense, when considered in light of the following factors:

    i) the nature and expense of the accommodation needed

    ii) the overall financial resources of the facility or facilities involved

    iii) the number of persons employed there

    iv) the effect (including financial effect) of the accommodation

    v) the overall financial resources of the covered entity and the overall size of its business

    vi) the type of operation and structure of the covered entity

(5) may be required to allow employee or third party to provide reasonable accommodation or to share costs.

(6) may be necessary for the employer to initiate informal, interactive process with the disabled individual to determine the appropriate reasonable accommodations.

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(7) accommodation does not have to be the "best" accommodation. Must be sufficient to meet the job related needs of the individual being accommodated.

(a) cannot compel an individual to accept an accommodation that is not requested or needed

(b) if a necessary accommodation is refused, individual may not be considered qualified.

2. Disability

a. One who has a physical or mental impairment that substantially limits one or more major life activities.

(1) A record of having such an impairment or regarded as having such an impairment.

b. Major life activities include functions such as caring for oneself, walking, seeing, hearing, speaking, breathing, learning and working.

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c. Impairment--

(1) Does not include physical characteristics such as eye or hair color, height or weight that is in "normal range" or left-handedness.

(2) Does not include common personality traits such as poor judgment, quick temper; environmental, cultural or economic disadvantages; or advanced age in and of itself.

(3) Does include conditions controlled by mitigation or that are mitigated by prosthetic device.

d. Substantially limits--

(1) Unable to perform a major life activity that the average person in the general population can perform -or-

(2) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner and duration under which the average person in the general population can perform that same major life activity.

(3) Factors -- nature and severity of the impairment, its duration, and the permanent or long-term impact of or resulting from the impairment.

(4) Major life activity of working - substantially limits - means significantly restricts in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills and abilities.

D. Physicals and Medical Exams - Sec. 102(c).

1. Pre-employment

a. May not inquire whether applicant has disability or nature of disability - may ask if can perform job-related functions.

b. Employers may require medical exams <u>but</u> <u>only</u> if they are job related and consistent with business necessity <u>and</u> <u>only</u> <u>after</u> an offer of employment has been made.

2. May condition employment on the results of the exam if:

a. All employees are subjected to exams

b. Information obtained is kept confidential and maintained in separate medical files and only used pursuant to this Act.

(1) Except that supervisors and managers may be informed regarding necessary restrictions and necessary accommodations, and first aid and safety personnel may be informed if the

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disability may require emergency treatment.

c. Examination is to determine fitness for job, not existence or severity of disability.

3. Employers may conduct voluntary medical exams as a part of employee health programs but must keep these confidential and in separate medical files.

4. Can require that the employee not pose a direct threat to health or safety of others in the work place.

   a. Direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

   b. There are specific rules for food handlers.

E. Drug Usage and Testing - Sec. 104.

1. Employers may discharge or deny employment to persons who illegally use drugs, on that basis, without fear of being held liable for discrimination - Conference Report.

2. Tests for use of illegal drugs are not considered medical exams under ADA.

3. Employers may prohibit use of illegal drugs and alcohol at workplace and require that employees not be under the influence of drugs and alcohol at the workplace and may require employees conform with requirement of Drug-Free Workplace Act of 1988.

   a. However--while current illegal drug users and alcoholics who cannot safely perform their jobs are not protected by ADA-those who have been rehabilitated or are in a supervised rehabilitation program and are not currently using drugs-or are erroneously regarded as engaging in use of illegal drugs are covered.

4. ADA allows employer to adopt policy re drug testing to ensure that an employee who has completed rehabilitation or in rehabilitation is no longer engaged in use of drugs.

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a. But may not be allowed under state law.

b. Iowa law prohibits except under very limited situations-Iowa Code § 730.5

(1) for employees can only test if part of pre-employment or regularly scheduled physical or if have probable cause, and specific requirements are met.

F. Allows insurers to underwrite and classify risks consistent with state law and allows covered entities to provide bona fide benefit plans based on risk classifications.

1. employees must be given access to whatever health insurance coverage employer provides to other employees

2. does not affect pre-existing condition clauses - can continue as long as not a subterfuge to evade purposes of ADA

G. Discrimination in "other terms, conditions and privileges" of employment--making facilities readily accessible.

1. Reasonable accommodation can require modifications or adjustments that enable employees with disabilities to enjoy benefits and privileges that are "equal" to (rather than "the same as") the benefits and privileges that are enjoyed by other employees.

2. Examples - Making existing facilities used by employers readily accessible to and usable by individuals with disabilities; job restructuring, part-time or modified work schedules, reassignment to vacant positions, acquisition or modifications of equipment or devices, appropriate adjustments or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations.

3. Undue hardship defense applies.

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4. To the extent that an employer may need to make an accommodation which would entail the removal of a physical or structural barrier, it would be advisable to comply with the accessibility guidelines (discussed below) is possible.

III. PUBLIC ACCOMMODATIONS - TITLE III
28 CFR Part 36 - 56 Fed. Reg. 35544 (1991).

A. Effective December 26, 1991. Sec. 310.

B. Prohibits discrimination against individuals with disabilities in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation and requires places of public accommodation and commercial facilities to be designed, constructed and altered in compliance with established accessibility standards. Sec. 302.

C. Requires goods and services, etc. be offered in the most integrated setting appropriate to the needs of the individual except when the individual poses a direct threat to the health or safety of others. Sec. 302(b)(1)(B).

D. Covers virtually all types of facilities--no small-business type of execution.

E. Places of public accommodation include the following (Sec. 301(7)):

1. Places of lodging (except if 5 or less rooms and proprietor lives there.)
2. Establishments serving food and drink.
3. Places of entertainment.
4. Gathering places (civic centers).
5. Retail sales establishments.
6. Service establishments (doctors' & lawyers' offices).
7. Public transportation terminals.
8. Cultural facilities (libraries and museums).
9. Parks and zoos.

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10. Places of education.

11. Social service centers (day care and food banks).

12. Places of recreation or exercise (golf courses).

F. Specific prohibitions. Sec. 302(b)(2)(A)

1. The use of eligibility criteria that "screen out or tend to screen out" persons with disabilities (unless the criteria can be shown to be "necessary").

2. Failure to make "reasonable modifications in policies, practices, or procedures" (unless the entity can demonstrate that making the modification would "fundamentally alter the nature of" the good or service provided).

3. Failure to take steps to ensure provision of needed auxiliary aids and services (unless the entity can demonstrate that making the modification would "fundamentally alter the nature of" the good or service provided or would result in and undue burden).

4. Failure to remove in existing buildings and vehicles, to the extent that the removal is "readily achievable":

   a. Architectural barriers;

   b. Communication barriers that are structural in nature; and

   c. Transportation vehicle barriers (subject to detailed limitations).

   d. Measures taken to comply with the barrier removal requirements of the regulations are to comply with the alteration requirements, including compliance with the accessibility guidelines (discussed below) ADAAG, except where the measures required to remove a barrier are not "readily achievable." In that situation the public accommodation may take other readily achievable measures to remove the barrier that do not fully comply

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with the specified requirements of the guidelines.

e. Factors to be considered in determining whether removal is readily achievable include:

(1) the nature and cost of the action needed under the regulations;

(2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures, or the impact otherwise of the action upon the operation of the site;

(3) the geographic separateness, and administrative or physical relationship of the site or sites in question to any parent corporation or entity;

(4) if applicable, the overall financial resources of any parent corporation or entity, the overall size of the parent corporation or entity with respect to the number of its employees, the number, type and location of its facilities; and

(5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the work force of the parent corporation or entity.

f. Priorities for removal of barriers.

(1) To take measures to provide access to a place of public accommodation from public sidewalks, parking or public transportation.

(2) To provide measures to provide access to those areas of the place of public accommodation where goods and services are made available to the public.

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(3) To provide access to rest room facilities.

(4) To take any other measures necessary to provide access to goods, services, etc.

5. Failure to use "readily achievable" alternate methods of service delivery if removing the architectural, communication, and transportation barriers referred to immediately above is not readily achievable.

G. New construction or alteration of existing facilities. Sec. 303.

1. Applies to places of public accommodation and all commercial facilities (whether or not a place of public accommodation).

2. Commercial facilities defined as facilities intended for nonresidential use and whose operations will affect commerce.

   a. to be interpreted broadly to include things not within public accommodation definition--such as office buildings, factories, and other places in which employment will occur.

3. Facility defined as all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure or equipment is located.

4. Alteration defined as altering an existing facility in a manner that affects or would affect the useability of the facility or a part thereof.

5. If new construction or applicable alteration--the public accommodation or commercial facility is required to comply with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG") - 36 CFR Part 1191 - 56 Fed. Reg. 35408 (1991).

6. With respect to new construction--act requires that places of public accommodation and commercial facilities designed or constructed for first occupancy after January 26, 1993, be readily

accessible to and useable by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable.

7. When alterations made--act requires that the alterations be made in such a manner that, to the maximum extent feasible, the altered portions are readily accessible to and useable by individuals with disabilities.

   a. where alterations affect or could affect usability of or access to an area of the facility containing a primary function--alterations must be made in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible--unless it is disproportionate to the overall alterations in terms of cost and scope.

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IOWA DEFENSE COUNSEL
ANNUAL MEETING

Report on the Activities of the ISBA — John Shors

Current Topics of Concern

Access to Justice in Iowa - Supreme Court Budget
- County Court Houses

Economic Impact

- Where is State of Iowa going economically?
  Should the organized Bar take a stronger role?
  Iowa Futures Committee

Proposed Rule 122
- Are Iowa citizens entitled to know that the lawyer representing them on Iowa matters knows something about Iowa law? Proposed Rule 122.

Controversial Positions of the Bar not to be by-passed, but to be done consciously. Will lawyers be the Willie Horton of the Presidential Campaign? Is the problem self-inflicted?

Other Comments

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Attachment: Proposed Rule 122
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RULE 122

Following is an explanation:

The approach taken is to require out-of-state lawyers to meet the same standards and be subject to the same rules as are lawyers who reside and practice in Iowa. In other words, the out-of-state lawyer is to have the same (but no greater) burden of compliance as the Iowa resident lawyer.

Section 122.2(1) of the proposed rule introduces a new concept, a lawyer "qualified to practice law in Iowa." More than admission is required. A lawyer qualified to practice in Iowa is one who is subject to the ethics Code and to the jurisdiction and control of the various Supreme Court commissions. If an out-of-state lawyer is to represent a person in Iowa with respect to an Iowa transaction involving primarily Iowa law, then that out-of-state lawyer ought to be subject to the same Code, jurisdictions and control as the Iowa-based lawyer.

Proposed Rule 122.3 addresses the required, prohibited and permitted activities of an out-of-state law firm with an Iowa office.

A major part of the language comes from the decision in the 1978 case of The Florida Bar v Savitt, 363 So.2d 559. In that case the Florida Supreme Court reviewed an injunction restraining a New York firm and one of its partners, not admitted in Florida, from engaging in certain activities in the Miami office of the New York firm. Prior to the Supreme Court's decision, the parties entered into a stipulation of settlement which the Court adopted and set forth verbatim in its opinion. All of the provisions in that stipulation (with changes necessary to adapt them to Iowa) are found in the proposed Rules 122.3, 122.4 and 122.5.

Rule 122.4 deals with an out-of-state firm without an Iowa office but having lawyers admitted in Iowa. Some but not all of the rules imposed by the Florida Supreme Court are applicable in this situation, and the applicable ones are restated with appropriate amendments.

Thus, while there appears to be duplication, it would have been an awkward drafting problem to prepare rules which would apply to both an out-of-state firm with an Iowa office and an out-of-state firm without an Iowa office.

Rule 122.5 covers an out-of-state firm that has neither Iowa-admitted lawyers nor an Iowa office. Again, and separately for the reason mentioned above, the few rules that are applicable to this situation are set forth in Rule 122.5.

Rule 122.6 outlines the action that needs to be taken by an out-of-state lawyer in order to become "qualified to practice law in Iowa."

Rule 122.7 requires out-of-state lawyers who seek clients in Iowa to abide by our Iowa Code of Professional Responsibility for Lawyers.

At the end you will find a proposed amendment to Supreme Court Rule 116 concerning temporary admission.

PROPOSED SUPREME COURT RULE 122

122.1 Preamble. It is in the best interests of all persons seeking or employing the services of a lawyer with respect to an Iowa transaction to have adequate assurances concerning the quality and availability of legal services and the validity of representations pertaining thereto, and protection against professional improprieties and the unauthorized practice of law, whether or not the lawyer is a resident of Iowa or has offices in Iowa. Premised upon the foregoing, the following rules are adopted.

122.2 Definitions. (1) A person "qualified to practice law in Iowa", as used in the following rules, means that such person (a) has been admitted to the Iowa Bar, (b) has satisfied all requirements of the Client Security and Disciplinary Commission of the State of Iowa (including the required periodic filings), (c) has satisfied all requirements of the Supreme Court Commission on Continuing Legal Education (including the required periodic filings), (d) has (either by being a resident of and practicing law in Iowa, or if not a resident of and practicing law in Iowa, by an appropriate filing under Rule 122.5 below) submitted to the jurisdiction and control of (i) the courts of the State of Iowa, (ii) the requirements of the Iowa Code of Professional Responsibility for Lawyers, (iii) the Committee on Professional Ethics and Conduct of the Iowa State Bar Association (as a Commission of the Iowa Supreme Court), (iv) the Client Security and Disciplinary Commission of the State of Iowa, (v) the Iowa Supreme Court Commission on Continuing Legal Education, (vi) the Grievance Commission of the Iowa Supreme Court, and (vii) the Unauthorized Practice Commission of the Iowa Supreme Court, and (e) has agreed to be bound by and subject to Iowa Supreme Court Rules 116, 117, 117.1, 118, 118A, 121, 122 and 123, and to Chapter 665 of the Code of Iowa.

(2) "Iowa lawyer" means a natural person who is qualified to practice law in Iowa.

(3) The phrases "practicing in Iowa" or "practice in Iowa" mean the practicing or practice of law with respect to essentially an Iowa transaction.

(4) The phrase "Iowa transaction" means a transaction which involves Iowa law and concerns a person residing or having a location or legal interest in Iowa.

(5) The phrases "having (or have) an office in Iowa (or an Iowa office)" means that the lawyer referred to, individually or in concert with others, is located outside Iowa and operates or administers a law office or practice in Iowa staffed by one or more lawyers practicing law with such lawyer.

122.3 Out-of-State Lawyer With Iowa Office. A lawyer located and practicing law in a state or jurisdiction other than Iowa and (individually or in concert with others so located) having an office in Iowa, in operating such Iowa office with respect to practicing or seeking to practice in Iowa, shall comply with and be subject to the following:

A. Required Activities.

(a) Such lawyer shall observe all the requirements of the Iowa Code of Professional Responsibility for Lawyers.

(b) Law lists, directories and professional announcements relating primarily to such Iowa office shall list, in addition to the firm name, only the individual lawyers qualified to practice law in Iowa unless there is included a statement indicating the lawyers not so qualified.

(c) Professional announcement cards (as defined in DR 2-102(A)(2) of the Iowa Code of Professional Responsibility for Lawyers) emanating solely from or relating only to such Iowa office will be made only as to matters involving Iowa lawyers or matters involving the Iowa office.

(d) Letterheads used by such Iowa office shall list, in addition to the firm name, only the individual lawyers qualified to practice law in Iowa unless there is included a statement indicating the lawyers not so qualified; the letterhead used by such Iowa office shall not include the name of any lawyer not a resident of Iowa when the arrangement between such lawyer and the Iowa office does not constitute a true interstate partnership or professional corporation or association.

(e) In any telephone or city directory published for communities in Iowa, there shall be listed, in addition to the firm name, only those lawyers who are Iowa lawyers. This rule does not apply to a telephone or city directory which includes cities in different states.

(f) All correspondence (except interoffice) concerning practice in Iowa shall be signed only by an Iowa lawyer, or by an individual whose status is otherwise clearly indicated, such as, "attorney not qualified to practice law in Iowa," "legal assistant," 'law clerk,' or as provided by the Iowa Code of Professional Responsibility for Lawyers or the formal opinions of the Committee on Professional Ethics and Conduct.

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(g) The professional card of a lawyer identifying himself or herself by name as a lawyer and giving his or her address shall not contain an Iowa law office address if such lawyer is not an Iowa lawyer.

B. Prohibited Activities. With respect to practicing or seeking to practice in Iowa, such lawyer shall not:

(a) Allow a person who is affiliated with such lawyer and who is not an Iowa lawyer to engage in professional activities in Iowa, except for the following: participating as co-counsel in litigation before state and federal courts in Iowa but only to the extent permitted under Supreme Court Rule 116 or any federal court rule; transitory professional activities "incidental" to essentially an out-of-state transaction not involving practicing in Iowa; and professional activities that constitute "coordinating and supervisory" activities in essentially multi-state transactions in which matters of Iowa law are handled by an Iowa lawyer.

(b) Operate an office in Iowa unless (i) there is at least one person in such Iowa office qualified to practice law in Iowa, and that person and such lawyer together constitute a full, bonafide partnership that operates according to a partnership agreement, or constitute a full bonafide professional corporation or association that operates according to corporate or association documents, and (ii) such person is regularly present in that office and who is hereby made professionally responsible for its practice in Iowa.

(c) Allow a person who is affiliated with such lawyer and who is not an Iowa lawyer to undertake responsibility for or to exercise supervision over practicing in Iowa by such office, or to undertake responsibility for or to exercise supervision over an Iowa lawyer with respect to practicing in Iowa, except as to matters of internal management and administration not directly related to an Iowa transaction, and except as permitted by the last clause of Rule 122.3B.(a) above.

(d) Subject to the last clause of Rule 122.3B.(a) above, allow a person who is affiliated with such lawyer and who is not an Iowa lawyer to practice in Iowa in such office other than as a law clerk or legal assistant under the direct supervision and control of a person who is an Iowa lawyer and who is hereby made professionally responsible for the work of such person.

C. Permitted Activities. With respect to practicing or seeking to practice in Iowa, such lawyer may:

(a) Communicate, consult and deal with personnel qualified to practice law in Iowa so long as such activities, if such lawyer is not qualified to practice in Iowa, merely constitute assistance to a person who is in such Iowa office (as referred to in the opening paragraph of rule 122.3) and is an Iowa lawyer. The results of such activities shall be a work product merged into the work product of that Iowa lawyer who is hereby made professionally responsible therefor.

(b) Communicate with clients and others, including attorneys, provided it is initially made clear and immediately confirmed in writing that the communicator, if not qualified to practice law in Iowa, is not so qualified, and that such communication is made either in the presence of or with the approval of a person so qualified and who is hereby made professionally responsible for the communication and who shall retain the direct relationship with the client.

(c) Give legal advice concerning a right or obligation governed by federal law, or regarding matters related primarily to federal administrative agency practice or to the law of jurisdictions other than Iowa, provided that if the lawyer giving the legal advice is then in Iowa and is not an Iowa lawyer, such lawyer is in Iowa on a transitory basis and it has been initially made clear to the client and immediately confirmed in writing that the lawyer is not an Iowa lawyer, and provided that matters of Iowa law, if any, are handled by an Iowa lawyer.

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122.4 Out-of-State Lawyer With No Iowa Office. A lawyer located and practicing law in a state or jurisdiction other than Iowa (individually or in concert with others so located) and not having an Iowa office shall comply with and be subject to the following rules and limitations when practicing in Iowa or seeking to practice in Iowa:

A. Required and Prohibited Activities.

(a) Such lawyer shall observe all the requirements of the Iowa Code of Professional Responsibility for Lawyers.

(b) Letterheads used in an Iowa transaction shall list, in addition to the firm name, only the individual lawyers qualified to practice law in Iowa unless there is included a statement indicating the lawyers not so qualified.

(c) In any telephone or city directory published for communities in Iowa, there shall be listed only those lawyers who are Iowa lawyers. A firm name shall not be listed except as part of the listing of the name of the Iowa lawyer. This rule does not apply to a telephone or city directory which includes cities in different states.

(d) All correspondence concerning practice in Iowa and on the stationery of such lawyer shall be signed only by an Iowa lawyer, or by an individual whose status is otherwise clearly indicated, such as, "attorney not qualified to practice law in Iowa," "legal assistant," "law clerk," or as provided by the Iowa Code of Professional Responsibility for Lawyers or the formal opinions of the Committee on Professional Ethics and Conduct.

(e) No person affiliated with such lawyer and not an Iowa lawyer shall engage in professional activities in Iowa, except for the following: participating as co-counsel in litigation before state and federal courts in Iowa but only to the extent permitted by applicable rules of temporary admission under Supreme Court Rule 116 or any federal court rule; transitory professional activities "incidental" to essentially an out-of-state transaction not involving practicing in Iowa; and professional activities that constitute "coordinating and supervisory" activities in essentially multi-state transactions in which matters of Iowa law are handled by an Iowa lawyer.

(f) No person affiliated with such lawyer and not an Iowa lawyer shall undertake responsibility for or exercise supervision over the practice in Iowa by an Iowa lawyer, except as permitted by the last clause of Rule 122.4A.(e) above.

(g) Subject to the last clause of Rule 122.4A.(e) above, no person affiliated with such lawyer and not qualified to practice law in Iowa shall work with an Iowa lawyer other than as a law clerk or legal assistant under the direct supervision and control of the Iowa lawyer who is hereby made professionally responsible for the work of such person.

B. Permitted Activities. With respect to practicing or seeking to practice in Iowa, such lawyer may:

(a) Communicate, consult and deal with an Iowa lawyer so long as such activities, if such lawyer is not qualified to practice in Iowa, merely constitute assistance

to that Iowa lawyer. The results of such activities shall be a work product merged into the work product of that Iowa lawyer who is hereby made professionally responsible therefor.

(b) Communicate with clients and others, including attorneys, provided it is initially made clear and immediately confirmed in writing that the communicator, if not qualified to practice law in Iowa, is not so qualified, and that such communication is made either in the presence of or with the approval of an Iowa lawyer who is hereby made professionally responsible for the communication and who shall retain the direct relationship with the client.

(c) Give legal advice concerning a right or obligation governed by federal law, or regarding matters related primarily to federal administrative agency practice or to the law of jurisdictions other than Iowa, provided that if the lawyer giving the legal advice is then in Iowa and is not an Iowa lawyer, such lawyer is in Iowa on a transitory basis and it has initially been made clear to the client and immediately confirmed in writing that the lawyer is not an Iowa lawyer, and provided that matters of Iowa law, if any, are handled by an Iowa lawyer.

122.5 Required Submission by Out-of-State Lawyer to Iowa Jurisdiction. Before a lawyer who is located and practicing law in a state or jurisdiction other than Iowa can practice in Iowa, such lawyer shall place on file with the Clerk of the Supreme Court of the State of Iowa a statement from the clerk or other responsible official of the highest court of each jurisdiction in which such lawyer practices and is admitted that he or she is in good standing as a lawyer, and a statement (i) that he or she has met all of the requirements in Rule 122.2(1) above, and (ii) that after completing the legal services in such Iowa transaction, will continue to submit (with respect to those legal services) to the jurisdiction, control and requirements referred to in Rule 122.2(1), all to the purpose and effect that a lawyer who is located and practicing law in a state or jurisdiction other than Iowa and desires to practice in Iowa shall be subject to the same requirements, controls and limitations as lawyers who reside and practice law in Iowa.

122.6 Out-of-State Advertising in Iowa. A lawyer practicing law in a state or jurisdiction other than Iowa and seeking to practice in Iowa (by holding out to the public that he or she is a person qualified to provide services constituting the practice of law in Iowa) or practicing in Iowa under any provision of this Rule 122 or Rule 116 of this Court shall abide by all of the advertising rules of the Iowa Code of Professional Responsibility

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for Lawyers (except as provided in Rules 122.3A.(e) and 122.4A.(c) above) with respect to that lawyer's advertising which is electronically, telephonically, in print or otherwise able to be seen or heard or read within Iowa, and which attracts as clients persons residing or having a location or legal interest in Iowa and concerning a transaction involving Iowa law.

122.7 Practitioners Not in Private Practice. The provisions of Rules 122.1 through 122.5 are not applicable (i) to a lawyer who is employed by any business or service entity not engaged in the practice of law or by any governmental body or agency to practice law for such employer, or (ii) to the practice of law conducted by that lawyer for any such employer; for purposes of these Rules only, such practice of law by any such lawyer shall not be regarded as "practicing in Iowa" but shall be regarded only as the fulfillment of such lawyer's obligation of employment.

Note: It is proposed that upon adoption of Rule 122 an amendment be made to Supreme Court Rule 116 by numbering the existing two paragraphs as "(1)" and"(2)" and by adding thereto the following two paragraphs:

"(3) Every application for practice in Iowa filed by a non-resident attorney under this Rule and Section 602.10111, Code, shall be accompanied with a sworn statement by such attorney (i) agreeing to be bound by and be subject to Supreme Court Rules 116, 117, 117.1, 118, 118A, 121, 122 (except for the requirement of admission to the Iowa Bar) and 123, to Chapter 665, Code, and to the Iowa Code of Professional Responsibility for Lawyers, and (ii) accepting all the requirements thereof, including payment into the Iowa Client Security Fund. The statement shall also include acceptance of jurisdiction over such lawyer by the State courts and by the various Commissions of the Supreme Court in any matter arising out of any violation of such Rules or the Code or the Iowa Code of Professional Responsibility for Lawyers. The first time a lawyer applies for admission under this Rule 116, the Court may waive only the continuing legal education requirements of the Iowa Supreme Court Commission on Continuing Legal Education if the Court finds that the applicant is then in compliance with the continuing legal education requirements of a state or jurisdiction in which the applicant is admitted to practice.

"(4) Every court order admitting such non-resident attorney shall condition permission so to practice in Iowa upon compliance with the foregoing paragraph (3), and shall provide that such admission will terminate when the Iowa litigation terminates."

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PROTECTION FOR THE MIDDLEMAN

By John Werner and Daniel J. Hanson

In 1986 the Iowa legislature adopted Iowa Code § 613.18, which abrogated some of the effects of Section 402A of the Restatement (Second) of Torts in situations where an ultimate user seeks to impose strict liability or breach of implied warranty of merchantability upon those in the chain of distribution of a product. Although Iowa was only one of several states to enact some form of protection for the middleman (see Appendix), Iowa's statute is unique.[1] Perhaps its most important aspect is that, unlike most other jurisdictions, Iowa does not ensure that a plaintiff will get to sue someone in the chain of distribution!

In 1992, the Iowa Supreme Court addressed the statute and provided valuable guidance in how it should be applied. Copies of the three (3) opinions are attached to this outline. A brief history lesson on middleman liability prior to the enactment of Section 613.18 will aid in appreciating the scope and types of protection provided by the legislature and the Iowa court.

Under Section 402A of the Restatement (Second) of Torts (1965), adopted in Hawkeye-Security Insurance Co. v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970), any seller of a defective product could be held liable for harm caused to the ultimate user.

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[1] The Model Act (UPLA) has not been adopted by any state, although many states use some of its concepts. See L. Frumer & M. Friedman, Products Liability, Vol. 3B (1992) for a complete text and discussion.

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Further, the term "seller" was all-inclusive, encompassing designers, manufacturers, assemblers, distributors, wholesalers and retailers. This liability was independent of the seller's conduct or the relationship between the conduct and the defect. In other words, the Mom and Pop hardware store could be liable for selling a product with a defect that neither Mom or Pop could have or should have discovered, and which they did not create. Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980). This liability often leads to the inclusion as a defendant of every link in the chain of product distribution, and endless wrangling over rights of contribution or indemnity between and among such a group of defendants. It could also result in Mom and Pop bearing all of the liability if the other links in the chain were bankrupt or otherwise not amenable to suit. The rationale for such potentially harsh results was that those who profited in any manner by the distribution of the defective product should bear the risk of economic loss, rather than the "innocent" user who was injured. In Iowa, at least since the court's ruling in Bingham v. Marshall & Huschart Machinery Company, Inc., 485 N.W.2d 78 (Iowa 1992), many of these rules no longer pertain. It is a new ball game, and your clients might get to go to the lockers while the other players watch the plaintiff's grand slam sail into the bleachers. In fact, your client may not even have to dress for the game!

The statute reads as follows:

613.18 Limitation on products liability of nonmanufacturers.

1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:

a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.

b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

3. An action brought pursuant to this section, where the claimant certifies that the manufacturer of the product is not yet identifiable, tolls the statute of limitations against such manufacturer until such time as discovery in the case has identified the manufacturer.

86 Acts, ch 1211, § 32.

Under the statute, there are ten categories of status or conduct which must be considered. The first level of analysis is to determine which category your client belongs to:

1. Designers. Section 1.

2. Manufacturers, solvent. Section 1.

3. Manufacturers, insolvent. Section 1.

4. Distributors who do not assemble. Section 1(a) or 1(b).

5. Distributors who do assemble. Section 2 ? - undetermined.

6. Wholesalers who do not assemble. Section 1(a) or (b).

7. Wholesalers who do assemble. Section 2 ? - undetermined.

8. Retailers who assemble products, but the act of assembly has no relationship to the injury. Section 2.

9. Retailers who assemble products and the assembly process does relate to the cause of the injury in some way. No help. Section 2.

10. "Otherwise" sellers. (Whatever, whoever they are.) Section 1(a) or 1(b) ?

Under the statute's somewhat unartful language, aided by the three appellate decisions now available, the following general rules seem established:

A. NO HELP.

Designers or manufacturers get no protection from the statute.

B. TOTAL IMMUNITY. Section 1(a).

Retailers, wholesalers and distributors who do not assemble the product are immune from suit under counts for strict tort liability or implied warranty liability, but only if the suit "arises solely from an alleged defect in the original design or manufacture of the product." Under Bingham, this immunity is complete, and does not depend on whether there is a manufacturer who is solvent and subject to suit. In effect, there is no longer

any cause of action against a seller for implied warranty or strict products liability for defects which arise solely from an alleged defect in the original design or manufacture.

C. QUALIFIED, CONDITIONAL LIMITATION ON LIABILITY.

1. Non-Assemblers. Section 1(b)

Retailers, wholesalers and distributors who do not assemble are "not liable in damages" (different from "immune from any suit") for strict tort liability and implied warranty, regardless of the nature of the alleged defect, provided that the manufacturer is subject to suit in Iowa and not declared insolvent.

2. Assemblers. Section (2).

Retailers who also assemble are likewise "not liable in damages" for strict tort or implied warranty, provided that the act of assembly is unrelated to the cause of the injury and that the manufacturer is not declared insolvent and is subject to suit in Iowa.

Bingham v. Marshall & Huschart, supra, upheld the trial court's dismissal of strict liability and implied warranty against a non-assembling distributor, even though the manufacturer was insolvent. The court applied Section 1(a)'s immunity from suit because those counts were based solely on alleged defect in original design and manufacture. In such a case, the manufacturer's solvency is not relevant. Stated another way, paragraphs 1(a) and 1(b) are to be read disjunctively, not conjunctively. Section 1(a) is limited to "original" defect situations; Section 1(b) is not. It is important to note that this holding states in

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dictum, that if failure to warn were alleged (or some other non-original defect), then the immunity of Section 1(a) would not apply, and the case would be handled under Section 1(b). Undoubtedly plaintiffs will add a boilerplate warning allegation to any petition in the future. Query: Why should a middleman be liable for a manufacturer's failure to properly warn, if the middleman had no way of knowing of the defect to be warned against? Are Mom and Pop to blame for General Electric's inadequate warning? In Bingham, plaintiff argued that Section 1(b) automatically applied if the manufacturer were insolvent, reasoning that unless it did, and given the manufacturer's insolvency, the plaintiff would have nobody to sue for strict liability or implied warranty for "original defect" cases. Without discussing the policy considerations, the court rejected the argument. This result is contrary to most other states' version of middleman protection, most of which place the economic burden on the middleman if the manufacturer is not subject to suit. Thus, Section 613.18 represents an important and unique form of protection to middlemen sued in the Iowa courts.

The second and third issues which have been decided are that a defendant who is added to the litigation after the effective date of the statute is entitled to its protection, even though the case was initially filed before the statute's effective date (July 1, 1986). Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82, 85 (Iowa 1992). In addition, the Erickson court stated that the statute's protections are not "affirmative defenses" which must be

raised in responsive pleadings. Instead, it is the plaintiff's burden to show that the defendant seller is not within the class of immune or liability-precluded sellers under Section 613.18. Defendant may raise Section 613.18 by "motion or pleading at the early stages of the litigation process". Id. at 85-86.

Justice Snell wrote a thoughtful piece of dicta in his dissenting opinion in Pepper v. Star Equipment, Ltd., 484 N.W.2d 156, 159-61 (Iowa 1992) which discussed Section 613.18. Although the Pepper majority held that it was not a Section 613.18 case, Justice Snell was urging that Section 613.18 was, in part, a "fault-siphoning" statute. He gave a good overview of the various protections afforded by the statute.

UNRESOLVED ISSUES

1. Can the trial court declare a defendant manufacturer "insolvent" on plaintiff's motion? Presumably a manufacturer with insurance is not "insolvent".

a. What happens if a manufacturer is "solvent" but without sufficient assets or enough insurance limits to pay a potentially large judgment in your case?

2. What about wholesalers, distributors or others who assemble? Are they covered under Section (2)? Why should Section 2 be limited solely to "retailers" who assemble? Aren't other assemblers logically entitled to similar protection if the assembly has no relationship to the accident?

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3. Under the Erickson opinion, the non-assembler need not raise Section 1(b) or 2 as affirmative defenses. When and how is the "not liable in damages" protection to be provided?

4. Is a designer considered to be a manufacturer for purposes of Section 1(a) and (b)?

5. Exactly how is the trial court supposed to define terms like "manufacturer", "insolvent" and "retailer"? Nor do we know what the words "solely" and "original" mean in the statute's context. No statutory definitions were provided.

6. Under the Erickson ruling, what happens to a defendant who tries to raise the provisions of Section 613.18 at some point beyond "the early stages"? Is the statute jurisdictional, and if it is, couldn't it be raised at any time?

7. Under Erickson, how is plaintiff supposed to prove the various negative and positive propositions set out in the various sections and subsections of the statute?

8. Who are "otherwise" sellers? Does this category include:

   a. Component part manufacturers? See Hillerichs v. AVCO Corp., 478 N.W.2d 70, 76, n. 2 (Iowa 1991).

   b. Those who sell used or reconditioned products?

   c. Bailors or lessors?

   d. Installers?

   e. Repairers?

APPENDIX

States Which Provide Some Statutory Protection To Middlemen And A Summary Of Illustrative Statutes

Colorado: Colo. Rev. Stat. §§ 13-21-401 to -402: No strict product liability action may be maintained against seller unless the seller is the manufacturer of the product or the defective part. If jurisdiction cannot be obtained over the manufacturer, the manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed to be the manufacturer.

Delaware: Del. Code Ann. tit. 18, § 7001: Seller must show: product was sold in sealed container or unaltered form; seller had no knowledge of defect; seller could not have discovered defect; seller was not manufacturer; seller did not alter, modify, assemble or mishandle product so as to cause injury; and purchasers of similar products had not placed seller on notice of defect. Seller may be liable if: manufacturer cannot be identified; manufacturer is immune or insolvent; or seller made express warranties.

Idaho: Idaho Code § 6-1407: Seller is not strictly liable if it had no opportunity to inspect and discover defect or if package was sold in original sealed container, unless: express warranty was made; seller knew or had reason to know of defect; seller altered, modified or installed product contrary to manufacturer's directions; seller provided specifications for the product; seller is wholly-owned subsidiary of manufacturer; manufacturer is wholly-owned subsidiary of seller; or the product was sold after expiration date. The seller may be liable if: manufacturer is not subject to service; manufacturer is insolvent; or court determines it is highly probable that claimant could not enforce a judgment against manufacturer.

Illinois: Ill. Ann. Stat. ch. 110, para. 2-621: Manufacturer must be identified by seller. The seller will then be dismissed unless: the seller exercised some significant control over the design or manufacture of the product or warned the manufacturer of the defect; the seller had actual knowledge of the defect; or the seller created the defect. A seller who has been dismissed may be reinstated as a defendant

if: the manufacturer is protected by a statute of limitation or repose; the manufacturer had been incorrectly identified; the manufacturer no longer exists or cannot be made subject to the jurisdiction of the court; the manufacturer would be unable to satisfy any judgment; or the manufacturer would be unable to satisfy any reasonable settlement. *Cf.* the Minnesota statute.

Iowa: Iowa Code § 613.18. *See* the main outline.

Kansas: Kan. Stat. Ann. § 60-3306: seller is not liable for defective product if: seller had no knowledge of defect; seller could not have discovered defect; seller was not manufacturer; manufacturer is subject to process; and a judgment against manufacturer is reasonably certain of being satisfied.

Kentucky: Ky. Rev. Stat. Ann. § 411.340: If manufacturer is identified and is subject to the jurisdiction of the court and seller can show product was sold in original condition or package, seller is not liable unless it breached express warranty or knew or should have known product was defective and unreasonably dangerous.

Maryland: Md. Cts. & Jud. Proc. Code Ann. § 5-311: Seller has defense from case based upon defective design or manufacture if: product was sold in sealed container or unaltered form; seller had no knowledge of defect; seller could not have discovered defect; seller did not provide specifications for the product; and seller did not alter, modify, assemble or mishandle product so as to cause injury. This defense is not available if: manufacturer is not subject to service of process; manufacturer has been judicially declared insolvent; claimant would be unable to enforce judgment against manufacturer; claimant unable to identify the manufacturer; manufacturer is immune from suit; or seller made express warranties.

Minnesota: Minn. Stat. Ann. § 544.41: Manufacturer must be identified by seller. The seller will then be dismissed unless: the seller exercised some significant control over the design or manufacture of the product or warned the manufacturer of the defect; the seller had actual knowledge of the defect; or the seller created the defect. A seller who has been

dismissed may be reinstated as a defendant if: the manufacturer is protected by a statute of limitation or repose; the manufacturer had been incorrectly identified; the manufacturer no longer exists or cannot be made subject to the jurisdiction of the court; the manufacturer would be unable to satisfy any judgment; or the manufacturer would be unable to satisfy any reasonable settlement. *Cf.* the Illinois statute.

Nebraska: Neb. Rev. Stat. 25-21,180 to -21,181: No product liability action may be brought against seller unless the seller is also the manufacturer.

N. Carolina: N.C. Gen. Stat. § 99B-2: seller is not liable in any product liability action, except one based upon express warranty, if product was sold in original sealed container or seller did not have reasonable opportunity to discover the defect. Seller may be liable if it mishandled the product, or if manufacturer is not subject to jurisdiction, or if manufacturer has been judicially declared insolvent.

Ohio: Ohio Rev. Code Ann. § 2307.78: Supplier can be liable for negligence or breach of express warranty or representation. Supplier can be strictly liable if: manufacturer is not subject to process; judgment cannot be enforced against manufacturer due to actual or asserted insolvency; supplier owns manufacturer in whole or in part; manufacturer owns supplier; supplier furnished design of product; supplier altered, modified or failed to maintain product; supplier marketed product under own trade name; or supplier failed to identify manufacturer.

S. Dakota: S.D. Codified Laws Ann. § 20-9-9: Seller not strictly liable unless seller is the manufacturer or assembler of the product, or unless the seller should have known of the defective condition.

Tennessee: Tenn. Code Ann. § 29-28-106: Seller is not subject to product liability if product is acquired and sold in an original container and/or if seller did not have a reasonable opportunity to inspect the product and discover the defect. The protections of this statute will not apply in breach of warranty cases, or unless jurisdiction cannot be obtained over the

manufacturer or unless the manufacturer has been judicially declared insolvent. Seller cannot be *strictly* liable unless: the seller is the manufacturer; jurisdiction cannot be obtained over the manufacturer; or the manufacturer has been judicially declared insolvent.

Washington: Wash. Rev. Code Ann. § 7.72.040: Seller may be liable for negligence, breach or express warranty or misrepresentation. Seller shall have the liability of the manufacturer if: manufacturer is not subject to service of process; it is highly probable that claimant could not enforce judgment against manufacturer; seller is controlled subsidiary of manufacturer or vice-versa; seller provided the specifications for the product; or the product was marketed under seller's trade name.

A Summary Of Approaches Which Appear In Many Statutes

1. The "original package defense": a seller will not be strictly liable if it sells a product in the original sealed package or unaltered form. This defense is related to, and often appears in conjunction with, the "reasonable opportunity to inspect and discover" principle (No. 2, below) and the "knew or should have known" principle (No. 3, below).

2. Some states provide protection to sellers who have no reasonable opportunity to inspect and discover the defect. In general, it must be shown that the opportunity for an inspection, if done with reasonable care, would have disclosed the existence of a dangerous defect.

3. Along related lines, some states provide that sellers may be strictly liable if they knew or should have known of the defect. The burden of proof may be on either party. In Kansas and Maryland, for example, *the defendant seller* must establish that it had no actual knowledge of the defect and could not have reasonably discovered it. In Illinois and Minnesota, by contrast, the seller loses protection if *the plaintiff* can show that the seller knew of the defect.

4. Some states require the seller to identify the true manufacturer. Once the true manufacturer is brought into court, the seller might be entitled to a dismissal or to indemnity from the manufacturer.

5. It is generally taken as given that a seller may be strictly liable if it is also the manufacturer. The manufacturer and seller may be different corporate entities, and some states provide that a seller is not entitled to protection if it is a subsidiary of the manufacturer or vice-versa. The relevant degree of parent-subsidiary control varies from state to state.

6. Sellers which modify, alter, assemble, construct, install, label, provide instructions for, provide warnings for, package, prepare, test or mishandle the product may not be entitled to protection.

7. Sellers which create the defect may not be entitled to protection.

8. Sellers which provide plans or specifications for the product or who otherwise had a hand in its design or manufacture may not be entitled to protection.

9. The seller may be required to bear the manufacturer's liability if it is highly probable that the manufacturer would be unable to pay any potential judgment.

10. The seller may be required to bear the manufacturer's liability if the manufacturer could not be properly served with process or if the manufacturer could not be made subject to the jurisdiction of the tribunal.

11. The seller may be required to bear the manufacturer's liability if the manufacturer has been judicially declared insolvent.

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Lee A. BINGHAM and Christine Bingham, Husband and Wife, Appellants,

v.

MARSHALL & HUSCHART MACHINERY COMPANY, INC., Appellee.

No. 91-575.

Supreme Court of Iowa.

May 13, 1992.

Injured worker brought products liability action against both insolvent manufacturer and seller of allegedly defective machine The District Court, Polk County, Rodney J. Ryan, J., granted seller's motion to dismiss strict liability and implied warranty claims, and entered judgment in favor of seller after trial on negligence claim. Injured worker appealed. The Supreme Court, Andreasen, J., held that: (1) worker's strict liability and implied warranty claims were properly dismissed against nonmanufacturing seller; (2) evidence of subsequent remedial measures to machine was properly excluded; and (3) exclusion of evidence relating to worker's loss of earning capacity was not reversible error.

Affirmed

1. Products Liability ⚬5, 6
Sales ⚬425

The term "product liability" relates to liability arising from injury or damage resulting from the use of a product, and may involve causes of action stated in negligence, strict liability or breach of warranty.

See publication Words and Phrases for other judicial constructions and definitions

2. Products Liability ⚬55
Sales ⚬255

Strict liability and implied warranty claims by injured worker against distributor of defective drill were properly dismissed based on statutory immunity of nonmanufacturers from such claims. I.C.A. §§ 613.18, 613.18, subds. 1, 1, pars a, b, 2.

3. Appeal and Error ⚬969, 970(2)
Trial ⚬43, 182

Trial court is granted broad range of discretion in determining admissibility of evidence and in giving instructions to jury, and on appeal, reviewing court determines whether trial court abused its broad range of discretion.

4. Evidence ⚬140

Evidence of owner's subsequent remedial measures to allegedly defective drill after worker suffered injury was properly excluded, where remedy had little relevance to injured party's negligence claim based upon distributor's failure to give proper instructions and warning. Rules of Evid., Rules 403, 407

5. Evidence ⚬546

Exclusion or admission of certain expert testimony, based upon court's determination of qualification of witness, was well within court's discretion, and court can properly consider experience and familiarity with subject, or lack thereof, in assessing witnesses' qualifications

6. Appeal and Error ⚬1056.4

Exclusion of evidence relating to plaintiff's loss of earning capacity was not reversible error, where jury found in favor of defendant on issue of liability.

Gregory T. Racette of Hopkins & Huebner, P.C., Des Moines for appellants

John Werner and Daniel J. Hanson of Grefe & Sidney, Des Moines, for appellee.

Considered by McGIVERIN, C.J., and CARTER, NEUMAN, SNELL and ANDREASEN, JJ.

ANDREASEN, Justice

A products liability suit was filed against an insolvent manufacturer and a seller of an allegedly defective machine. Prior to trial, the district court granted the seller's motion to dismiss the strict liability and implied warranty claims brought against it. The plaintiff's negligence claim proceeded

to a jury trial. The jury returned a verdict against the plaintiffs and in favor of the seller. Appeal was taken from the pretrial dismissal and from the judgment entered upon the verdict. Issues are also raised regarding evidentiary rulings made during the negligence trial as well as to instructions given to the jury. Finding no error, we affirm.

I. *Background.*

In March of 1987, Lee Bingham severely injured his thumb while working with a straight-line table-feed drill at the John Deere Works (Deere) in Ankeny, Iowa. The drill was manufactured by Moline Tool Company (Moline). Deere purchased the drill from a distributor, Marshall & Huschart Machinery, Inc. (Huschart), in 1974.

As a result of his injuries, Bingham[1] filed suit against Moline and Huschart alleging strict liability, breach of implied warranty, and negligence. Moline is insolvent and has been so declared by the United States Bankruptcy Court for the Northern District of Illinois' Eastern Division.

Bingham filed a motion to have the trial court declare the manufacturer insolvent and to hold Huschart liable for his injuries under Iowa Code subsection 613.18(1) (1989). Huschart countered with a motion to dismiss all of Bingham's claims. After hearing, the district court denied Bingham's motion and granted Huschart's motion in part; dismissing the strict liability and breach of warranty claims under subsection 613.18(1)(a). The court, however, preserved the negligence claim for trial.

Bingham then applied to this court for permission to file an interlocutory appeal. We denied the request. The negligence claim proceeded to trial. Numerous objections were made to evidentiary rulings and to the instructions submitted to the jury. The jury returned a verdict in favor of Huschart on all counts. Bingham appeals.

II. *Products Liability—Iowa Code Section 613.18*

[1] The term "product liability" relates to liability arising from injury or damage resulting from the use of a product. Product liability may involve causes of action stated in negligence, strict liability or breach of warranty. *See generally* 72 C.J.S. *Products Liability* §§ 2, 3 (Supp. 1975); 63 Am.Jur.2d *Products Liability* §§ 1, 5–7 (1984).

Strict liability in tort was first recognized by this court in *Hawkeye-Security Insurance v. Ford Motor Co.*, 174 N.W.2d 672, 684 (Iowa 1970). We adopted the principles of strict liability as found in Restatement (Second) of Torts section 402A. *Id.* Under these principles, a seller of a defective product may be held liable for harm to the ultimate user or to the user's property. Under comment (f) to section 402A, the term seller is defined as a person engaged in the business of selling products for use or consumption. The term seller included the manufacturer, wholesaler, dealer, distributor and retailer. *Id.* Strict liability was included in the definition of fault when, by statute, Iowa adopted comparative fault in 1984. 84 Iowa Acts, ch. 1293, § 1 (now codified at Iowa Code § 668.1).

With the adoption of 86 Iowa Acts ch. 1211, § 32, now codified at Iowa Code section 613.18, a statutory limitation was imposed upon strict liability and implied warranty claims against nonmanufacturers. The section provides:

> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
>
> a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
>
> b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of

1. Bingham's wife Christine, was also a named plaintiff in the suit. Christine's claims are for loss of consortium. We will refer to the Binghams in the singular.

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this state and has not been judicially declared insolvent.

2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent

[2] In challenging the court's dismissal of the strict liability and implied warranty claims, Bingham argues that subsection 613.18(1)(a) does not give the seller a complete exemption from suit Bingham asserts the general immunity is qualified or limited by the requirements of subsection 613.18(1)(b). He urges the intent of subsection 613.18(1) was to provide immunity to wholesalers, retailers, distributors and other sellers upon proof that the manufacturer was subject to the jurisdiction of Iowa courts and had not been declared judicially insolvent We disagree with Bingham's construction of the statute

In interpreting Iowa Code section 613.18, we keep our familiar rules of statutory construction in mind. *See, e.g., American Asbestos v. Eastern Iowa Community College,* 463 N.W.2d 56, 58 (Iowa 1990). The statute is divided into two subsections Subsection 613.18(1) pertains to wholesalers, retailers, distributors and other sellers who are not the manufacturer or designer of the product and who do not assemble the product. Subsection 613.18(2) pertains to retailers who *do assemble* the products they sell

Subsection 613.18(1) is itself divided into two paragraphs. Paragraph 613.18(1)(a) provides for immunity from suit when the potential claim arises solely from defects in the original design or manufacture of the product Paragraph 613.18(1)(b) limits strict liability and implied warranty claims when the claims do not arise solely from an alleged defect in the original design or manufacture of the product. Examples of suits arising under paragraph 613.18(1)(b) include suits under strict liability for failure to warn about the dangers of a product. *See, e.g., Cooley v. Quick Supply Co.,* 221 N.W.2d 763, 768–69 (Iowa 1974) (citing Restatement § 402A); *LaCoste v. Ford Motor Co.,* 322 N.W.2d 898, 900 (Iowa App.1982); *Prosser & Keeton on Torts* § 99, at 695 (5th ed. 1984); 63 Am Jur.2d *Products Liability* § 545 (1984).

There is no dispute that Huschart, the distributor, sold, but did not assemble, the drill Thus, subsection 613.18(2) is inapplicable. It is also clear that Bingham's claim is one that arises solely from an alleged defect in the original design or manufacture of the product. Thus, subsection 613.18(1)(a) is applicable and provides Huschart with a statutory immunity from suit. Subsection 613.18(1)(b) does not impose a limitation upon the immunity protection of subsection 613.18(1)(a); it provides alternate protection against strict liability and breach of implied warranty for suits against nonmanufacturers where the defect was not in the original design or manufacture. Subsection 613.18(1)(a) provides a "person ... is *immune* from any suit based upon ...." Subsections 613.18(1)(b) and (2) provide a "person ... is *not liable for damages* based upon ... upon proof that ...." Although the statute is not a model of clarity, we believe the immunity protection of 613.18(1) is not dependent upon proof that the manufacturer of the product is subject to the jurisdiction of the courts of this state and has not been declared judicially insolvent as required in subsections 613.18(1)(b) and (2)

The district court was correct in granting Huschart's motion to dismiss Bingham's strict liability and implied warranty claims.

III. *Evidentiary Rulings*

[3] A trial court is granted a broad range of discretion in determining the admissibility of evidence and in giving instructions to the jury We therefore review to determine whether the court abused its broad range of discretion *See*

e.g., *State v. Harmon*, 238 N.W.2d 139, 145 (Iowa 1979).

A Evidence of Subsequent Remedial Measures.

[4] Bingham claims that Huschart was negligent in failing to give proper safety instructions and warnings to Deere, the purchaser of the drill. Bingham offered evidence that Deere had changed the control mechanisms on the drill after he suffered his injuries.

Huschart objected to the evidence of Deere's subsequent remedial measures to the drill; citing both Iowa Rules of Evidence 407 and 403. However, it was eventually conceded that rule 407 did not prohibit the introduction of such evidence because the subsequent remedial measure had been taken by one other than the defendant. The court excluded the evidence based upon rule 403. Rule 403 permits the exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

We, like the federal courts and the trial court, believe that rule 407 does not prohibit the introduction of evidence of subsequent remedial measures if they are undertaken by a third party nondefendant. *See Raymond v. Raymond Corp.*, 938 F.2d 1518, 1524 (1st Cir.1991) ("Rule 407 applies only to subsequent remedial measures taken voluntarily *by the defendant*") (emphasis supplied) (citing cases). *See also,* E. Cleary *McCormick on Evidence* § 275, at 816 (3d ed. 1984); Annotation, *Admissibility of Evidence of Subsequent Remedial Measures Under Rule 407 of the Federal Rules of Evidence,* 50 A.L.R.Fed. 935, § 3 at 937 (1980 & 1991 Supp.); Annotation, *Admissibility of Evidence of Subsequent Repairs or Other Remedial Measures in Products Liability Cases,* 74 A.L.R.3d 1001 § 4[b] at 1016 (1976 & Supp.) Even though such evidence may not be prohibited by rule 407, it still may be excludable on other grounds, including rule 403.

Many federal courts have excluded evidence of subsequent remedial measures on the basis of rule 403 when rule 407 has been held inapplicable. *See, e.g., Raymond,* 938 F.2d at 1524 and cited cases. *See also Petree v. Victor Fluid Power,* 887 F.2d 34, 39 (3d Cir.1989). We agree with the reasoning of the 1st Circuit in *Raymond:*

> This does not necessarily mean, however, that the evidence must be admitted. As discussed *supra,* evidence may be excluded under Fed.R.Evid. 403 if its probative value is outweighed by the unfair prejudice that could result. Rule 403 may be used to exclude evidence of subsequent third party actions which are felt to bear only marginally on the question of whether a product was unreasonably dangerous at the time of manufacture. *Grenada Steel [Industries, Inc. v. Alabama Oxygen Co., Inc.]* 695 F.2d [883] at 889 [(5th Cir.1983)] (Evidence of subsequent nonparty repairs was properly excluded under 403 because it "lacked probative value and injected the dangers of confusion and misleading the jury."); *Gauthier v. AMF, Inc.*, 805 F.2d 337, 338 (9th Cir.1986) (Evidence of nonparty manufacturer's subsequent design changes should have been excluded under 403 as irrelevant.); *Koonce [v. Quaker Safety Products & Manufacturing Co.]* 798 F.2d [700] at 720 [(5th Cir.1986)] (Memo written by nonparty to suit regarding safety measures taken in response to accident could properly have been excluded as prejudicial or misleading.).

Id. at 1524–25.

Evidence of Deere's modification of the drill by installing two-hand button controls has little relevance to Bingham's negligence claim based upon failure to give proper instructions and warning. It would have greater relevance in proof of a strict liability claim, a claim properly dismissed by the court. We believe that the trial court was well within its discretion to exclude the evidence of the subsequent remedial measure taken by Deere based on rule 403.

B. Other Evidentiary Rulings.

We have reviewed Bingham's other evidentiary challenges and find them without

merit. The court did not abuse its discretion in initially excluding testimony made by Deere's safety director who was a production supervisor at the time the drill was purchased. The original proffered testimony related to what action Deere would have taken had the warning been given at the time of purchase. The witness was later allowed to testify as to what actions he would have taken as safety director had a warning been given to Deere prior to Bingham's injury. Thus, substantially the same evidence was later in the record without objection.

[5] The exclusion or admission of certain expert testimony, based upon the court's determination of the qualification of the witness, was well within its discretion. The court can properly consider the experience and familiarity with the subject, or the lack thereof, in assessing the witness' qualifications.

[6] The exclusion of evidence relating to Bingham's loss of earning capacity is not reversible error. No prejudice can be shown. Even if the court improperly excluded evidence offered to prove damages, it is not reversible error where the jury finds in favor of the defendant on the issue of liability. *Shawhan v. Polk County,* 420 N.W.2d 808, 811 (Iowa 1988).

We have followed well-established standards in our review of the propriety of the submission of instructions to the jury. *See Young v. Gregg,* 480 N.W.2d 75, 80 (Iowa 1992). We find no prejudicial error in the instructions actually given or in the court's refusal to give Bingham's requested instructions. The instructions given thoroughly and fully presented the issues to the jury so that it had a proper understanding of the law to be applied in reaching a verdict.

IV. *Conclusion.*

We affirm the district court judgment. We were required to expend additional time and energy in addressing the issues in this appeal because appellant's counsel is unfamiliar with the Iowa Rules of Appellate Procedure. We urge appellant's counsel to carefully review and comply with our rules in the future; specifically rule 14(a)(5).

AFFIRMED.

Martin ERICKSON d/b/a Martin's Welding, Inc., Appellee,

v.

WRIGHT WELDING SUPPLY, INC., and Cleveland Welding Supply, Inc., Defendants,

and

Airco, Inc., Appellant.

No. 91-42.

Supreme Court of Iowa.

May 13, 1992.

Rehearing Denied June 18, 1992.

Plaintiff brought product liability action by filing petition against original defendant, and subsequently filed amended petition adding defendant as party. The District Court, Sac County, Gary L. McMinimee, J., entered judgment upon jury verdict apportioning 50% of fault to defendant. Defendant appealed. The Supreme Court, Andreasen, J., held that: (1) amended petition bringing defendant into suit did not relate back to original filing of suit and, therefore, defendant was entitled to assert protection of statute providing immunity or limiting liability of nonmanufacturers in suits based upon strict liability; (2) defendant could raise statutory defense issue on appeal although it did not plead it as affirmative defense; and (3) jury instruction was incorrect statement of law as to defendant's fault in strict liability.

Reversed and remanded for new trial.

merit. The court did not abuse its discretion in initially excluding testimony made by Deere's safety director who was a production supervisor at the time the drill was purchased. The original proffered testimony related to what action Deere would have taken had the warning been given at the time of purchase. The witness was later allowed to testify as to what actions he would have taken as safety director had a warning been given to Deere prior to Bingham's injury. Thus, substantially the same evidence was later in the record without objection.

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AFFIRMED.

Martin ERICKSON d/b/a Martin's Welding, Inc., Appellee,

v.

WRIGHT WELDING SUPPLY, INC., and Cleveland Welding Supply, Inc., Defendants,

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Reversed and remanded for new trial.

1. Pleading ⟹252(1)

While "relation back" is generally applied only with reference to statute of limitations, concept may also find application in other contexts.

See publication Words and Phrases for other judicial constructions and definitions.

2. Products Liability ⟹2

Amended petition in product liability action bringing defendant into suit did not relate back to original filing of suit against first defendant; therefore, defendant was entitled to assert protection of statute providing immunity or limiting liability of nonmanufacturers in suits based upon strict liability under certain circumstances where statute became effective after filing of action but before defendant was added as party. Rules Civ.Proc., Rule 89; I.C.A. § 613.18.

3. Appeal and Error ⟹173(2)
Products Liability ⟹74

Statutory immunity or limitation of liability provided to nonmanufacturers in strict liability suits was not an affirmative defense that had to be raised in pleadings and proven by defendant; therefore, defendant's failure to plead as affirmative defense issue of statutory immunity or limitation of liability of nonmanufacturers did not preclude defendant from raising issue on appeal. Rules Civ.Proc., Rules 72, 101, 104; I.C.A. § 613.18.

4. Action ⟹12

Affirmative defense is one which rests on facts not necessary to support plaintiff's case; thus, any defense which would avoid liability although admitting allegations of petition is affirmative defense.

5. Products Liability ⟹75

Plaintiff has burden of proving elements of strict liability.

6. Products Liability ⟹96

Jury instruction in product liability case that, with respect to defendant, plaintiff must prove defendant was at fault, based on negligence and/or strict liability, was incorrect statement of law as to defendant's fault in strict liability where defendant was entitled to prospective defense of statutory immunity or limited liability of nonmanufacturers in strict liability suits. I.C.A. § 613.18.

7. Appeal and Error ⟹1062.1, 1177(2)

In civil cases, when trial court errs in submitting even one of several theories of recovery and jury returns only general verdict for plaintiff, verdict cannot stand and defendant is entitled to new trial.

Don N. Kersten and Mark S. Brownlee of Kersten & Carlson, Fort Dodge, for appellant.

William H. Roemerman of Crawford, Sullivan, Read, Roemerman & Brady, Cedar Rapids, for appellee.

Considered by McGIVERIN, C.J., and CARTER, NEUMAN, SNELL, and ANDREASEN, JJ.

ANDREASEN, Justice.

Our initial question in this complex products liability action is whether one of the defendants is entitled to protections provided by section 613.18 of the Iowa Code (1987). As to the plaintiff's strict liability claim, the trial court held the defendant was not entitled to the benefits of the statute because the case was filed before the effective date of the statute. We conclude the statute was applicable to the later-added defendant. Based on this conclusion, we must next determine if the defendant preserved this issue notwithstanding its failure to raise the statute as an affirmative defense in its responsive pleadings. Finding that the issue was preserved, we reverse and remand.

I. *Background.*

In 1986, the Iowa legislature approved "An act relating to liability," including provisions relating to products liability. 1986 Iowa Acts ch. 1211, § 32 now codified at Iowa Code § 613.18. The act is applicable to "all cases filed on or after July 1, 1986." 1986 Iowa Acts ch. 1211, § 47. The act provides immunity or limits liability of non-

manufacturers in suits based upon strict liability under certain circumstances.

On February 11, 1986, a fire and explosion destroyed Martin Erickson's welding shop in Auburn, Iowa. On May 14, 1986, Erickson filed a petition against Wright Welding Supply, Inc. (Wright) alleging it was at fault for the fire and explosion. On March 30, 1987, almost ten months after the effective date of the statute, Erickson filed an amended and substituted petition, adding Airco, Inc. (Airco) and Cleveland Welding Supply, Inc. (Cleveland), as defendants. The amended petition alleged a product liability claim based upon theories of strict liability, negligence and res ipsa loquitur against all defendants.

Throughout the trial process, Airco claimed that it was entitled to statutory protections of Iowa Code section 613.18. The court denied Airco's claim, ruling that the "case" had originally been filed prior to the effective date of the statute.

At the end of the trial a directed verdict was granted to Cleveland. The case was then submitted to the jury upon theories of strict liability and negligence as against Airco and Wright. The jury returned a verdict apportioning fault as follows: Airco fifty percent, Erickson thirty-five percent, and Wright fifteen percent. The special verdict forms did not indicate the theory or theories the jury relied upon in rendering its verdict. Judgment was entered upon the verdict.

Airco filed a combined motion for judgment notwithstanding the verdict (JNOV), motion for new trial, and motion to amend judgment entry. *See* Iowa R.Civ.P. 242, 243, 244. In support of its motion, Airco restated its position that since it was added as a party after the effective date of Iowa Code section 613.18, it was entitled to the protections provided by the statute. The court denied the motion. Airco appealed; Wright did not appeal and is not a party here.

Today, we also decide *Bingham v. Marshall & Huschart Machinery Co.*, 485 N.W.2d 78 (Iowa 1992), another products liability case involving Iowa Code section 613.18. We refer the reader to *Bingham* for general background discussion of section 613.18.

II. *The "Relation Back" Doctrine.*

At trial, the district court did not believe section 613.18 was applicable because Erickson had filed suit against Wright before July 1, 1986, the effective date of the Act. The court concluded the "case" had been filed in May 1986 and implicitly found that the amendment adding Airco as a defendant related back to the original May 1986 filing.

The court looked to the plain meaning of the term "case." We find the term a general term for an action, cause, or suit. Black's Law Dictionary 195 (5th ed. 1979). We think that the case against Airco was not filed until after the effective date of the statute unless, under our procedural rules, the amendment relates back to the filing of the original suit against Wright.

Generally, when we are faced with "relation back" issues, the question is whether an amendment to a petition correcting the name of a defendant or substituting a defendant is effective with relation to a statute of limitations. *See, e.g., Grant v. Cedar Falls Oil Co.*, 480 N.W.2d 863 (Iowa 1992) (correcting name); *Jacobson v. Union Story Trust & Sav. Bank*, 338 N.W.2d 161 (Iowa 1983) (changing parties).

In deciding such cases, we interpret Iowa Rule of Civil Procedure 89, "Making and Construing Amendments," which provides in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim was asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

When presented with such issues, we have consistently held that the amendments do not relate back to the date of the filing of the original petition if the new party has not received notice of the institution of the action "within the period provided by law for commencing the action against him." *See id.* Here, however, we are not dealing with a statute of limitations issue.

Airco has advanced two alternate theories in support of its contention that Erickson's amended filing does not relate back. Airco first argues Iowa Rule of Civil Procedure 89, allowing for relation back, is not applicable to cases not involving statute of limitations problems. Since this case does not involve a statute of limitations problem, the rule is not applicable and thus there is no provision for relation back.

Under its second theory, Airco impliedly agrees rule 89 may apply to cases involving issues other than the statute of limitations. However, the argument continues that under the specific *facts* of this case the rule is inapplicable. Airco argues that the rule itself and the interpretations that we, and other courts interpreting similar rules, have placed on the rule, limit its applicability to "changes" in parties; not to the "addition" of parties. Thus, since Airco was "added" as a party, the rule is inapplicable and once again there is no provision for relation back.

[1] We are not persuaded by Airco's first argument. "While 'relation back' is generally applied only with reference to the statute of limitations, the concept may also find application in other contexts." 3 *Moore's Federal Practice* § 15.15[5] (2d ed. 1985) (and cases cited therein) [*Federal Practice*]; Moore, Vestal & Kurland, *Moore's Manual* § 9.09[9] (1977) (and cases cited therein) [*Manual*]. The case before us obviously presents another context in which the rule may be used.

[2] We do, however, agree with Airco's second argument and conclude on the facts of this case that the amendment adding Airco does not relate back. Although it is apparent from our review of cases and treatises on Federal Rule of Civil Procedure 15(c) (formerly identical to Iowa Rule 89) that there is split of authority whether an amendment adding a party relates back (*compare Manual* at § 9.09[9] ("It remains true that where the failure to name the proper defendant is not a misnomer or misdescription, adding the proper party as a defendant will not relate back to the original filing."); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 (6th Cir.1973); *Graves v. General Ins. Corp.*, 412 F.2d 583, 585 (10th Cir.1969); *United States v. Western Casualty & Surety*, 359 F.2d 521, 523 (6th Cir. 1966); *United States v. Chapman Constr. Inc.*, 85 F.R.D. 255, 256 (W.D.Okla.1979); *Herm v. Stafford*, 455 F.Supp. 650, 654 (W.D.Ky.1978) *with Federal Practice* at § 15.15[4.-2] ("Although the rule refers to 'an amendment changing the party' it has properly been held to sanction relation back of amendments which add or drop parties, as well as those substituting new parties for those earlier joined.") (and cases cited therein); *Andujar v. Rogowski*, 113 F.R.D. 151, 155 n. 5 (S.D.N.Y.1986)), we think that under the facts presented today the better rule is that the addition of another defendant does not relate back to the original filing of the suit against the first defendant.

Accordingly, since Airco was added as another defendant the amended petition bringing it into the suit does not relate back. Airco is therefore entitled to assert the protection of Iowa Code section 613.18. Having reached this conclusion, we next determine if Airco was required to raise the statute as an affirmative defense.

III. *Affirmative Defense.*

[3] Airco did not plead an affirmative defense premised upon section 613.18. Erickson argues Airco cannot raise the statutory defense issue on appeal because it failed to raise it as an affirmative defense in its responsive pleadings. Airco urges

the issue was properly raised in its motions to dismiss, its challenges to the instructions, and in its posttrial motions.

We are guided in our analysis by the interrelationship between Iowa Rules of Civil Procedure 72: "[The answer] must state any additional facts deemed to show a defense"; Rule 101: "Any defense ... which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded"; and Rule 104: "Every defense in law or fact to any pleading must be asserted in the pleading responsive thereto."

[4] An affirmative defense is one which rests on facts not necessary to support the plaintiff's case. *Peoples Trust & Sav. Bank v. Baird,* 346 N.W.2d 1, 4 (Iowa 1984); *Baker v. Beal,* 225 N.W.2d 106 (Iowa 1975). Thus, any defense which would avoid liability although admitting the allegations of the petition is an affirmative defense. 1 B. Lindahl *Iowa Practice* § 13.39 (1991).

[5] We do not believe the immunity from suit or limitation of liability provided by section 613.18 is an affirmative defense that must be raised in the pleadings and proven by the defendant. The plaintiff has the burden of proving the elements of strict liability. Before the adoption of section 613.18, the plaintiff need only show the defendant was a seller. Since the adoption of the statute, a plaintiff must establish the seller is not in the newly defined class of sellers immune from suit or whose liability is precluded by the statute. The plaintiff must prove the elements of its case, including proof that the seller is not immune from suit or is subject to liability.

We thus conclude Iowa Code section 613.18 is not an affirmative defense and need not be raised in responsive pleadings. Although Airco is not required to raise the statutory issue in its pleading, it is appropriate that this issue be raised by motion or pleading at the early stages of the litigation process. Parties should utilize the most efficient method to promptly establish the true facts and then present the statutory issue for court determination.

IV. *Negligence Count.*

[6] Erickson argues that even if Airco is entitled to the prospective defense of section 613.18, as to the strict liability claim, the judgment entered upon the jury verdict should be affirmed because there was sufficient evidence to support a finding that Airco was negligent. Unfortunately, the court did not submit separate instructions or interrogatories to the jury. The court instructed:

> The Plaintiff must prove all of the following propositions with respect to Defendant Airco, Inc.:
>
> 1. Defendant Airco, Inc., was at fault, based on negligence and/or strict liability....

In answering this question, the jury responded to an interrogatory by answering the question "was Airco, Inc., at fault," "yes."

[7] In civil cases, "when a trial court errs in submitting even one of several theories of recovery and the jury returns only a general verdict for the plaintiff the verdict cannot stand and the defendant is entitled to a new trial." *Gordon v. Noel,* 356 N.W.2d 559, 565 (Iowa 1984). *See also Nichols v. Westfield Indus., Ltd.,* 380 N.W.2d 392, 397 (Iowa 1985) (where the forms of verdict do not reveal the basis upon which the jury finds a defendant to be negligent, the submission of a specification which is without support in the record requires reversal).

Because we conclude that Airco was entitled to assert the protections of section 613.18, and also conclude the instruction submitted to the jury on strict liability was an incorrect statement of the law as to Airco's fault in strict liability, we must reverse and remand for a new trial on both the strict liability and negligence claims.

REVERSED AND REMANDED FOR NEW TRIAL.

Duane E. NEUBAUER and Evelyn Neubauer, Appellees,

v.

Joyce HOSTETTER, Appellant,

and

Jennings Hostetter, Defendant.

No. 90–1875.

Supreme Court of Iowa.

May 13, 1992.

Landlords and their fire insurer brought action against husband and wife tenants arising from fire damage to leased farmhouse. The District Court, Jefferson County, Phillip R. Collett, J., entered judgment in favor of plaintiffs against wife and did not find liability on part of husband. Wife appealed. The Supreme Court, Carter, J., held that insurer was not precluded from exercising subrogation rights against wife.

Affirmed.

Insurance ⇐606(1.1)

Tenant was not an "implied coinsured" with landlords and, thus, landlords' fire insurer was not precluded from exercising subrogation rights against tenant who negligently caused fire that destroyed farmhouse; tenant occupied farmhouse pursuant to oral lease, tenant was not named as insured in policy issued to landlords, and she did not assert that landlords ever agreed to provide insurance covering her tenancy estate.

See publication Words and Phrases for other judicial constructions and definitions.

Kenneth R. Munro of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for appellant.

Timothy J. McKay of McKay, Moreland & Webber, P.C., Ottumwa, for appellees.

Considered by McGIVERIN, C.J., and SCHULTZ, CARTER, LAVORATO, and ANDREASEN, JJ.

CARTER, Justice.

Joyce Hostetter, a tenant of a farm home owned by plaintiffs, Duane Neubauer and Evelyn Neubauer, appeals from an adverse judgment in an action against her by the Neubauers and their fire insurer. The gravamen of the action is the negligence of defendant Joyce Hostetter, which caused fire damage to the leased premises. The district court entered judgment in favor of the plaintiffs against defendant Joyce Hostetter. No liability was found on the part of her husband, Jennings Hostetter, who had also been named as a defendant in the action. Joyce has appealed, asserting that she also was an insured under the plaintiffs' fire policy. We conclude that she has failed to establish that position and accordingly affirm the judgment of the district court.

Plaintiffs were the owners of a two-story, nine-room farmhouse in rural Jefferson County. They purchased a fire insurance policy from Farmers Mutual Insurance Association (Farmers Mutual) in February 1981 to cover the premises. In late 1985, the Neubauers rented the farmhouse to Jennings Hostetter pursuant to an oral lease. The parties agreed on rent and utility charges, but the procuring or existence of fire insurance was not discussed. At the time the lease was entered into, Jennings' wife, defendant, Joyce Hostetter, was living in Illinois. In 1986, she moved into the farmhouse.

After the house sustained some wind damage in 1986, Duane Neubauer informed Jennings Hostetter that Duane carried insurance on the house. When similar damage occurred in 1987, Duane informed Jennings that his policy covered only the structure, and Jennings should obtain renter's insurance for his personal belongings. In February 1988, defendants purchased a renter's policy from Auto–Owners Mutual Insurance Company (Auto–Owners) after an electrical surge damaged some of their personal property.

Michael PEPPER, Appellant,

v.

STAR EQUIPMENT, LTD., Appellee,

and

Owatonna Manufacturing Company, Inc., Third-Party Defendant.

No. 90-1766.

Supreme Court of Iowa.

April 15, 1992.

In products liability action, the District Court, Story County, M.D. Seiser, J., allowed defendant to implead third-party defendant. Plaintiff appealed interlocutorily. The Supreme Court, Carter, J., held that defendant should not have been allowed to implead, for fault apportionment purposes, third-party defendant protected against personal judgment by federal bankruptcy laws.

Reversed and remanded.

Snell, J., filed dissenting opinion.

1. Parties ⇐51(4)

Defendant in products liability action should not have been allowed to implead, for fault apportionment purposes, third-party defendant protected against personal judgment by federal bankruptcy laws; absent liability insurance, same reasons that exist for not considering fault of phantom or nonjoined parties favor denial of impleader of parties protected against personal judgment by federal bankruptcy laws.

2. Negligence ⇐97

Rule that fault of defendant or third-party defendant with defense to plaintiff's claim is not to be considered in allocation of aggregate causal fault by trier of fact is not limited to situations in which there is absence of causal fault on part of extra party; rule applies irrespective of fault when party has special defense to plaintiff's claim.

3. Negligence ⇐97

Requirement that third-party defendant's fault may not be considered in apportionment of aggregate fault unless plaintiff has viable claim against that party is not mere mechanical rule but is based on policy considerations arising in application of chapter providing for comparative fault allocation in tort actions. I.C.A. § 668.1 et seq.

Kirke C. Quinn and Ben T. Doran of Courter, Quinn, Doran & Anderson, Boone, for appellant.

Richard G. Santi and Michael J. Eason of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, for appellee.

Considered en banc.

CARTER, Justice.

This interlocutory appeal challenges an order of the district court allowing a defendant in a products liability action to implead a third-party defendant protected against a personal judgment by federal bankruptcy law. After considering the arguments presented, we conclude that the impleader approved by the district court was improper and reverse that court's order.

The present controversy arose in a products liability action filed by plaintiff, Michael Pepper, as a result of injuries suffered while operating a front-end skidloader designed and manufactured by Owatonna Manufacturing Company, Inc. (Owatonna). Plaintiff's original petition named Owatonna as the defendant against whom his claim was being made. After he learned that Owatonna was in the midst of a chapter 7 bankruptcy proceeding in federal court in Minnesota, plaintiff filed an amended petition deleting Owatonna as a defendant and adding Star Equipment, Ltd. (Star Equipment) as the defendant against whom claim was being made.

The amended petition sought recovery from Star Equipment on theories of strict liability and negligence, each based on the sale of the skidloader by Star Equipment to plaintiff's employer. Star Equipment re-

sponded by asserting affirmative defenses of contributory fault and distributor's immunity under Iowa Code section 613.18(1) (1989). Star Equipment also moved the district court to permit the filing of a third-party petition against Owatonna.

Attached to the latter motion was an order of the bankruptcy court in Minnesota allowing Star Equipment to assert a claim against Owatonna for the sole purpose of apportioning fault to that entity in the trial of plaintiff's claim against Star Equipment. The order of the bankruptcy judge provided that the automatic stay provisions imposed by the chapter 7 proceeding would bar an attempt to satisfy any judgment in the state court action from Owatonna's assets. In keeping with this order, the prayer for relief in Star Equipment's third-party claim merely stated:

> [T]hird-party plaintiff Star Equipment, Ltd. prays that the fault of third-party defendant Owatonna Manufacturing Company be determined for purposes of Iowa Code Chapter 668.

[1] The primary thrust of plaintiff's argument against allowing impleader of Owatonna is that this would frustrate a legislative exception to distributor immunity under section 613.18(1)(b) for certain product liability claims when the manufacturer is insolvent. He also urges that to allow impleader of a third-party defendant against whom no valid personal judgment may be obtained frustrates the basic tenets of comparative fault actions as established in Iowa Code chapter 668.

Star Equipment responds by urging that nothing in section 613.18 purports to deal with the present issue one way or the other. It also points out that, unlike the Uniform Comparative Fault Act from which chapter 668 was derived, the Iowa law contains no special rules of fault apportionment for insolvent defendants.[1]

We do not base the result that we reach in this decision on section 613.18. We believe the answer to the parties' disagreement is to be found in our prior decisions interpreting chapter 668. In *Peterson v. Pittman*, 391 N.W.2d 235 (Iowa 1986), we reviewed a situation in which a county employee sued a contractor working on a county project for injuries allegedly caused by the contractor's negligence. The contractor sought to add as third-party defendants the county and the coemployee who supervised plaintiff. No affirmative relief was claimed against either. The prayer for relief merely requested "that the jury examine [defendants'] conduct and be allowed to allocate a certain percentage of the negligence to those parties." We held that it was improper to bring parties into an action for purposes of ascertaining their degree of fault in the absence of some claim for affirmative relief against those parties. *Id.* at 238.

Star Equipment seeks to distinguish *Peterson* on the basis that, in the present case, both plaintiff and Star Equipment are precluded from making any claim against Owatonna as a result of the latter's bankruptcy. We believe, however, that the strategy of adding a party solely for purposes of fault allocation will almost always arise in situations where the added party has some special defense against a claim for affirmative relief. In *Peterson*, any claim by the plaintiff or the defendant contractor against the third-party defendants was precluded by the exclusive remedy bar of the workers' compensation statutes. In the present case, the bar to seeking affirmative relief against Owatonna rests in the federal bankruptcy law. We find that the reason for not permitting impleader is equally persuasive in either situation.

There is a more fundamental reason why the effort to implead Owatonna solely for purposes of fault allocation should be denied. That is because under the applicable substantive law no fault is properly allocable to Owatonna under the circumstances which exist in the present case. We have

1. Neither the Uniform Comparative Fault Act nor chapter 668 deal with the issue of a defendant's insolvency or bankruptcy before judgment. Section 2(d) of the Uniform Comparative Fault Act provides for postjudgment reallocation of fault attributable by verdict to a party against whom a judgment has proved to be uncollectible. *See* 12 Uniform Laws Annot. 48 (Supp.1991). No similar provision is contained in chapter 668.

previously recognized in *Schwennen v. Abell*, 430 N.W.2d 98 (Iowa 1988), and *Reese v. Werts Corp.*, 379 N.W.2d 1 (Iowa 1985), that, if a defendant or third-party defendant has a defense to the plaintiff's claim, that party's fault is not to be considered in the allocation of aggregate causal fault by the trier of fact. *Schwennen*, 430 N.W.2d at 102–03; *Reese*, 379 N.W.2d at 6.

[2] The rule adopted in *Schwennen* and *Reese* has not been limited to situations in which there is an absence of causal fault on the part of the extra party. It also applies when that party has a special defense to the plaintiff's claim, irrespective of fault. In *Reese*, as in *Peterson*, the special defense of the third-party defendant was based on the exclusive-remedy provisions of the workers' compensation laws. In *Schwennen*, the defendant's special defense was based on the rule that no action lies between a deprived spouse and an injured spouse *inter se* for loss of consortium. Although Star Equipment suggests that the automatic stay provision of the pending chapter 7 bankruptcy should not be equated with the affirmative defenses that were involved in *Schwennen* and *Reese*, we believe this is a distinction that is without significance.

[3] The requirement that a third-party defendant's fault may not be considered in the apportionment of aggregate fault unless the plaintiff has a viable claim against that party is not a mere mechanical rule. It is based on policy considerations arising in the application of chapter 668. As we recognized in *Schwennen*, 430 N.W.2d at 103–04, the presence of a third-party defendant in an action may siphon off a portion of aggregate fault from the defendant against whom the plaintiff is claiming. This can result in the plaintiff receiving a lesser recovery than if the third-party defendant were not in the case.

Under Iowa Code section 668.4 (1989), if a defendant is found to bear fifty percent or more of the aggregate fault, that party is liable for the total damages assessed, diminished only by the plaintiff's percentage of fault and fault attributable to released parties.[2] If a defendant is found to bear less than fifty percent of the aggregate fault, that party's liability is arrived at by multiplying the total damages found by the trier of fact by that defendant's percentage of fault. In the application of these rules, a slight difference in fault allocation may produce a substantial difference in recovery.

A plaintiff's only real protection against this type of recovery diminution is to claim directly against the third-party defendant on the same cause of action alleged against the primary defendant. The statute of limitations has been relaxed under section 668.8 to permit this to be done in nearly all cases. *See Betsworth v. Morey's & Raymond's*, 423 N.W.2d 196, 197 (Iowa 1988). If, however, as in the present case, the plaintiff has no possibility of obtaining an enforceable judgment against the third-party defendant, plaintiff has no protection against fault siphoning. In addition, this situation is aggravated by the fact that the defendant against whom plaintiff has claimed will normally attempt to shift blame for the occurrence to the bankrupt third-party defendant who has no interest in the result of the litigation and thus no motive to defend against the claims. On balance, we believe that, in the absence of liability insurance, the same reasons that exist for not considering fault of phantom or nonjoined parties, *see Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156, 159 (Iowa 1986), favor denial of impleader of parties protected against a personal judgment by federal bankruptcy laws.

We have considered all issues presented and conclude that the order of the district court should be reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

All Justices concur except SNELL, J., who dissents.

2. To the extent that the decision in *Christopherson v. Deere & Co.*, 941 F.2d 692, 695–96 (8th Cir.1991), is in conflict with this conclusion, we believe it represents a misinterpretation of the joint and several liability rules established by § 668.4.

SNELL, Justice (dissenting).

I respectfully dissent.

This decision in effect converts our comparative fault chapter 668, from authorizing apportionment of fault to mandating collectibility of damages. The majority justifies its result as needed to protect a plaintiff against fault siphoning. Nothing in chapter 668 suggests, however, that an insolvent defendant should suddenly disappear from the total fault picture, leaving solvent defendants to bear all the blame for a plaintiff's damages. In eschewing fault siphoning the result reached by the majority is a sort of fault avulsion.

Owatonna Manufacturing Company, Inc. was party to this lawsuit, initially, having been sued by the plaintiff as the defendant solely responsible for his injuries. No one doubts that chapter 668 applied then.

On learning of Owatonna's bankruptcy proceedings, plaintiff then sued Star Equipment claiming it was solely responsible. Owatonna was dismissed by plaintiff from the suit at this time. Instantly, chapter 668 no longer applies. The majority concludes that it is legal for plaintiff to bring suit against a solvent defendant but it is illegal for a subsequently sued defendant to bring into the suit the same original defendant to apportion fault because it is now insolvent. This scenario assures plaintiff a 100% recovery from somebody more than it furthers the legislature's intent to fairly apportion fault. An analysis of the interplay between our comparative fault chapter and our statute limiting products liability of nonmanufacturers indicates that allowing Owatonna to be impleaded was proper.

Iowa Code section 613.18(1), (2) (1991) provides as follows:

> **Limitation on products liability of nonmanufacturers.**
>
> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
>
> a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
>
> b. Not liable for damages based upon strict liability in tort or breach of implied warrant of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.
>
> 2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

The relevant provision from our comparative fault act is Iowa Code section 668.3(2), which reads as follows:

> In the trial of a claim involving the fault of more than one party to the claim including third-party defendants ... the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
>
> ....
>
> b. The percentage of total fault allocated to each ... third-party defendant....

Plaintiff maintains that Iowa Code section 613.18(1)(b) reflects a legislative intent to ensure that where a plaintiff is entitled to bring a products liability action against a seller, the plaintiff's actual recovery therein will not be diminished by an apportionment of fault between an insolvent manufacturer and the solvent seller pursuant to Iowa Code section 668.3(2)(b). In contrast, if Star Equipment, the seller in the instant dispute, is allowed to join Owatonna Manufacturing as a codefendant, the chapter 668 comparative fault act would be applicable and an apportionment of fault between

Star Equipment and Owatonna would be in order. Iowa Code § 668.3(2)(b).

Turning to the language of the Iowa statutes, chapter 668 provides nothing to suggest that an insolvent person or entity may not be made a "party" for purposes of apportioning fault. More specifically, Iowa Code section 668.2 defines a party as being any of the following: (1) a claimant, (2) a person named as a defendant, (3) a person who has been released, and (4) a third-party defendant. Thus, considering chapter 668 alone, to the extent that Owatonna is made a "party" to this lawsuit, it may be allocated a percentage of fault under section 668.-3(2)(b).

Furthermore, allowing an insolvent manufacturer to be made a codefendant in a products liability suit against a seller who is not also an assembler is consistent with the legislative intent as expressed in Iowa Code section 613.18. Iowa Code section 613.18 is designed to expose a seller or distributor, who is not the assembler, designer or manufacturer, to liability in a products liability action only where two conditions are satisfied: One, the products liability action must not be based solely on an alleged defect in the original design or manufacture of the product, and two, the manufacturer must either not be subject to the jurisdiction of the courts of this state or have been judicially declared insolvent. Iowa Code § 613.18(1)(a), (b).

Standing alone, the formulation of the statute above might suggest that a seller or distributor, who is not also the assembler, designer or manufacturer of the product, could be held liable for defects introduced by the manufacturer so long as the suit was not based *solely* on an alleged defect in design or manufacture and the manufacturer is either not subject to to the jurisdiction of the court or has been judicially been declared insolvent. However, subparagraph two of section 613.18 strongly suggests that the legislature did not intend to expose a seller who is not also an assembler to liability for the manufacturer's share of the harm, even where the suit is not based solely on an alleged defect in the original design or manufacture of the product. Subparagraph two of section 613.18 clearly exposes a seller or distributor *who is also the assembler of a product* to liability for injury that has no causal relationship to the assembly of the product whenever the manufacturer is either not subject to the jurisdiction of the court of this state or has been judicially declared insolvent. In effect, the legislature has expressly made the seller who is also an assembler an insurer of the manufacturer's solvency, but has notably declined to do the same with respect to a seller who is not also an assembler of the offending product. The negative implication of this express legislative mandate is that if Star Equipment is not both the assembler and the seller of the skidloader, then it should not be shouldered with liability arising from a defect introduced by the manufacturer/designer.

Other comparisons indicate that Iowa chapter 668 on comparative fault and section 613.18 limiting products liability of nonmanufacturers are not mutually exclusive. Nowhere in section 668.2 is the definition of "party" limited to solvent parties. Also, section 613.18 affects the liability of sellers only when the suit is based on strict liability or breach of implied warranty of merchantability. Fault based on negligence is not affected by section 613.18. Plaintiff's construction of these statutes would result in a nonmanufacturer seller being able to compare the manufacturer's fault in a negligence case, but not in a strict liability or implied warranty case. None of the statutory language suggests that this bizarre result was intended by the legislature. *See Metier v. Cooper Transp. Co.*, 378 N.W.2d 907, 913 (Iowa 1985) (impractical or absurd results are to be avoided). I am also unable to find any language in section 613.18 indicating that the nonmanufacturer product seller was intended to be the sole target in cases where the manufacturer is insolvent. Similarly, no language in chapter 668 suspends its principles when a party is insolvent.

Another statutory rule would be drastically altered by plaintiff's claim. Section 668.4 abolished joint and several liability among joint tortfeasors for a defendant found less than fifty percent at fault. This 100% liability would be reinstated by the majority's decision when the manufacturer is insolvent, a result nowhere indicated as the intent of the legislature.

In deciding that this case is controlled by our prior decisions, the majority has ignored an analysis of these statutes and has accepted a mechanical application of our cases.

In *Peterson v. Pittman*, 391 N.W.2d 235 (Iowa 1986), we held that third-party defendants were properly dismissed where they were sued for the purpose of ascertaining their degree of fault without any claim being made against them. *Id.* at 238. Because no relief was sought, they were not parties to the suit. We addressed a collateral issue in *Selchert v. State*, 420 N.W.2d 816 (Iowa 1988). There, we held that the comparative fault act does not require joinder of all potential defendants in one action. *Id.* at 819–20. Thus, fault allocation pursuant to chapter 668 was precluded against defendants who had not been made a "party" to the suit. *Id.* We said: "Had our legislature intended to include in the section 668.2 definition of 'party' all those persons involved in an occurrence, whether or not named as a claimant or defendant, it could easily have done so." *Id.* at 820. Finally, in *Schwennen v. Abell*, 430 N.W.2d 98 (Iowa 1988), we said:

> The fault of parties toward the claimant which has not been placed in issue cannot be considered. *Peterson v. Pittman*, 391 N.W.2d 235, 238 (Iowa 1986). Similarly, fault of parties placed in issue in the pleadings which is ultimately determined to be legally insufficient to support the claim may not be considered in the aggregate fault apportionment. *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading*, 382 N.W.2d 156, 158–60 (Iowa 1986); *Reese v. Werts Corp.*, 379 N.W.2d 1, 4 (Iowa 1985).

Our decisions in these cases recognized the need to exclude phantom defendants from being apportioned fault under our comparative fault act. In *Schwennen*, we said that the jury must be made aware of the effect of its fault apportionment on the claimant's right of recovery. We reversed and remanded for reconsideration of fault where the jury had considered a spouse's fault who could not be liable on a loss of consortium claim. *Schwennen*, 430 N.W.2d at 104.

Although these cases consider the effect of nonparties and legally immune parties to a suit, they do not rest on a construction of our comparative fault act based on the collectibility of judgments. Our comparative fault act apportions fault, not solvency.

In the case at bar, further actions against Owatonna were automatically stayed by the bankruptcy court. When Star Equipment obtained the order from the bankruptcy court permitting suit but prohibiting collection of any judgment against Owatonna, it did what it could to make Owatonna a party. A demand for judgment by Star Equipment against an insolvent Owatonna has no relevance to the apportionment of fault issue and might violate the bankruptcy court's order. *Cf. Green v. Welsh*, 956 F.2d 30 (2nd Cir.1992) (section 524 of bankruptcy code not a bar to a judicial proceeding to determine debtor's liability on prepetition claim as prerequisite to claimant's recovery from debtor's insurer). Owatonna would not be a phantom defendant but would be seen by the jury as a party whose fault will necessarily be placed "at issue" as the source of the product defect is litigated. *See Schwennen*, 430 N.W.2d at 102.

I believe the impleader of Owatonna was consistent with our cases and the legislative intent of the statutes. The trial court should be affirmed.

DEFENDING TRUCKERS

R. Jeffrey Lewis
Gamble & Davis, P.C.
Des Moines, Iowa

I. LEGAL FRAMEWORK FOR TRUCKER CASES.

1. <u>Legal Relationships</u>. In general, the trucking industry is regulated by the Federal Motor Carrier Regulations of the Interstate Commerce Commission (49 CFR §300, et seq.). Due in part to these regulations and to tradition, the trucking industry involves a variety of somewhat unique legal relationships which can affect the handling of the defense of a truck accident. The most common forms are:

   A. <u>Leased Owner-Operators</u>. While owner-operators of trucks are a very common form of small business in Iowa, it has been my experience that many attorneys do not understand the legal arrangement. In its simplest form, the Interstate Commerce Commission issues operating authority to a trucking company, a "common carrier," to engage in the interstate transportation of cargo and the trucking company in turn leases its truck tractors and drivers from owner-operators of the trucks. The trucking company provides the loads, interstate operating rights and trailers and the truck owner supplies the truck and a driver, usually himself. Typically, the owner of the equipment owns one or possibly two semi trucks, lives in a small town or a rural area, does most of the driving of his unit and handles as much of the maintenance and repairs as possible. When "relief" or other drivers are used they often are relatives or friends of the owner-operator. The trucking company involved is usually a larger, sometimes quite large, operation with regular shipper customers, numerous trailers and at least one terminal. The owner-operator in these arrangements is considered by the parties to be an independent contractor and the arrangement is specifically authorized by the Interstate Commerce Commission (see 49 CFR §1057.11, et seq.) provided the lease is a "permanent" lease over thirty (30) days in duration and satisfies other regulatory requirements. It is common for the plaintiff in truck accident cases to sue both the lessor and lessee since the name of the trucking company is displayed by ICC "placards" on the side of the cab of the truck and the driver/owner of the truck is listed in the police report. From the defense standpoint, the issue as to the identity of the

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defendant(s) can be of some importance because the owner-operator is typically a hard-working small businessman with virtually no assets other than his truck and plaintiff's counsel often views the trucking company as a "target" defendant. While the common carrier lessee will occasionally be dismissed on motion, in my experience the vicarious liability of the trucking company is usually a jury issue due to the degree of control exercised by the trucking company over the owner-operator. I am attaching a copy of a typical jury instruction on this issue which was submitted in a recent case in Polk County.

B. <u>Employee or Company Drivers</u>. A number of trucking companies still have employee drivers or a combination of employee drivers and owner-operators. As a practical matter, the primary differences between these categories of drivers is ownership and degree of control over the semi truck and methods of compensation. Hourly wages are rarely paid to either category. Owner-operators are usually paid a percentage of the gross revenue for a trip from settlement sheets while company drivers are often paid according to miles driven on a trip. Both types of drivers are dispatched by trucking company employees over designated routes and are controlled to a large extent by company policy and procedures. Trucking company owned trucks tend to be more uniform in age and condition, to have safety extra features such as speed governors, to be newer and more professionally maintained with good maintenance records. From the standpoint of the plaintiff, both forms of compensation can generate an argument or inference that the truck driver has a real incentive to work excessive hours at excessive speeds and the lack of maintenance records of many owner-operators on trucks with as much as 400,000-500,000 miles on them can generate negligence arguments in equipment defect related cases.

C. <u>Common Ownership But Different Entities Own Equipment, Have Operating Rights And Employ Drivers.</u> Some of the larger trucking companies in Iowa have, for business and tax reasons, split ownership of company equipment, employment of drivers and operating authority between different affiliated corporations with common ownership. The equipment company permanently leases the trucking to the operating company and the operating company contracts with the employee company for drivers to operate the leased

equipment. A variation of this arrangement is that the trucking company contracts with an unrelated company to supply drivers. The information normally available at the scene of an accident is the owner of the truck, the name of the driver and the common carrier designation on the cab of the truck. The actual employer is not known by the plaintiff until discovery or trial. Since the negligence of a consensual driver is not necessarily imputed to the owner of the vehicle (unlike an employer-employee situation) the identity of the defendants can have significance in certain cases. See, Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991).

D. Leases and Insurance. The "permanent" lease of an owner-operator with a common carrier is required to provide, among other things, that liability insurance for the protection of the public is to be supplied by the trucking company lessee for truck operation under the lease. See 49 CFR §1057.12. The minimum amount of liability insurance required is $750,000.00. The rentention (or deductibles) of trucking companies are often quite large and, from a practical standpoint, defense counsel in some lawsuits is spending the money of the insured, not the insurance company, in connection with settlements or judgments. The permanent lease required liability insurance coverage runs to both the owner-operator and authorized carrier for claims brought by third party plaintiffs. Typically, the owner-operator will have "bobtail" liability insurance coverage for accidents which occur while he is operating his truck outside the scope of the business of the lessee carrier and not in furtherance of the lease. This bobtail coverage must be specified in the permanent lease. 49 CFR §1057.12. Since owner-operators do not always have a return load for the trucking company after a delivery and do not want to "deadhead" back, they often enter into "trip" leases for a specific load or trip. These trip leases are also authorized by Interstate Commerce Commission rules. See 49 CFR §1057.11, et seq., but provide that the lessor will indemnify and hold harmless the lessee from any liability arising from accidents. These leases which are contemporaneous with the "permanent" leases often involve complicated questions of which party is responsible for claims, identity of the insurance carriers providing coverage and which insurance coverage is primary.

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2. <u>Violation of Interstate Commerce Commission/Department of Transportation Regulations as Negligence Per Se</u>. There is no Iowa case which directly holds that the violations of federal motor carrier rules and regulations are negligence per se, but it seems clear that they are and judges so instruct juries. It is the general rule in Iowa that the violation of statutory rules of the road or ordinances constitute negligence per se. <u>Bannon v. Pfiffner</u>, 333 N.W.2d 464 (Iowa 1983); <u>Bangs v. Keifer</u>, 174 N.W.2d 372 (Iowa 1970). In other jurisdictions in which this general rule has been applied to regulatory requirements of interstate truckers a similar result has been reached. See, <u>Hageman v. TSI, Inc.</u>, 786 P.2d 452 (Colo. 1989). The most common way this issue arises in Iowa cases is with warnings on disabled or stopped trucks on highways, usually on an Interstate Highway. The Federal Motor Carrier regulations are specific on what warnings must be used, where they are to be placed and when. See 49 CFR §§390-399 and a copy of a jury instruction on this issue submitted by the court in a recent case in Warren County. Truckers, being independent, when they do put out flares, fuses or reflective triangles, generally have their own methods of using them and their own loose interpretation of what is required. As a consequence, the plaintiff often can claim negligence per se in this common accident situation based upon non-compliance with applicable rules.

3. <u>Sudden Emergency</u>. The affirmative defense of sudden emergency as excusing otherwise negligent conduct has been used effectively by defense lawyers in the past in truck accident cases. Juries seem to relate to this defense and often have experienced unexpected obstacles or emergencies in their own driving. The defense has unique application to the operation of a loaded semi truck-trailer because the driver cannot maneuver his vehicle like other vehicles, the weight and momentum of the load makes it difficult to react quickly and the driver must always be concerned about "jackknifing" his rig and upsetting it across the highway. This is particularly true in cases involving winter weather conditions. Unfortunately, from the defense standpoint this defense has been eroded by the adoption of comparative fault and decisions subsequent to adoption of the Comparative Fault Act. The Iowa Court of Appeals decision in <u>Miller v. Eichhorn</u>, 426 N.W.2d 641 (Iowa App. 1988), while not abolishing the defense, found that it was not error to refuse to submit it to a jury on the grounds that the comparative fault reasonable man instructions allowed the jury to consider the existence of an emergency. Instead of a specific issue submitted to the jury which would excuse a trucker's negligence, the issue is now blended into

fault instructions which give it considerably less impact and effectiveness.

4. Logbooks and Hours of Service. The rules for the hours an interstate truck driver can drive or be on duty are quite detailed and specific. See 49 CFR §395.2, et seq. Regardless of background, education or degree of sophistication in other areas, all interstate truck drivers are amazingly proficient at filling out and reading their logbooks. The logbooks are invariably in compliance and are often spot-audited by trucking companies for compliance. The problem is that they are not always accurate. It is not rare for an industrious plaintiff's attorney to be unable to show that while a truck driver's logs show that he was on the west coast, his fuel ticket or trip expense vouchers show that he was purchasing diesel for his truck in the Midwest.

5. Driver Qualification Files. A truck driver, whether he or she is an owner-operator or an employee driver, must be qualified to drive a truck interstate by the authorized common carrier and the carrier is required to maintain the qualification file. See 49 CFR §391.1, et seq. This file contains, among other things, the employment application, prior employment inquiries, reviews of driving record, results of driving road test, the written test of safety and I.C.C. rules and results of physical examination. This file is almost always requested by plaintiffs and can contain information damaging to the truck driver's defense.

6. Police Officer Opinions. While not unique to the truck industry, truck drivers do seem to receive citations after accidents more than other drivers, usually for failure to maintain control or to keep a proper lookout, and many police officers, perhaps correctly, view them as professional drivers with a duty somewhat higher than the normal motorist. Until recently, the outcome of some personal injury cases could be largely determined by one party or the other qualifying the investigating officer as an expert based upon experience and asking his opinion concerning the cause of the accident or fault of the parties. The Eighth Circuit Court of Appeals and the Iowa appellate courts have lately been taking a closer look at these "experts" and refusing to allow police officer opinions:

   A. Zimmer v. Miller Trucking Co. Inc., 743 F.2d 601 (8th Cir. 1984) (portions of police officer report not admissible where he wrote that defendant contributed to accident by illegal or improper parking).

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B. Faries v. Atlas Body Mfg. Co., 797 F.2d 619 (8th Cir. 1986) (police officer expert opinion and report that cause of accident was motorcyclist's speed and loss of control should not have been admitted, not supported by sufficient investigation and based upon the statement of an interested party).

C. Bornn v. Madagan, 414 N.W.2d 646 (Iowa App. 1987) (opinions of investigating officer, deputy sheriff and state trooper, not admissible that accident caused by failure of a driver to yield right-of-way; constituted a legal conclusion and was an opinion as to relative faults of the parties).

D. Nicholas v. Schweitzer, 472 N.W.2d 266 (Iowa 1991) (investigating officer's testimony excluded as to whether defendant's vehicle was moving when a truck passed it before collision; not a reconstruction expert and opinion based upon hearsay declarants; also jury might give undue weight to his opinions).

E. Terrell v. Reinecker, 482 N.W.2d 428 (Iowa 1992) (investigating officer's testimony that in his opinion motorist's failure to yield right-of-way should not have been admitted at trial since it was a legal conclusion that plaintiff violated a statutory duty).

II. FACTUAL FRAMEWORK IN TRUCKER CASES.

1. Citations. Interstate truck drivers who receive tickets arising from accidents, even those involving death and serious personal injury, almost always plead guilty to them either by forfeiting their bond or by a guilty plea. Most truck drivers view a traffic citation as a hazard of professional driving and do not want to lose a week or two weeks of work by losing trips to attend court appearances and hearings. They also often feel that they would need an attorney but do not feel that they could really afford to retain one. Since guilty pleas are admissible evidence in Iowa, they can create real problems for defense counsel.

2. Safety Programs. Many trucking companies have not only their own safety programs and safety rules, but also (usually at the urging of their liability insurance companies) make a determination after an accident whether it was preventable or not. A preventable accident determination represents the safety department's view that the truck driver could have been more careful and safe and this information is documented in the driver's file. Regardless of whether

this decision is ultimately determined to be admissible at trial, it is an obstacle which needs to be overcome with the driver and company witnesses. Counsel for the plaintiff can generally have a field day with company safety rules which are often general and specific to the conduct involved in the accident.

3. Knowledge of Truckers. Many Iowa residents know truckers or have had relatives or friends who have been truck drivers in the past. Virtually every jury panel in Iowa contains people with some knowledge of truck driving and truck drivers. There are advantages and disadvantages to this fact. Jurors familiar with truckers often know that substantial liability insurance is required and may have some bias towards individual trucking companies. At the same time, it helps in voir dire and during the trial in terms of empathy and identity with the truck driver.

4. Drivers. Truck drivers as a group change jobs a lot. It is not unusual for a truck driver to give an employment history with 10 or 15 different trucking companies and to have been at various times either owner-operators or employee drivers.

5. Place of Accidents. Trucking is not just on interstate highways, but Interstate trucker experiences are generally those to which counsel for the plaintiff will make oblique references in cases involving speed issues. Truckers transport virtually any commodity entering or leaving Iowa and use almost all roads in Iowa. Common interstate accidents involve disabled or stopped trucks, rearending slow moving vehicles and losing control in bad weather. Other highway accidents usually involve passing other vehicles, blocking intersections and lane changes.

6. Trucking Business. Trucking companies, even large ones, are traditionally family enterprises in which a number of family members work as employees. The industry is quite competitive and truckers tend to be specialized along major customer needs.

III. TRIAL PREPARATION/TRIALS/SUGGESTIONS.

1. Use individuals at trial, who, if plaintiff is right, caused the accident. Generally, but not always, this is the truck driver. To the extent possible the plaintiff should be required to try his case against this individual.

2. Trucking companies can and should be humanized as much as possible by stressing family ownership and involvement, interest in safety, the roots of the

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company, etc. An individual in a supervisory capacity should, if possible testify, on an issue of substance.

3. Ask about speed governors and speed tapes. It is becoming quite common for companies to purchase trucks with automatic speed regulators which prevent a semi truck on level highway from traveling more than about 68 miles per hour. Speed tapes are less common but do exist in Iowa. Neither speed tapes nor governors are hardly ever used in trucks owned by owner-operators.

4. If possible, use "in-house" experts on operation of trucks, alleged mechanical problems, daily safety checks, etc. Avoid obviously expensive out-of-state experts.

5. Contact and interview <u>all</u> witnesses and potential witnesses to the accident and events leading to the accident. While this seems obvious, it is surprising how often plaintiffs will rely on one witness and liability experts. In my experience, initial contact with witnesses is best made by non-lawyers.

6. Give priority to contact with all investigating officers and to neutralizing, if possible, adverse testimony. Attorneys tend to rely upon information from the officer who signed the report or the technical accident reconstruction officer. In serious accidents there are always numerous police officers assisting. With respect to interstate accidents investigated by the Highway Patrol, there often are local police officers present who can be valuable witnesses on such subjects as visibility, lighting and road conditions. Insurance adjusters and trial counsel are usually not the best individuals to make initial contact with these officers.

7. Review with the truck driver and, however tedious, understand his logbooks and trip records. In the event the logbooks are shown to be inaccurate try not to over react. This obviously bears on the credibility of the driver, but is usually not directly applicable to the primary liability issues.

8. Be cautious about arguing that the damage to the vehicles was slight as evidence that the injuries should be minimal. In semi truck-automobile accidents it is not unusual to have damage to the car, including the seat of the injured occupant, which is not readily visible from photographs. Slight damage to a semi truck can be expensive to fix.

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9. Semi trucks have numerous lights of various types other than the headlights and this can be helpful to remember and explain when vehicle visibility is an issue.

10. Involve the truck driver in development of a defense theme. He generally is extremely familiar with his equipment and has views on the cause of the accident. Make sure he is refreshed on the applicable federal and state regulations.

11. Do not concede liability unless absolutely necessary.

12. Understand and be prepared to explain, through witnesses if possible, the mechanics of truck driving such as visibility, jackknifing, ability to stop and turn suddenly and stopping distances in comparison to cars.

13. Make effective use of motions in limine in advance of trial on such subjects as police officer opinions, police officer reports, expert opinions and retained experts, insurance, and the extent of trucking operations of the defendant truck company (number of trucks, trailers, employees, terminals, etc.).

14. In cases in which punitive damages have to be argued, focus on operating profit, not gross revenues or assets. Trucking companies, due to substantial depreciation and other factors, have significant cash flow and gross receipts, but low net or taxable income.

15. If the truck driver has pled guilty to a traffic citation relevant to liability issues before you get the file and the situation cannot be resolved through the courts, develop testimony from the driver as to why he entered the plea. If he entered the plea for reasons related to charge and accident, have him prepared to explain why, at that time, he believed he was guilty.

RL-S242

INSTRUCTION NO. ______

In this case the plaintiff asserts that Defendant Zylstra was an employee of Defendant Sully Transport, Inc. at the time of the accident. The defendants contend that Defendant Zylstra was an independent contractor. In order to establish that Defendant Zylstra was an employee of the defendant corporation, the plaintiff must prove by a preponderance of evidence that an employer/employee relationship existed at that time.

The test for determining whether a person is an independent contractor or an employee is dependent upon many factors. The first inquiry is who has the right to control the physical conduct of the service. If control is vested in Defendant Zylstra, he is an independent contractor. If it is vested in Defendant Sully Transport, Inc., then Defendant Zylstra is an employee.

Control is, however, not conclusive. Although it is the primary consideration, other factors are also relevant. In determining whether Defendant Zylstra was an independent contractor or an employee of the defendant corporation, you should consider the following factors in weighing the evidence to determine if the plaintiff has established that the Defendant Zylstra was an employee but no one single factor is determinative of the issue.

1. The right of selection or to employ at will.

2. Responsibility for the payment of wages by the employer. "Wages" means all remuneration for personal services in cash or any medium other than cash.

3. The right to discharge or terminate the relationship.

4. For whose benefit is the work performed?

5. The intention of the parties as to the relationship they were creating.

6. Is the employer withholding federal income taxes and making deductions of social security?

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INSTRUCTION NO. ______

You are instructed that under federal and Iowa law, the driver of a commercial truck on Interstate Highways has the following legal duties:

(a) Whenever the truck is stopped either upon the traveled portion of a highway or the shoulder of a highway for any reason, the truck driver shall immediately activate his vehicular hazard warning signal flashers and continue the flashing until the driver places required warning devices on the roadway.

(b) Whenever the truck is stopped upon the traveled portion of the highway or the shoulder for any reason, the driver shall as soon as possible, but in any event within ten minutes place required warning devices on the roadway.

(c) The warning devices to be placed shall consist of either three emergency reflective triangles, three electric emergency lanterns, three liquid burning emergency flares or three red emergency reflectors and shall be placed as follows:

    (1) One warning device at the traffic side of the vehicle within ten feet of the rear of the vehicle;

    (2) One warning device at a distance of 100 feet in the direction of approaching traffic in the center of the lane or shoulder occupied by the vehicle; and

    (3) One warning device at a distance of 200 feet in the direction of approaching traffic in the center of the lane or shoulder occupied by the vehicle.

The failure to comply with this law constitutes negligence.

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PROBLEMS OF THE DEFENSE: A JUDICIAL PERSPECTIVE

OR

A PRESENTATION OF POTENTIAL PITFALLS BY PERSONAL PERUSAL FROM THE PERSPECTIVE OF A PERSON ON THE PODIUM

BY

DISTRICT JUDGE CARL E. PETERSON

PROBLEMS OF THE DEFENSE: A JUDICIAL PERSPECTIVE

I. PLEADING - PLAINTIFF'S PARADISE

A. Notice pleading.

1. Purpose.
Function of pleading is to put other parties on notice of what the pleader intends to prove and to define the issues. Treanor v. BPE Leasing Inc., 158 N.W.2d 4, 7 (Iowa 1968); Hanson v. Lassek, 154 N.W.2d 871 (Iowa 1967).

2. Content.
The pleader need only make a short and plain statement of a "claim" showing that he is entitled to relief and demand judgment. Haugland v. Schmidt, 349 N.W.2d 121, 123 (Iowa 1984); Cunha v. City of Algona, 334 N.W.2d 591, 596 (Iowa 1983).

3. Suffiency.
The pleading is sufficient if it apprises of the incident out of which the claim arose and the general nature of the action. Northwestern National Bank v. Metro Center, Inc., 303 N.W.2d 395, 401 (Iowa 1981).

a. Even pleading a wrong theory is not necessarily fatal. Northwestern National Bank v. Metro Center, Inc., supra, at page 401.

b. The petition need not plead ultimate facts or identify a specific legal theory. Lake v. Schaffnit, 406 N.W.2d 437, 439 (Iowa 1987); Adam v. Mount Pleasant Bank & Trust Co., 355 N.W.2d 868, 870 (Iowa 1984).

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B. Motion to Dismiss.

1. When sustainable.
A motion to dismiss grounded on failure to state a cause of action is sustainable only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted. Woods v. Schmitt, 439 N.W.2d 855, 859-60 (Iowa 1989); Hardin v. State, 434 N.W.2d 881, 883 (Iowa 1989); Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d 685, 688 (Iowa 1987); American Bank v. Sivers, 387 N.W.2d 138, 139 (Iowa 1986).

2. Construction of pleadings.
The pleading must be construed in the light most favorable to the pleader and the court should resolve all doubts and ambiguities in the pleader's favor. Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d 685, 686 (Iowa 1987).

3. R.C.P. 104(b) Motion.
The Supreme Court does not recommend filing a motion to dismiss the viability of which is in any way debatable; nor does it endorse sustaining such motions, even where the ruling is eventually affirmed. Cutler v. Class, Whicher & Mishne, 473 N.W.2d 178, 181 (Iowa 1991). Dismissals of many of the weakest cases must be reversed on appeal. Id. This results in wasted judicial resources because two appeals result where one would have sufficed had the case been resolved by way of summary judgment or trial. Id.

   a. Rarely not survive.
   Since the advent of notice pleading under Rule 69(a), it is a rare case which will not survive a Rule 104(b) Motion. As a result, disposition of unmeritorious claims in advance of trial must now ordinarily be accomplished by other

pretrial procedures which permit narrowing of the issues and the piercing of bare allegations contained in the petition. Stessman v. American Black Hawk Broadcasting Co., 416 N.W.2d 685, 688 (Iowa 1987). See also, Unertl v. Bezanson, 414 N.W.2d 321, 323-24 (Iowa 1987)[effect of I.R.C.P. 69(a)(1) and I.R.C.P. 67 upon Rule 104(b)].

It is a rare case which will not survive a Rule 104(b) Motion. American National Bank v. Sivers, 387 N.W.2d 138, 140 (Iowa 1986).

b. Unnecessary.
A motion to dismiss for failure to state a claim is now almost as unnecessary as the similar obsolete pleading of demurrer. Burd v. Board of Education of Audubon County, 260 Iowa 846, 151 N.W.2d 457, 463 (Iowa 1967).

II. JURY VOIR DIRE - PRETRIAL PEEK

A. Right to examine.
"The prospective jurors shall be sworn. The parties may then examine those drawn . . ." R.C.P. 187(b).

B. Purpose.
Litigants have a right to examine prospective jurors on voir dire in order to enable them to select a jury composed of persons qualified and competent to judge and determine facts without bias, prejudice, or partiality. Elkin v. Johnson, 260 Iowa 46, 148 N.W.2d 442 (Iowa 1967).

C. Trial Court Discretion.
Latitude allowed counsel in voir dire of prospective jurors rests largely in Trial Court's sound discretion. Wilson v. Ceretti, 210 N.W.2d 643 Iowa 1973).

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III. MOTION IN LIMINE - POTENT PROCEDURE

A. Purpose.
The function of a motion in limine is not only to exclude reference to anticipated evidence claimed to be objectionable because incompetent, irrelevant, immaterial, or privileged, during the voir dire and opening statements; but also to restrict questions or statements of counsel until the admissibility of the evidence can be determined outside the presence of the jury. Twyford v. Weber, 220 N.W.2d 919 (Iowa 1974).

B. Effect of Denial.
When a motion in limine is denied, the moving party must still make proper objection during trial when the evidence is being offered, or the objection is waived. Rush v. Sioux City, 240 N.W.2d 431 (Iowa 1976).

IV. SUMMARY JUDGMENT - PERILOUS PRECIPICE.

A. Purpose.
The purpose of summary judgment is to avoid a trial when no genuine issue of material fact exists. Amco Insurance Co. v. Stammer, 411 N.W.2d 709, 711 (Iowa Ct. App. 1987). Summary judgment is used to avoid useless trials and streamline the litigation process. Diamond Products Co. v. Skipton Painting and Insulating, Inc., 392 N.W.2d 137, 138 (Iowa 1986). A "trial" as defined by civil procedure rules is a hearing on the merits of a controversy after the opportunity for preliminary proceedings has passed; thus, summary judgment is not a trial within the meaning of the rules. State v. Greenley, 336 N.W.2d 414, 416 (Iowa 1983).

B. Standard.
Summary judgment is proper when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. First National Bank in Fairfield v. Kenny, 454 N.W.2d 589, 591 (Iowa 1990); Behr v. Meredith Corporation, 414 N.W.2d 339, 341 (Iowa 1987). See, Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988).

1. Facts.
   The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202, 211 (1986).

   a. Material.
      An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law. Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988).

   b. Genuine.
      The requirement of "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 889 (Iowa 1989); Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988).

2. Merits.
   In ruling on a motion for summary judgment, the Court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does. Daboll v. Hoden, 222 N.W.2d 727, 731 (Iowa 1974); Matter of the Estate of Henrich, 389 N.W.2d 78, 80 (Iowa Ct. App. 1986).

C. Burden.

1. Initially on movant.
   The burden of showing the non-existence of an issue of material fact is upon the moving party. First National Bank in Fairfield v. Kenny, 454 N.W.2d 589, 591 (Iowa 1990); Farm Bureau Mutual Insurance Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988); Scheckel v. Jackson County, Iowa, 467 N.W.2d 286, 289 (Iowa Ct.App. 1991).

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2. Burden shifts.
After the movant satisfies the initial burden of production, the burden shifts to the resisting party to then set forth specific facts showing there is a genuine issue for trial. James v. Swiss Valley Ag Service, 449 N.W.2d 886, 888 (Iowa Ct. App. 1989).

D. Resisting Party.
When a motion is made and supported, the resisting party may not rest on mere allegations or denials but must set forth specific facts showing a genuine issue for trial. Schuling v. Tilley, 454 N.W.2d 899, 900 (Iowa 1990); R.C.P. 237(e). It can be fatal to the party resisting the summary judgment motion to rely alone on a perceived weakness in the movant's contention. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985).

V. TRIAL CONDUCT - PERSONAL PECADILLOS

A. The trial court shall exercise reasonable control of the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarassment. Iowa Rule of Evidence 611.

VI. EXPERT TESTIMONY - POMPOUS PERSUADERS

A. Admissibility.
It is ordinarily for the trial court to determine in each case whether expert testimony fulfills the requirements of R.C.P. 702. State v. Vincik, 398 N.W.2d 788 (Iowa 1987).

Admissibility of expert opinion testimony rests largely within the Trial Court's discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985).

B. Extent of Information Usable From Expert.
Expert witnesses may base opinions on facts or data not admissible in evidence if "of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon the subject". R.C.P. 703.

Even assuming certain information is of the type reasonably relied upon by experts, Rule 703 does not automatically mean the information itself is independently admissible at trial. Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990).

Nachtsheim v. Beach Aircraft Corp., 847 F.2d 1261, 1270 (7th Cir. 1988) takes the position that Rule 703 generally permits experts to state the underlying basis of their opinions (if the information is of the type reasonably relied upon by experts), but the underlying information still is subject to exclusion under the balancing test of Rule 403.

Even under Rule 803(4) if it is an expression of the plaintiff's conclusion, as opposed to factual data, it may be inadmissible hearsay. J. Weinstein & M. Berger, Weinstein's Evidence, §803(4)(01), at 803-146 (1988).

C. Ultimate Issue.
Objection that qualified expert's testimony invades the province of the jury is of no force and effect. Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978). However, a qualified expert may not testify as to the "fault" of one of the parties. Grismore v. Consolidated Products Co., 232 Iowa 328, 344 (5 N.W.2d 646, 655) (Iowa 1945), nor can an expert testify that liability insurer's attorney acted in bad faith and that the insurer failed to conduct a sufficient investigation of the claim against insured. Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30, 37 (Iowa 1982). Nor may an expert testify to a legal conclusion on domestic law. Miller v. Bonar, 337 N.W.2d 523, 529 (Iowa 1983).

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D. Objection.
Standing objection to conclusions of the expert will not preserve the record. Bornn v. Madagan, 414 N.W.2d 646 (Iowa App. 1987); Van Iperen v. Van Bramer, 392 N.W.2d 480 (Iowa 1986).

E. Non-Professional Experts.
The use of "shirt sleeve" experts. State v. Briner, 255 N.W.2d 422 (Nebraska 1977); U.S. v. Johnson, 575 F.2d 1347 (1978).

F. Cross-Examination.
Questions on cross-examination eliciting testimony from expert that he gets paid several thousand dollars each time he testifies is proper to show possibility of bias. U.S. v. Edwardo-Franco, 885 F.2d 1002 (2nd Cir. 1989). Testimony on cross-examination of expert re: fees earned in prior cases and alleged inconsistent statements in prior cases is proper. Collins v. Wayne Corp., 621 F.2d 777 (1986).

VII. FINAL ARGUMENT - PENETRATING PERCEPTIONS

A. General statement.
State v. Burns, 94 Iowa 238 (Iowa 1903).

B. Acceptable argument.
1. Comments on failure to call a party. 75A Am.Jur.2d, Trial, §588.
2. Comment on failure to call a witness. Johnson v. Kinney, 7 N.W.2d 188 (Iowa 1942).
3. Argument by analogy -- the argument is acceptable if it does not mirror the qualities of a juror.

C. Unacceptable argument.
1. Golden rule argument. Russell v. Chicago, Rock Island and Pacific Railroad Company, 86 N.W.2d 843, 249 Iowa 664 (Iowa 1957) (exception: self-defense).

2. Calling juror by name. In re Maiers Estate, 20 N.W.2d 425, 236 Iowa 960. However, if no objection made, see Johnson v. Kinney, 7 N.W.2d 188 (Iowa 1942).

3. Assuming facts not in the record. State v. Eaton, 190 Iowa 212, 215, 180 N.W. 195, 196 (Iowa 1920).

4. Unduly personalizing the argument.

5. Improper characterization.

6. Conscience of the community. Westbrook v. General Tire & Rubber Co., 754 F.2d 1233 (1985).

7. Reading law to the jury. State v. Mayes, 286 N.W.2d 387.

8. Unit of time. Westbrook v. General Tire & Rubber Co., 754 F.2d 1233 (1985); Cardamon v. Iowa Lutheran Hospital, 128 N.W.2d 226 (Iowa 1964); Althof v. Benson, 147 N.W.2d 875 (Iowa 1967); 22 Am. Jur.2d, Damages, §263-264.

VIII. INSTRUCTIONS - PURSUE OR PERISH

A. Law.
Rule of Civil Procedure 196.

B. Procedure.
It is the trial court's duty to instruct a jury fully and fairly, even without request, but our adversary system imposes the burden upon counsel to make a proper record to preserve error, if any, in the factual circumstance by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in the event they are refused. State v. Sallis, 262 N.W.2d 240 (Iowa 1978).

C. Sufficiency of objection.
The objection must be sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury. Moser v. Stallings, 387 N.W.2d 599 (Iowa 1986).

O

If no objection is taken, the instruction, right or wrong, becomes the law of the case. To be adequate, an objection must advise the court of the basis for complaint and the real criterion is whether the objection alerted the trial court to the claimed error. Even a defective objection may accomplish that purpose. Froman v. Perrin, 213 N.W.2d 684.

D. Timing.
Objections must be timely. State v. Jackson, 397 N.W.2d 512 (Iowa 1986).

IX. IMPEACHING A JURY VERDICT - POST-TRIAL PROTEST

A. Inquiry.
Upon an injury into the validity of a verdict or an indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment, or concerning his mental processes in connection therewith, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. R.C.P. 606.

B. Three-Part Test.
To impeach a verdict on the basis of jury misconduct, the Court has formulated a three-part test. First, the evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct. Second, the acts or statements complained of must exceed tolerable bounds of jury deliberation by constituting jury misconduct. Third, and finally, it must appear the conduct was s calculated to, and it is reasonably probable it did, influence the verdict. State v. Sauls, 391 N.W.2d 239 (Iowa 1986).

C. Quotient Verdict.

Unlikely possibility of attacking quotient verdict. Affidavits of jurors describing their reaction to testimony is not competent evidence to impeach the verdict. State v. Hennessey, 405 N.W.2d 846 (Iowa 1987). The affidavit of jurors concerning how the jurors arrived at compensatory damages award is not competent and is not a basis for new trial. Crowley v. Glessner, 328 N.W.2d 513 (Iowa 1983).

ANNUAL APPELLATE DECISIONS REVIEW

October 1991 - September 1992
473 N.W.2d 612 through 486 N.W.2d

By

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APPELLATE PROCEDURE

Ezzone v. Hansen, 474 N.W.2d 548 (Iowa 1991)

Costs

Court assessed costs of 734 of the successful appellant's 1412-page appendix against the appellant, because including those pages was unnecessary to the issues raised on appeal.

Ahls v. Sherwood, 473 N.W.2d at 619 (Iowa 1991)

Finality

Ahls sued Vacationland and Optimus, the seller and a component manufacturer, respectively, of a heater that exploded in the Ahls home. District court dismissed Optimus on personal jurisdiction grounds. Vacationland then cross-petitioned against Optimus for contribution and indemnity. District court dismissed Vacationland's cross-petition on the ground that the previous dismissal was the law of the case. The Supreme Court rejected Vacationland's request to appeal in advance of final judgment.

On the day set for trial, October 3, 1989, Ahls settled with all remaining defendants. District court entered an order noting the settlements and assessing a $500.00 late settlement penalty. The dismissal documents were filed on November 15. On November 27, Vacationland filed a notice of appeal from district court's dismissal of its cross-petition against Optimus. Optimus moved to dismiss the appeal.

HELD: Vacationland's appeal was timely. District court's October 3 order did not constitute a final adjudication. Although the dismissals filed on November 15 do not constitute a "final order" by the court, the federal concept of "pragmatic finality" permits such dismissals to terminate the district court proceedings and trigger the running of Vacationland's appeal time.

P

Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991)

Further Review

Defendant cross-appealed from judgment entered on defense verdict because district court apportioned 49% of court costs to her. Court of appeals affirmed on both appeals. Plaintiff then applied for further review, but defendant did not. Nevertheless, court proceeded to adjudicate defendant's cross-appeal and reversed the imposition of costs. HELD: Once Supreme Court grants further

review, it "may consider all of the issues properly preserved and raised in the original briefs," including issues raised on a cross-appeal and notwithstanding cross-appellant's failure to apply for further review.

Springer v. Weeks & Leo Co., 475 N.W.2d 630 (Iowa 1991)

Law of the Case

In Springer I, the Court recognized a cause of action for the retaliatory discharge of an at-will employee, at least when "employment is terminated for reasons contrary to public policy." Springer had adduced substantial evidence in support of her claim that she was fired because she pursued a workers' compensation claim, and the Court reversed a directed verdict in favor of defendant. On retrial, defendant argued unsuccessfully that the Court's reversing language in Springer I - "We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state" - required plaintiff on retrial to establish the elements of tortious interference with contract in accordance with sections 766 and 766A of the Restatement (Second) of Torts. District court instead instructed in accordance with ICJI 3100.1 (retaliatory discharge). Jury awarded plaintiff $14,000 in lost wages and $5,000 for emotional distress. On appeal, defendant argued that the "tortious interference" language from Springer I constituted the law of the case.

The Supreme Court affirmed, disavowed all references in Springer I to the "interference" cause of action, and approved ICJI Instruction 3100.1. The court answered the "law-of-the-case" argument by holding that "an appellate court decision becomes the law of the case and is controlling . . . [unless it] has been clarified by judicial decisions following remand." Court listed all of the post-Springer I opinions in which it has referred to Springer's cause of action as "retaliatory or wrongful discharge."

P

In re Estate of DeVoss, 474 N.W.2d 539 (Iowa 1991)

Scope of Review

Appellate review of a denial of intervention "is on error, with some deference given to the district court's discretion."

ATTORNEYS

West v. Jayne, 484 N.W.2d 186 (Iowa 1992)

Association

Attorney West hired Attorney Jayne as an associate. Their oral agreement required West to be responsible for the overhead for Jayne's practice and to pay Jayne a weekly salary and certain percentages of any contingent fees collected by Jayne, those percentages depending upon who secured the client for the law firm and who performed the work.

In 1985, while an ethics complaint against West was pending, West notified Jayne that he could not pay Jayne's weekly salary. Several months later, with no further salary payments forthcoming from West, Jayne moved out without notice but with over 60 files (with written consent of the clients). West sued Jayne for West's share of the fees Jayne collected on these files.

HELD: West's failure to pay Jayne's weekly salary did not permit Jayne to rescind the contract and retain all fees earned in files that had come into Jayne's possession pursuant to their oral agreement. West had already performed his obligations that merit his right under the agreement to certain percentages of the fees ultimately collected. Jayne never attempted to enforce his contractual right to the weekly salary. West's suspension does not annul the West-Jayne contract. While Supreme Court Rule 118.12 and supporting advisory opinions affect what fees a suspended attorney can earn in contingent fee cases that commence before the suspension and end during the suspension, neither the rule nor the opinions impact upon matters of contract between two attorneys.

Committee v. Connolly, 476 N.W.2d 41 (Iowa 1991)

Discipline

Connolly misappropriated more than $26,000 from a payroll service business he conducted. He mishandled two personal injury cases, allowing one to be dismissed under rule 215.1 and representing in another to his clients that he had filed suit and that settlement had been obtained, when in fact no suit had ever been filed or settlement made. HELD: Revocation.

P

Committee v. Conzett, 476 N.W.2d 43 (Iowa 1991)

Discipline

Conzett, who handled personal injury cases only occasionally, failed to bring one such case to trial and permitted it to be dismissed under rule 215.1. He unsuccessfully moved for reinstatement. He failed to inform his client of the dismissal. When new counsel contacted Conzett, he met with client and promised that a settlement offer was imminent. He fabricated a letter from defense counsel with an offer of settlement. Upon delivering it to his client, he immediately "realized the gravity and irrationality of his conduct" and terminated the transaction. He then reported his own violation. HELD: Four-month suspension.

Committee v. Foudree, 477 N.W.2d 384 (Iowa 1991)

Discipline

Foudree failed to appear for trial in case where his client was defendant. Although he claimed that he did not receive notice of trial date, he filed no post-trial motions once the result became known to his client by way of execution. He filed a notice of appeal improperly and failed to file an appendix timely. Supreme Court dismissed the appeal. Foudree failed to handle parking tickets and a DOT hearing for another client after accepting a $2,100 retainer. Foudree lastly failed to respond to the ethics committee's inquiries and the complaints filed by the two clients. Foudree had no office, no secretary, and no files or record-keeping. HELD: One-year suspension.

Committee v. Leed, 477 N.W.2d 390 (Iowa 1991)

Discipline

Bussing had sued her late husband's employer in the late 1970's for wrongful discharge and suffered an adverse verdict. Bussing asked Leed to look into the matter, long after the appeal time had expired. He agreed to do so, and she provided him with documents and deposition transcripts. Leed convinced the employer to pay some additional death benefits because of a mistake by Bussing on an election form. Before moving to the state of Washington, Leed wrote Bussing about his move and promised to look into her matter further. He never contacted her again, and Bussing filed an ethics complaint. He told the committee that he would contact Mrs. Bussing, return her documents, and explain that he could do no more. He never did so. HELD: Three-month suspension.

Committee v. Gill, 479 N.W.2d 303 (Iowa 1991)

Discipline

Gill represented Rafoth in a dissolution. She instructed him to appeal. It was dismissed for failure to file appellate deadlines. Rafoth found out from ex-husband. Gill failed to respond to ethics complaint. HELD: Three-month suspension.

Committee v. Trujillo, 479 N.W.2d 326 (Iowa 1991)

Discipline

Trujillo practiced law in Moline, Illinois, but was licensed to practice in Iowa as well. He was convicted on guilty plea to two counts of theft by deception, arising out of embezzlement from two clients in the total amount of $75,000. HELD: Revocation.

Committee v. Schooler, 482 N.W.2d 426 (Iowa 1992)

Discipline

Schooler practiced law in Carlisle and was "essentially the owner" of a bank there. He acted as counsel for the estate of Kleckner, failed to file the federal estate tax return for five years, and applied for fees with a knowingly false statement that the state taxes "have been filed." When estate made delinquency list, Schooler applied to remove estate, and falsely stated that all tax matters had been cleared. Kleckner's executor, Betty Henderson, died, and Schooler acted as counsel for her estate as well. Henderson's principal creditor was Schooler's bank. He did not advise Henderson's executor of the conflict or obtain any consent to act as attorney for the estate in spite of the conflict. The conflict repeated itself when Henderson's husband died. HELD: Although the estates suffered minimal damage from the delay in filing tax returns and from the conflicts, and although Schooler voluntarily ceased the practice of law in 1989, he is suspended for at least one year.

P

Committee v. Rauch, 486 N.W.2d 39 (Iowa 1992)

Discipline

Attorney delayed closing a client's estate and failed to pay tax when due, took a fee in a conservatorship without court approval, failed to maintain his trust account in an organized manner, lost his temper with a district judge, and failed to handle an adoption in a timely manner. The commission also heard evidence

that the attorney misappropriated funds that were to have been deposited in a trust for his son's benefit, but decided not to recommend disbarment because the attorney was the residuary beneficiary of the son's estate and because he had secured permission from his son's guardian to delay payment of the funds to the trust. HELD: Instead of the three months recommended by the commission, the court imposed a suspension of at least one year.

Committee v. Behnke, 486 N.W.2d 275 (Iowa 1992)

Discipline

Client retained Behnke to handle a slip-and-fall case. Behnke did not document fee agreement for his representation. He recovered $2,100 under a medical payments provision in the tort-feasor's insurance policy. He met with the client for the very first time to obtain the client's endorsement and to pay the client $100. Behnke did not provide any documentation or accounting of the settlement proceeds but advised the client that the balance would go to her treating physician. Behnke deducted two separate fees from the proceeds and failed to pay the doctor until after the client received a billing and contacted new counsel. Behnke also inadvertently overpaid another client from his trust fund and failed to remedy the negative balance for an extended period of time. Behnke had previously been suspended for three years and previously had been reprimanded. HELD: Three-year suspension.

Committee v. Boysen, 480 N.W.2d 26 (Iowa 1992)

Discipline

Boysen made payment to client Hunter from his trust account with the expectation that Hunter would be receiving a settlement payment on a legal matter being handled by Boysen. When the settlement did not occur, Boysen's trust account carried a negative balance for several months, until Boysen's law firm made up the difference. Client Newbury retained Boysen to obtain a loan for her. Although Boysen was unsuccessful, he acted as if he had obtained it and entered a record of deposit for the amount of the desired loan in his trust account under her name. Boysen then proceeded to write checks to her from the trust account, which caused a negative balance for several months.

HELD: Reprimand rather than suspension, because Boysen's conduct was aberrational and no client was damaged.

Committee v. Horn, 480 N.W.2d 861 (Iowa 1992)

Discipline

Client contacted Horn in June 1989 to foreclose a mechanic's lien. Horn represented thereafter that suit had been filed when it had not, and Horn did not file suit until after client filed a grievance complaint 15 months after first contacting Horn. Horn did not respond to the ethics committee. Horn previously had been suspended under similar circumstances for three months. HELD: Six month suspension.

In re Conservatorship of Holmberg, 483 N.W.2d 9 (Iowa App. 1992)

Fees

Lucille Holmberg fell, injured herself, and was unable to manage her affairs. Her son, Donald, filed a petition for appointment of conservator. The court appointed the bank as conservator. Lucille's attorney, George Clark, agreed to act as attorney for the conservator. Lucille's children wanted to prosecute Lucille's claim. Clark and the conservator were not optimistic about the merits of Lucille's case. They tried to discourage it. Clark told the children by letter that he would take the case only if paid on an hourly basis, in an effort to dissuade them from pursuing the claim. The children persisted, and Clark and the conservator agreed to prosecute the claim. Clark agreed with the conservator that the prudent method of payment under the circumstances was by contingent-fee. The conservator (through Clark) obtained an order authorizing the conservator to prosecute the claim and to pay Clark on a contingent-fee basis. The conservator did not notify the children of this change in Clark's position.

Clark obtained a $60,000 settlement for the conservator. Several years later, when Donald took steps to close the conservatorship, he contested the attorney fee.

HELD: Contingent fee is a reasonable and well accepted basis for prosecuting civil-damage actions and was a prudent course of action for this conservator. Conservator did not have to apply for judicial permission to commence the lawsuit, and had no obligation to provide the children with notice. Clark had no obligation to provide a further accounting or itemization of his services, given the valid contingent-fee agreement entered into by him and the conservator in good faith in an effort to protect and conserve the ward's assets.

CIVIL PROCEDURE

PEB Practice Sales, Inc. v. Wright, 473 N.W.2d 624 (Iowa App. 1991)

179(b)

Dentist signed exclusive listing agreement with PEB in his own name, even though practice was owned by his P.C. Although PEB introduced dentist to the eventual purchaser, dentist sold practice through a competitor of PEB. After trial on PEB's claim for the commission it would have earned, district court found for PEB but made no finding as to whether the competing broker acted as an agent for the dentist as opposed to the purchaser. District court made no finding as to an offset for the expenses PEB would have incurred in performing the listing agreement. Dentist did not file a 179(b) motion.

HELD: Although "an owner may sell property through his own efforts without necessarily being liable for a commission under an exclusive right-to-sell agreement," appellate court will assume that district court found (but did not state) that competitor was an agent for the selling dentist. Such an implicit finding negates the dentist's argument that he has no liability for selling "through his own efforts." Dentist's failure to alert district court through 179(b) motion to its failure to calculate an offset also waives any error on damage calculation.

State v. Santa Rosa Sales & Marketing, Inc., 475 N.W.2d 210 (Iowa 1991)

179(b)

Attorney General sued Santa Rosa for violations of Consumer Fraud Act and Uniform Securities Act. Court entered ruling and decree after trial, leaving neither side happy. State filed 179(b) motion (which contained a request for an extension of the 10-day deadline) 17 days after entry of the ruling. Santa Rosa filed notice of appeal within 30 days of original ruling but before court had ruled on State's 179(b) ruling. State cross-appealed within 30 days of ruling on 179(b) motion (district court granted State's request for extension of time).

HELD: Request for extension of 10-day deadline for rule 179(b) motion was untimely, and district court had no authority to grant it or to entertain 179(b) motion. Santa Rosa's appeal within 30 days of court's original ruling, therefore, was not premature; State's motion to dismiss Santa Rosa's appeal is denied. State's cross-appeal, which was not filed either within 30 days of court's original ruling or within 5 days of Santa Rosa' appeal, is untimely and is dismissed.

In re Estate of Claussen, 482 N.W.2d 381 (Iowa 1992)

179(b)

In trial to court, defendant objected to admission of amortization schedule on grounds of hearsay. District court reserved ruling and then failed to mention its ruling in the ultimate written decision. HELD: Failure to file 179(b) motion waives any error in admission of exhibit.

Hagan v. Val-Hi, Inc., 484 N.W.2d 173 (Iowa 1992)

179(b)

Hagan sued Liberty Loan Corp., an Iowa corporation, for slander of title and fraudulent misrepresentation. While suit was pending, Liberty was merged into Oklahoma Morris Plan Co., an Oklahoma corporation. Morris Plan then was merged into Liberty Financial Management Co., a Delaware corporation. Hagan's case went to trial and resulted in a $64,000 judgment against Liberty. While Liberty's appeal was pending, Liberty Financial Management merged with Amalgamated Sugar Co., a Utah corporation. The resulting corporation was renamed Val-Hi. After the Court of Appeals affirmed the judgment against Liberty, Hagan sued Val-Hi for the amount of judgment. Val-Hi moved for dismissal based on lack of personal jurisdiction.

HELD: Because Val-Hi did not alert the district court to its failure to discuss Val-Hi's argument that its liability was limited to the value of assets transferred by the predecessor corporation to the successor corporation, any error was waived.

Quigley v. Wilson, 474 N.W.2d 277 (Iowa App. 1991)

Affirmative Defense

Quigley sold farm on contract to Wilson in 1980. In 1986, Wilson notified Quigley that it could not make payments. Quigley and Wilson agreed to reduce the contract price and change other terms. Their agreement was reduced to writing by Quigley's counsel and was executed and recorded. Wilsons proceeded to perform in accordance with the 1986 agreement.

After Quigley established a voluntary conservatorship, the conservator sued Wilson for failing to perform in accordance with the 1980 contract. Wilson answered by denying the allegations and by asserting that the 1986 agreement modified the 1980 contract. The conservator alleged in a trial brief that the 1986 agreement was unenforceable due to lack of consideration.

HELD: District court erred in refusing to consider conservator's argument of lack of consideration. In a sense, it constituted an "affirmative defense to an affirmative defense," and recent changes to rules 68, 72, and 73 dispense with the necessity of any reply to an affirmative defense. See Midwest Management Corp. v. Stephens, 291 N.W.2d 896 (Iowa 1980).

Grant v. Cedar Falls Oil Co., 480 N.W.2d 863 (Iowa 1992)

Amendment

Plaintiff sued Holiday Erickson Petroleum, Inc., d/b/a Food 4 Less, on the last possible day. When plaintiff learned from defense counsel that the proper name of the store owner was Cedar Falls Oil Co., plaintiff amended and served. HELD: Civil Rule 89 permits relation back only if the correct party receives notice of the institution of the action "within the period provided by law for commencing the action against him." This means that the party the plaintiff intends to sue must actually receive notice of the institution of the action within the applicable statute of limitations.

COMMENT: Civil Rule 89 was promulgated in conformity with federal rule 15(c), which recently has been amended to permit relation back if the correct party receives notification within the time permitted by the federal rules for service of process, measured by the filing of the original complaint.

Allison-Kesley Ag Center, Inc. v. Hildebrand, 485 N.W.2d 841 (Iowa 1992)

Amendment

P

On a Saturday, Hildebrand purchased $200,000 worth of PIK certificates, which are "bearer" certificates, from Allison-Kesley for $218,000 with a "certified draft" drawn on the International Credit Exchange, Acapulco, Mexico. Hours later, Hildebrand sold the same PIK certificates to Farmers Co-op for $210,000. After Hildebrand left, Farmers Co-op became suspicious of the endorsements, and called the original owner of the certificates. A series of conversations among several businesses ensued over the next several hours, and Allison-Kesley eventually became concerned about the validity of the Acapulco draft. Allison-Kesley asked Farmers Co-op to stop payment on its check. By this time, Hildebrand's bank had closed.

On Monday, Farmers Co-op learned that Hildebrand's bank had released only portions of the cash payable to Hildebrand in return for the check issued by Farmers Co-op to Hildebrand. Farmers Co-op stopped payment on the check. Hildebrand threatened Farmers Co-op

with litigation. Farmers Co-op learned from the Federal Reserve Bank that International Credit Exchange did not exist. Nevertheless, Farmers Co-op lifted its stop payment order and Hildebrand's bank released remaining funds. By the time the Allison-Kesley was able to act, it was able to attach only $85,000 of funds held in Hildebrand's bank.

Allison-Kesley sued Farmers Co-op for conversion. Three months after trial and 30 days after submission of written briefs and arguments, Allison-Kesley moved for leave to amend its petition against Farmers Co-op to add a claim for breach of contract.

HELD: District court did not abuse its discretion in refusing to permit the amendment, notwithstanding testimony by witnesses on both sides at trial about the conversations and transactions that formed the basis for Allison-Kesley's claim of breach of contract. "Allison-Kesley knew or should have known as of the inception of their suit that [its employees] were prepared to offer testimony that [Allison-Kesley] had secured an agreement with [Farmers Co-op not to] release their stop payment in exchange for a promise of indemnification by Allison-Kesley."

<u>Erickson v. Wright Welding Supply, Inc.</u>, 485 N.W.2d 82 (Iowa 1992)

<u>Amendment</u>

Legislature enacted section 613.18 relating to the product liability of "middlemen" in 1986 and provided that it would be applicable to "all cases filed on or after July 1, 1986." Plaintiff suffered property damage to his business during a fire that occurred on February 11, 1986. He sued a welding supply business on May 14. On March 30, 1987, plaintiff amended to add claims against Airco on claims of strict liability and negligence. Airco did not assert section 613.18 as an affirmative defense, but it did assert the protections of the statute in a motion to dismiss, in challenges to instructions, and in post-trial motions.

HELD: The immunity or limitation of liability provided by section 613.18 is <u>not</u> an affirmative defense.

> Before the adoption of section 613.18, the plaintiff need only show the defendant was a seller. Since the adoption of the statute, a plaintiff must establish the seller is not in the newly defined class of sellers immune from suit or whose liability is precluded by statute. The plaintiff must prove the elements of its case, including proof that the seller is not immune from suit or is subject to liability.

Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991)

Deposition

District court has no authority to impose the prevailing party's cost of procuring a copy of a deposition paid for by the opposing party as court costs.

Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991)

Discovery

Defendant in car-accident litigation refused under work-product doctrine to produce copies of or disclose content of statements he made to his insurer. At trial, district court permitted plaintiff to ask defendant if he had made any statements about the accident, but refused to permit further questioning either for impeachment purposes or as a method of refreshing recollection.

After reversing the defense verdict for other reasons, the court noted for purposes of retrial that plaintiff was not entitled to the statements absent the showing of substantial need in Rule 122(c), in accordance with Ashmead, 336 N.W.2d at 201. The court noted that plaintiff had not attempted to compel production of the statements when his written request for same was met with objection. The court also refused to permit plaintiff to use doctrine of refreshing recollection as a vehicle for causing the statements to be produced at trial.

Gary v. Heritage National Healthplan Services, Inc., 485 N.W.2d 851 (Iowa App. 1992)

P

Discovery

In wrongful/discriminatory/retaliatory discharge case, employee moved for continuance of trial on grounds, among others, that employer had failed to respond to certain requests for production of documents. District court noted that employee had never filed a motion to compel or for sanctions and declined to continue trial.

HELD: District court properly overruled motion for new trial sought on basis of employer's failure to respond to certain discovery requests.

Alden v. Iowa District Court, 479 N.W.2d 318 (Iowa 1992)

Dismissal

Alden sued manufacturer for product liability and a co-employee of her husband for gross negligence in connection with his fatal fall from a personnel lift. Alden objected to the trial date set by the court and repeatedly sought to postpone the trial. Shortly before trial, district court granted summary judgment for co-employee. Alden applied for interlocutory appeal and asked that trial against manufacturer be stayed pending outcome of application and, if granted, outcome of appeal. Iowa Supreme Court requested briefing on issue of stay, and manufacturer resisted. Supreme Court granted interlocutory appeal but denied Alden's request for stay, expressly ruling that, after consideration, it was deemed appropriate that Alden's case against the manufacturer proceed to trial as scheduled. Alden immediately dismissed her claim against the manufacturer without prejudice and then refiled it.

Manufacturer filed a motion pursuant to rule 80(a) for sanctions. After evidentiary hearing, district court found that the dismissal was filed to cause delay that was unnecessary and sustained the manufacturer's motion. District court imposed a $500 penalty against Alden and a $500 penalty against her counsel, and entered an order prohibiting Alden from adducing any evidence in her new action against manufacturer that she had not disclosed through discovery in the first action.

HELD: At the time of Alden's dismissal, rule 215 gave her the unfettered right to dismiss without prejudice "at any time before the trial has begun." Alden and her counsel conceded that the dismissal was filed to delay trial, but argued that it was necessary to avoid two trials and to avoid manufacturer's use of "empty chair" argument. As it turned out, Court reversed the co-employee's summary judgment, so "the specter of two separate trials became a reality." See Alden v. Genie Industries, 475 N.W.2d 1 (1991). "In retrospect, we probably should have granted Alden's request for a stay when we granted the interlocutory appeal in the [co-employee's] case." Sanctions are set aside.

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Experts

Cook sued State for injuries suffered in two-vehicle accident at intersection that Cook alleged was inadequately "signed." Cook tested at .158 at hospital. At second trial, Cook offered two expert witnesses during rebuttal on the reliability of the blood-alcohol test. Cook had not disclosed these experts before trial. HELD: No abuse of discretion in permitting Cook to use the rebuttal experts.

<u>Loftsgard v. Dorrian</u>, 476 N.W.2d 730 (Iowa App. 1991)

<u>Experts</u>

On August 10, 1989, district court ordered that plaintiff's expert witnesses be designated by October 30, 1989. Plaintiff did not designate expert Sannito or any other expert by that date. Defendant moved to strike plaintiff's experts and court ordered plaintiff to provide supplemental interrogatory answers by February 26, 1990. Plaintiff did so for other experts but only identified Sannito. Defendants moved to strike Sannito, which district court did on May 1. Trial occurred two months later.

HELD: District court did not abuse its discretion in excluding witness Sannito.

<u>Provenzano v. Wetrich, McKeown and Haas</u>, 481 N.W.2d 536 (Iowa App. 1991)

<u>Experts</u>

In medical malpractice case filed after effective date of section 668.11 (certification of experts in professional liability action), counsel agreed after deadlines for both parties had run that each party could add one additional expert. Defendant added two additional experts, but plaintiffs did not object. Sixty-two days before trial, defendant listed seven new experts. Plaintiffs moved to exclude four (the other three had been involved in treatment and care and were well known to plaintiffs). Judge Collett sustained plaintiffs' motion as to three of the new experts (the fourth was an annuitist and fell outside section 668.11).

On the day before trial, Judge Jenkins expressed his opinion that counsel had waived the provisions of 668.11 and invited defendant to ask Jenkins to reconsider Collett's ruling. Defendant moved for reconsideration as to one of the three excluded experts. Judge Jenkins sustained the motion, authorized use of the expert, and offered plaintiffs a continuance. Plaintiff declined the continuance and proceeded to trial, which resulted in a defense verdict. The additional expert permitted by Judge Jenkins testified.

HELD: Though plaintiffs waived their right to the first additional expert and arguably waived their right to the second (due to no timely objection), waiver did not extend

> to all experts that the defendant may wish to designate .... Such a holding would effectively undermine all amicable extrajudicial agreements between counsel.

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District court abused this discretion and plaintiffs were prejudiced. The ruling on the eve of trial forced plaintiffs to choose between an expensive continuance or proceeding without adequate time to prepare for the last additional expert.

Carson v. Webb, 486 N.W.2d 278 (Iowa 1992)

Experts

Plaintiff failed to identify her treating physicians within the time specified by rule 125(c) in her civil assault action. District court ruled that physicians could not express any expert opinion. HELD: Failure to disclose treating physicians does not merit exclusion of fact or opinion testimony that arises by virtue of the witness's role as treating physician.

> [T]he paramount criterion is whether this evidence ... relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation.

See Day v. McIlrath, 469 N.W.2d 676 (Iowa 1991).

COMMENT: In Day, the court described the types of opinions that do require 125(c) disclosure of treating physicians:

> We believe a treating physician ordinarily focuses, while treating a patient, on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability) which may become paramount in the context of a lawsuit.

In a footnote, the court now cautions that not all expert opinions by treating physicians as to causation will trigger disclosure under rule 125(c). "Some conclusions concerning causation relate directly to the treatment of a patient and are thus outside the scope of section 668.11 or rule 125."

In re Estate of DeVoss, 474 N.W.2d 539 (Iowa 1991)

Intervention

District court properly denied petitions of intervention by disinherited heirs at law in declaratory judgment action brought by executor to determine validity of deeds signed by decedent. HELD: Appealing verdict that had rendered them disinherited left their interest too speculative to merit intervention. Appellate review

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of a denial of intervention "is on error, with some deference given to the district court's discretion."

First Interstate Bank v. Gray, 476 N.W.2d 52 (Iowa 1991)

Judgment

Mr. and Mrs. Paul and Judith Gray executed a promissory note in favor of First Interstate Bank. The Grays were jointly and severally liable. When they defaulted, First Interstate sued Paul and obtained a default judgment against him. Pursuant to rule 228, First Interstate submitted the note to the district court clerk, who stamped it "canceled by judgment." With the judgment against Paul unsatisfied, First Interstate sued Judith on the note. District court granted her motion for summary judgment, based upon the cancellation. HELD: Cancellation applies to the judgment debtor (Paul) only. To the extent that the debt remains unsatisfied, rule 228 does not bar suits against other joint severally obligees.

Uthe v. Time-Out Family Amusement Centers, 475 N.W.2d 635 (Iowa App. 1991)

Requests for Admissions

In a wrongful discharge action, Uthe deposed all of the relevant employees and officers of defendant and then served requests for admissions that related to the content of conversations between plaintiff and other employees of defendant. Defendant referred plaintiff to his own tape recordings of those conversations (which recordings had not yet been produced to defendant) and to the deposition transcripts. Defendant then said that the requests could not be admitted or denied. Plaintiff filed a motion asking district court to declare that defendant had admitted the matters contained in the requests. Before the court ruled, defendant was provided copies of the recordings, but it never supplemented its responses to the requests for admissions. District court overruled plaintiff's motion.

HELD: District court abused its discretion in refusing to find that defendant, by failing to supplement its responses, had admitted the requests for admissions. The error did not entitle plaintiff to a new trial, however, because plaintiff proved all of the requested admissions at trial and never filed a motion for any sanctions under rule 134(c).

Gary v. Heritage National Healthplan Services, Inc., 485 N.W.2d 851 (Iowa App. 1992)

Requests for Admissions

District court imposed deadline of February 15, 1990, for completion of discovery. In the context of that deadline, order provided: "Motions [sic] that require a response from an opposing party shall be filed so that the response is due before the discovery deadline." Plaintiff served requests for admissions on February 5. HELD: District court did not abuse its discretion in sustaining defendant's objection to requests for admissions and in ruling that requests were untimely filed.

Werner's, Inc. v. Grinnell Mutual Reinsurance Co., 477 N.W.2d 868 (Iowa App. 1991)

Rule 80

Plaintiff lost their vehicle to theft while on vacation in Mexico. Grinnell's insurance policy expressly excluded coverage for losses other than those occurring within the United States. Plaintiff sued Grinnell on a theory, among others, of reasonable expectations of coverage "while in the southern part of the United States." HELD: Mexico is not part of the southern United States. Plaintiff did not make an accurate reasonable expectations argument, and it would have failed if they had. Grinnell's exclusion is clear, unambiguous, and typical. District court properly sustained Grinnell's motion for summary judgment.

Plaintiff's argument is not so bad, however, that district court abused its discretion in refusing to impose sanctions under rule 80.

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Alden v. Iowa District Court, 479 N.W.2d 318 (Iowa 1992)

Rule 80

Alden sued manufacturer for product liability and a co-employee of her husband for gross negligence in connection with his fatal fall from a personnel lift. Alden objected to the trial date set by the court and repeatedly sought to postpone the trial. Shortly before trial, district court granted summary judgment for co-employee. Alden applied for interlocutory appeal and asked that trial against manufacturer be stayed pending outcome of application and, if granted, outcome of appeal. Iowa Supreme Court requested briefing on issue of stay, and manufacturer resisted. Supreme Court granted interlocutory appeal but denied Alden's request for stay, expressly ruling that, after consideration, it was deemed appropriate that Alden's case against the manufacturer proceed to

trial as scheduled. Alden immediately dismissed her claim against the manufacturer without prejudice and then refiled it.

Manufacturer filed a motion pursuant to rule 80(a) for sanctions. After evidentiary hearing, district court found that the dismissal was filed to cause delay that was unnecessary and sustained the manufacturer's motion. District court imposed a $500 penalty against Alden and a $500 penalty against her counsel, and entered an order prohibiting Alden from adducing any evidence in her new action against manufacturer that she had not disclosed through discovery in the first action.

HELD: At the time of Alden's dismissal, rule 215 gave her the unfettered right to dismiss without prejudice "at any time before the trial has begun." Alden and her counsel conceded that the dismissal was filed to delay trial, but argued that it was necessary to avoid two trials and to avoid manufacturer's use of "empty chair" argument. As it turned out, Court reversed the co-employee's summary judgment, so "the specter of two separate trials became a reality." <u>See</u> <u>Alden v. Genie Industries</u>, 475 N.W.2d 1 (1991). "In retrospect, we probably should have granted Alden's request for a stay when we granted the interlocutory appeal in the [co-employee's] case." Sanctions are set aside.

<u>Dennis v. Christianson</u>, 482 N.W.2d 448 (Iowa 1992)

<u>Service</u>

Plaintiff sued defendant for injuries suffered in two-vehicle accident exactly two years after the accident. The sheriff was unable to serve either the operator or the owner because the owner's address was incorrectly listed on the service instructions and the operator had moved to Arizona. Two and one-half years later, plaintiff had done nothing to serve either defendant other than write a letter to the post office in an unsuccessful effort to locate defendants. Plaintiff secured new counsel, who succeeded in serving both defendants within one month. Defendants moved to dismiss for plaintiff's failure to cause service within a reasonable time after commencement of litigation.

HELD: Delay was presumptively abusive, and plaintiff failed to justify. Plaintiff's application for directions as to how to obtain service was filed to avoid dismissal threatened in a scheduling order. Owner's movement of its business from one place to another in Des Moines and operator's move to Phoenix (<u>before</u> suit was filed) without leaving a forwarding address do not constitute evasion of service.

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Estate of Morgan v. North Star Steel Co., 484 N.W.2d 199 (Iowa 1992)

Service

Plaintiff filed 179(b) motion 11 days after district court dismissed petition, but served defendant with copy of 179(b) motion by mail on 10th day. HELD: Rule 82(d) provides that a filing deadline "shall be tolled when service is made, provided the actual filing is done within a reasonable time thereafter."

COMMERCIAL LAW

Farmers State Bank v. Huebner, 475 N.W.2d 640 (Iowa App. 1991)

Cosigner

Walk rented farmland from Schultz and financed his farming operation on Schultz' land through Farmers State Bank. When Walk attempted to renew his loans, FSB required either additional security or a cosigner. Walk's friend, Huebner, cosigned without reading the note. The note mistakenly listed the Schultz property as collateral as a result of the bank's attempt to describe the location of the personal property pledged by Walk as collateral. Bank loaned other money to Walk that was secured by a mortgage on other real estate owned by Walk. When Walk eventually defaulted on all loans, Walk gave a deed to his real estate to the bank in lieu of foreclosure. The bank foreclosed on the other security and then sued Huebner for the difference.

HELD: FSB was entitled to utilize parol evidence to establish that its listing of the Schultz property in the collateral list was an error. Substantial evidence supported district court's finding that Huebner did not establish that FSB induced him to become a cosigner through the fraudulent representation that the note was secured by the Schultz property.

> [FSB president Bowers] testified that his conversations with Huebner during the execution of the notes were limited. Bowers testified that on neither occasion was there any discussion about the underlying security and on neither occasion did Huebner read the note he was signing.... Huebner recalled that Bowers had said both times that the note was safely secured by real estate. Huebner admitted that he did not know the contents of the

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notes when he signed them and that he never attempted to ascertain the status of the notes he had signed. Although the two bachelor farmers had known each other for 30 years, during which they had hunted and fished together and had even owned farm equipment together, Huebner testified that he did not know whether Walk owned the 160 acres he farmed.

Husker News Co. v. South Ottumwa Savings Bank, 482 N.W.2d 404 (Iowa 1992)

Endorsement

Husker News, a wholesale distributor of magazines and books to retailers, entrusted financial transactions to a driver whose route was remote. Husker permitted the driver to deposit cash into his personal account, to inventory returns and credit customers for returned magazines, and to store excess returns at Husker News' cost. Driver provided false inventories, fabricated storage accounts, deposited checks made payable to Husker News to his personal account by falsely representing to his own bank that he had authority to do so, and misrepresented to Husker News the amounts of cash payments by retailers. Husker News sued retailers, driver's bank, and drawee banks for their role in permitting driver to embezzle from his employer. Husker News contended that retailer had a duty to check accuracy of driver's account of retailer's returns on driver's credit memo and to examine the back of its canceled checks for unauthorized endorsements. As to drawee banks, Husker News contended that they were not holders in due course because the driver's endorsement on checks made payable to Husker News was neither authorized nor effective.

HELD: I. Husker News' entrustment of discretionary acts to its driver constituted a high degree of negligence that substantially contributed to the bank's acceptance of the driver's endorsement.

II. Iowa law does "not recognize a good-Samaritan obligation revent the perpetration of a tort by another on a third party. e would be even less reason to impose a duty on an outsider to ect an employer from its own employee." Section 554.4406, h imposes a duty to discover and report unauthorized signatures lterations, creates a duty in the retailer, but only to its

Houghton State Bank v. Peterson, 477 N.W.2d 94 (Iowa 1991)

Foreclosure

Peterson borrowed money from Bank and gave second mortgage on real estate and homestead. Peterson defaulted. Bank obtained judgment on promissory note, but did not foreclose second mortgage because Peterson owed first mortgagee more money than value of Peterson's real estate. When first mortgagee foreclosed, district court found that first mortgage covered only the homestead. After decision was affirmed, and more than two years after Bank obtained judgment on note, Bank attempted to execute on non-homestead property. Peterson and first mortgagee resisted execution.

Section 615.3 provides:

> Judgments ... rendered on promissory obligations secured by mortgage ..., but without foreclosure ..., shall not be subject to renewal by action ... and, after the lapse of two years ..., shall be without force and effect ... except as a setoff or counterclaim.

HELD: Section 615.3 bars Bank's execution. Fact that judgment had no value until first mortgagee's priority was eliminated by judicial degree is irrelevant. Case law that found section 615.3 to be tolled by other litigation focused on validity of judgment, not its value.

Production Credit Association v. Shirley, 485 N.W.2d 469 (Iowa 1992)

Fraudulent Conveyance

Lyle and Georgia Taylor and their farming corporation, Taylor Enterprises (TE), were indebted to Citizens State Bank (Citizens) and PCA. When Taylors and TE could not make payments, Citizens and PCA obtained judgments of foreclosure. PCA and Citizens resolved their competing claims for the assets of Taylors and TE by agreeing that PCA was subordinate to Citizens. While PCA and Taylors were engaged in mandatory mediation proceedings under section 654A.6, Lyle Taylor sold his stock in Lyco, Inc., to his nephew and niece, the Shirleys, for $90,000. Lyco owned the Taylors' vacation homes in Arizona and Minnesota and other miscellaneous personal property. The appraised value of the Lyco assets exceeded $180,000. The Shirleys were aware of PCA's judgment and the Taylors' inability to satisfy it from other assets. The sale occurred without any advertising, listing by brokers, an appraisal, a closing, and without the exchange of documents memorializing the transaction. Shortly after the sale transaction, Shirleys orally agreed to lease

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the vacation homes back to the Taylors without exploring the fair market value of such leases. Taylors used the proceeds of the sale of Lyco to pay Citizens.

PCA sued the Taylors and Shirleys for fraudulent conveyance. HELD: PCA established by clear and convincing evidence that Taylors sold Lyco with the intent to defeat and defraud PCA and that the Shirleys intentionally participated in the fraudulent scheme. Shirleys were not a bona fide purchaser. If Shirleys had paid fair market value, Citizens would have bid less at the sheriff's sale, thus giving PCA the opportunity to acquire assets in satisfaction of its judgment. Shirleys are <u>not</u> entitled to a credit for the $90,000 they did pay. "To refund to the transferee the amount paid would be to remove all danger of loss and destroy the restraint which the law imposes upon such transactions."

<u>Allison-Kesley Ag Center, Inc. v. Hildebrand</u>, 485 N.W.2d 841 (Iowa 1992)

<u>Holder in Due Course</u>

On a Saturday, Hildebrand purchased $200,000 worth of PIK certificates, which are "bearer" certificates, from Allison-Kesley for $218,000 with a "certified draft" drawn on the International Credit Exchange, Acapulco, Mexico. Hours later, Hildebrand sold the same PIK certificates to Farmers Co-op for $210,000. After Hildebrand left, Farmers Co-op became suspicious of the endorsements, and called the original owner of the certificates. A series of conversations among several businesses ensued over the next several hours, and Allison-Kesley eventually became concerned about the validity of the Acapulco draft. Allison-Kesley asked Farmers Co-op to stop payment on its check. By this time, Hildebrand's bank had closed.

On Monday, Farmers Co-op learned that Hildebrand's bank had released only portions of the cash payable to Hildebrand in return for the check issued by Farmers Co-op to Hildebrand. Farmers Co-op topped payment on the check. Hildebrand threatened Farmers Co-op ith litigation. Farmers Co-op learned from the Federal Reserve ank that International Credit Exchange did not exist. evertheless, Farmers Co-op lifted its stop payment order and ildebrand's bank released remaining funds. By the time the llison-Kesley was able to act, it was able to attach only $85,000 f funds held in Hildebrand's bank.

Allison-Kesley sued Farmers Co-op for conversion. HELD: ubstantial evidence supported district court's finding that armers Co-op was a holder in due course. It gave "value" in xchange for a negotiable instrument, at a time when it had no otice of any defense against or claim to it.

First Interstate Bank v. Gray, 476 N.W.2d 52 (Iowa 1991)

Note

Mr. and Mrs. Paul and Judith Gray executed a promissory note in favor of First Interstate Bank. The Grays were jointly and severally liable. When they defaulted, First Interstate sued Paul and obtained a default judgment against him. Pursuant to rule 228, First Interstate submitted the note to the district court clerk, who stamped it "canceled by judgment." With the judgment against Paul unsatisfied, First Interstate sued Judith on the note. District court granted her motion for summary judgment, based upon the cancellation. HELD: Cancellation applies to the judgment debtor (Paul) only. To the extent that the debt remains unsatisfied, rule 228 does not bar suits against other joint severally obligees.

COMPARATIVE FAULT

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Allocation of Fault

At the intersection of two state highways, where the east-west traffic must stop, the east-west state highway ends and a county highway begins. The county highway's centerline is offset 12 feet to the north, so that eastbound traffic jogs a bit to the left (north) as it passes through the intersection. The typography of the intersection is flat, with views unobstructed. On the afternoon of the accident giving rise to the litigation, visibility was good.

Eastbound motorist Cook blew the stop sign and collided with a semi. Cook left 41 feet of skid marks before the collision, but the skids started just 11 feet from the stop sign and were in the westbound lane. Cook tested at .158.

The State placed a "stop ahead" sign on the right side of the highway, 1,305 feet from the intersection. The "manual on uniform traffic control devices" provides that "stop ahead" signs should be placed 750 feet in advance of the intersection "in rural areas," and as far as 1,500 feet or more "on high speed roads, and particularly on freeways." Cook produced evidence that the barrel-mounted stop sign had been moved across the intersection (presumably but not necessarily by cars colliding with it) and that cars had left skid marks through the original location of the sign several times a year.

After bench trial, district court found the State 90% at fault and the motorist 10% at fault. The State challenged the findings of negligence and proximate cause and the allocation of fault. The Iowa Supreme Court (6-3) reversed and remanded for new trial with directions for the district court to make specific findings as to the various particulars of fault asserted by each party.

On remand, a different district court judge made specific findings of negligence as to Cook and the State. Most importantly, the court found that the blood test had chain-of-custody defects and was inconsistent with clinical findings by Cook's treating physician. The court apportioned 70% of the fault to the State and 30% to Cook. The court found that State was negligent for, among other things, failing to install rumble strips along the approach to the stop sign. District court provided a caveat in its ruling that if it erred in its findings about the rumble strips, its other findings of negligence "were, standing alone, a proximate cause of plaintiff's injuries."

HELD: Cook failed to adduce substantial evidence to support a finding of negligence with respect to the rumble strips. Cook established only that rumble strips had been in use for many years at similar intersections. District court's "severability" finding does not address the question of whether or not the allocation of percentages is affected by reduction of the number of negligent acts by the State. District court must issue new findings apportioning negligence between the parties.

COMMENT: Case was filed before July 1, 1984, so most of chapter 668 was not applicable.

> Notwithstanding this circumstance, however, we are convinced that similar procedures govern the determination of comparative negligence claims under the doctrines established in Goetzman, 327 N.W.2d 742 (Iowa 1982). This creates a clear potential for a party found guilty of four separate acts of causal negligence to be assigned a higher percentage of negligence . . . than a party found guilty of fewer acts of causal negligence.

Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992)

Allocation of Fault

Purchaser of real estate sued listing realtor for failing to disclose that property was in flood fringe zone. Purchaser settled with and provided releases to sellers, the appraiser, and the mortgage lender. District court permitted jury to compare fault of each released entity, and jury assessed fault against each one.

HELD: Realtor adduced substantial evidence in support of jury's allocation of percentages to each released party. Realtor adduced evidence that sellers received a notice of flood zoning from the city. Although purchaser did not speak with the appraiser or see the appraisal, purchaser paid lender a fee for the appraisal, and appraiser was required to determine whether property was in a flood zone. The amount loaned was close to the sale price, so jury could infer that loan would not have gone through if appraiser had discovered the zoning.

Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992)

Allocation of Fault

Employer constructed a grain processing machine under existing high voltage lines installed by Interstate Power. Plaintiff's co-employee Jones instructed plaintiff how to operate plant in his absence. Plaintiff climbed on top of plant when it malfunctioned, inserted long metal pole into fabricated openings on top of plant in effort to unclog it, and was electrocuted when he pulled pole back up. Plaintiff testified that he knew the electric lines were present and would have avoided them "if he had looked." Jury assessed 25% of the fault against plaintiff and 75% against Interstate Power.

HELD: Plaintiff's fault was not more than 50% as a matter of law. Plaintiff was not consciously aware of the electric lines just before coming into contact with them. They were not in his view as he climbed, nor when he was using the pole. The performance of job duties occupied his attention at the time of the accident.

Schnoor v. Deitchler, 482 N.W.2d 913 (Iowa 1992)

Allocation of Fault

Schnoor, a life-long farmer with several years of experience as a grain trucker, contracted with Deitchler to haul Deitchler's beans. Schnoor did this for several years, and as a result became familiar with Deitchler's open and unguarded auger. Schnoor's duties did not include loading the beans into his truck or in otherwise operating or even coming close to the auger. He walked to the back of his truck to check on Deitchler's progress in loading the beans, and slipped on beans that he knew were lying loose on hard ground. His foot came in contact with the auger and he was injured.

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HELD: District court should have directed a verdict in favor of Deitchler. Invitee is entitled to nothing more than knowledge of the dangerous conditions he will encounter and the opportunity to appreciate the risk. The facts do not justify application of any exception, see Konicek, 457 N.W.2d 614 (Iowa 1990), for those instances in which the possessor of land should expect that an invitee's attention may be distracted or that an invitee will proceed to encounter a known and obvious danger because the advantage of doing so outweighs the apparent risk.

DISSENT (7-2): Whether or not possessor of land should expect that invitee will proceed to encounter known or obvious danger because the advantage of doing so outweighs the apparent risk is peculiarly a fact question, especially in light of chapter 668. While it was not Schnoor's obligation to operate the auger, it was his obligation to make sure that his truck did not become overloaded. Deitchler testified that it was expected and typical for Schnoor to be in the vicinity of the auger while it was operating.

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Contribution

Before July 1, 1984, Cook sued State for injuries suffered in two-vehicle accident at intersection that Cook alleged was inadequately "signed." Other persons were injured, and both Cook and the State settled their claims. District court found Cook 30% negligent and State 70% negligent. State sought an order requiring Cook to pay contribution to the State in the amount of 30% of the payments by the State to the other claimants. HELD: Because Cook had previously settled the claims against him, he had no common liability with the State to those claimants "at the time the State effected its settlement."

Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991)

Costs

Jury found plaintiff 51% at fault, so he did not recover from defendant. Section 625.1 provides: "Costs shall be recovered by the successful against the losing party." Section 625.3 provides:

> Where the party is successful as to a part of the party's demand, and fails as to part, . . . the court on rendering judgment may make an equitable apportionment of costs.

District court required defendant to pay 49% of court costs.

HELD: Plaintiff was not successful on his claim, so district court had no authority under section 625.3 to make an equitable apportionment of costs. Section 625.4, dealing with multiple parties, was not applicable because defendant's cross-petition for indemnity was rendered moot by a 51% verdict.

Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991)

Last Clear Chance

Bokhoven and his employer, Renaud, were servicing augers in a grain bin on a farm owned by Klinker. Bokhoven and Renaud were inside the bin and asked Klinker, who was outside, to turn on the motor. Everyone knew that Klinker was unfamiliar with the controls. When Klinker started the motor, a sweep auger clutch was inadvertently engaged and swept into Bokhoven, causing him serious injuries. Bokhoven sued Klinker. District court refused to instruct as requested by Bokhoven on last clear chance. Jury found Bokhoven 51% at fault.

HELD: "[D]octrine of last clear chance, even when considered a part of proximate cause, has no further function to perform where contributory negligence is no longer a complete bar to plaintiff's recovery. We abolished last clear chance as a separate doctrine in Stuart [v. Madison, 278 N.W.2d 284 (Iowa 1979)]. . . . [A]doption of chapter 668 . . . did not resurrect the doctrine. When a party wishes to assert last clear chance, the district court need not instruct more than by reference to standard proximate cause language.

COMMENT: Court approves ICJI 700.3:

> The conduct of a party is proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991)

Mitigation

Fifteen-year-old operator of moped collided head-on with garbage truck that had moved into moped's lane on residential street in order to go around a parked car. Plaintiff was not wearing a helmet, and his injuries included "severe brain damage."

Trial was bifurcated into liability and damage phases at plaintiff's request and over defendant's objection. Jury assessed fault 50% to plaintiff and 50% to defendant. In damage phase, defendant presented evidence and argument that plaintiff's failure to wear a helmet contributed to the severity of his injury. Court did not exclude such evidence or argument but instructed jury "that there is no common law or statutory duty to wear a helmet."

Court reversed on errors occurring in liability phase. For purposes of retrial, court declined to impose a common-law duty on a moped operator to wear a helmet.

After extensively reviewing the case law on both sides of the issue, with particularly extensive and laudatory treatment of an Arizona opinion that imposes such a duty, see Law v. Superior Court, 755 P.2d 1135 (1988), the court deferred to the legislature and declined to recognize a common-law duty to wear a helmet. Pivotal in the court's deference was the legislature's creation of a "seat belt" duty/defense with a 5% ceiling, and the legislature's repeal of the motorcycle helmet law in 1976. Because mitigation of damages is part of fault under chapter 668, judicial recognition of a "helmet" duty, coupled with the 50% rule in chapter 668 and no percentage ceiling similar to the "seat belt" duty,

> could actually prevent an otherwise innocent plaintiff from recovering anything. . . . Under the present state of the law a perfectly innocent moped operator who is hit by a speeding drunk driver could conceivably recover nothing. The jury could assess more than 50% of the total fault to the moped operator because the operator failed to wear a helmet.

Because mitigation is part of fault under chapter 668, the court expresses great doubt about the wisdom of bifurcating comparative fault trial into liability and damage aspects, at least where mitigation is an issue.

DISSENT: Two justices concluded that failure to wear a helmet can be found by a jury to breach the moped operator's general common-law duty to act prudently with respect to his own safety. That the legislature had not chosen to criminalize such behavior is not relevant on issue of plaintiff's civil fault.

COMMENT: First, how can a 15-year-old who elects to operate a moped at 25 m.p.h. on city streets with car and truck traffic without availing himself of the established and advertised benefits of a helmet be labeled "perfectly innocent?" Second, since the legislature has defined fault to include mitigation and has declared Iowa's public policy that a plaintiff whose conduct is more than 50% at cause for his injury should not be permitted to recover anything, the court's concern about the injustice of its own manufactured worse-case scenario should be addressed to the political process. It certainly has no relevance to the decision

whether or not to recognize a common-law duty. Third, in comparing the absence of legislation on the "helmet" duty with the "seat belt" law, the court speaks in complimentary terms about the 5% limitation. It should come as no surprise that several months later, the Court found this 5% limitation to be constitutional. See Duntz v. Zeimet, 478 N.W.2d 635 (1991). Fourth, the court begins its extensive discussion of this issue with the following observation:

> Failure to use a helmet or seat belt may . . . be a contributing cause to the injuries sustained and so may be relevant to the issue of damages.

Notwithstanding the court's refusal to recognize a duty, does this sentence mean that it remains permissible to prove that the cyclist was not wearing a helmet and that use of a helmet would have minimized or reduced or even eliminated injuries that were suffered?

Duntz v. Zeimet, 478 N.W.2d 635 (Iowa 1991)

Mitigation

Zeimet was not wearing her seat belt when her vehicle collided with the vehicle operated by Duntz. He challenged the constitutionality of section 321.445(4), which provides for actions arising on or after July 1, 1986, as follows:

> [F]ailure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault .... However, ... the failure to wear a seat belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances:
>
> (1) [Defendant] must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.
>
> (2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed 5% of the damages awarded after any reductions for comparative fault.

HELD: Limitation on amount jury may reduce plaintiff's recovery for violation of seat belt law does not deny defendant his constitutional right to trial by jury or violate equal protection.

DISSENT (4-1): "[A]rbitrary limitation of 5% ... unconstitutionally infringes on a defendant's right to a trial."

Pepper v. Star Equipment, 484 N.W.2d 156 (Iowa 1992)

Party

Pepper sued Owatonna Manufacturing Co. for injuries suffered while operating equipment manufactured by Owatonna and sold by Star Equipment. When Pepper learned that Owatonna was in a chapter 7 bankruptcy proceeding, plaintiff amended his petition to "delete" Owatonna as a defendant and add Star Equipment as the sole defendant. Star Equipment moved for leave to file a third-party petition against Owatonna, and attached an order from the bankruptcy court lifting the stay "for the sole purpose of apportioning fault to [Owatonna] in the trial of plaintiff's claim against Star Equipment." The bankruptcy order provided that the stay "would bar an attempt to satisfy any judgment in the state court action against Owatonna's assets." Star's prayer in the proposed third-party petition sought only "that the fault of ... Owatonna ... be determined for purposes of [ch.] 668." District court granted Star Equipment's motion and plaintiff appealed with permission.

HELD: "[I]n the absence of liability insurance, the same reasons that exist for not considering fault of phantom or non-joined parties favor denial of impleader of parties protected against a personal judgment by federal bankruptcy laws." Court consistently has refused to permit the assessment of percentages of fault against persons or entities against whom plaintiff cannot recover.

> [I]f a defendant or third-party defendant has a defense to the plaintiff's claim, that party's fault is not to be considered in the allocation of aggregate causal fault by the trier of fact.
>
> The rule ... has not been limited to situations in which there is an absence of causal fault on the part of the extra party. It also applies when that party has a special defense to the plaintiff's claim, irrespective of fault.

Star Equipment's argument that the automatic stay is different than special defenses such as the exclusive-remedy provisions of the workers' compensation law and the bar against an action by a deprived spouse against an injured spouse for loss of consortium, "is a distinction that is without significance."

The rule is not merely mechanical but is based on policy considerations important to ch. 668.

> [A] third-party defendant ... may siphon off a portion of aggregate fault from the defendant against whom the plaintiff is claiming.
>
> . . .
>
> A plaintiff's only real protection against this type of recovery diminution is to claim directly against the third-party defendant .... The statute of limitations has been relaxed ... to permit this to be done .... If ... the plaintiff has no possibility of obtaining an enforceable judgment against the third-party defendant, plaintiff has no protection against fault siphoning. In addition, ... the defendant ... will normally attempt to shift blame for the occurrence to the bankrupt third-party defendant who has no interest in the result of the litigation and thus no motive to defend against the claims.

DISSENT (8-1): Justice Snell distinguished earlier Iowa cases in which plaintiff had no legal claim against the party sought to be added from Owatonna, against whom plaintiff clearly had a claim but from whom plaintiff simply could not recover due to insolvency.

COMMENT: I. The majority recognizes the flaw in its own reasoning by adding the caveat "in the absence of liability insurance." But what if an uninsured bankrupt has <u>some</u> assets such that unsecured creditors like Pepper will receive something on their claims? Does "insolvent" in the majority's opinion really mean <u>no</u> dollars for unsecured creditors? Is $.10 on the dollar enough for the majority to impose the risk of insolvency on the plaintiff instead of a defendant who might be less than 50% at fault (and therefore <u>not</u> jointly and severally liable) if the jury is permitted to assess percentages of fault against the bankrupt? Is $.50 on the dollar enough? $.90 on the dollar?

II. In discussing the potential prejudice to Pepper from permitting Star Equipment to add Owatonna for purposes of allocation of fault, the majority said:

> Under [section 668.4], if a defendant is found to bear 50% or more of the aggregate fault, that party is liable for the total damages assessed, diminished only by the plaintiff's percentage of fault and fault attributable to released parties.[2]

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The footnote provides:

> To the extent that the decision in Christopherson v. Deere & Co., 941 F.2d 692, 695-96 (8th Cir. 1991), is in conflict with this conclusion, we believe it represents a misinterpretation of the joint and several liability rules established by § 668.4.

In this diversity-jurisdiction case, Curtis Christopherson was injured when his father turned on a Deere vertical unloading auger while Curtis was cleaning the sump area by hand. Curtis sued Deere, and Deere cross-petitioned against the father. Curtis did not assert a claim against his father. The jury allocated percentages of fault as follows:

Curtis	20%
Father	30%
Deere	50%
	100%

The 8th circuit affirmed the district court's refusal to impose joint and several liability on Deere, notwithstanding § 668.4's application of the exception to joint and several liability for "defendants who were found to bear less than 50% of the total fault," because it would be unfair to impose joint and several liability on Deere for the fault allocated to a person that Curtis could but did not sue.

Welte v. Bello, 482 N.W.2d 437 (Iowa 1992)

Proximate Cause

When evidence establishes that there may have been more than one actionable cause of the injury or damage, the standard proximate-cause instruction should include: "There can be more than one proximate cause of an injury or damage."

Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992)

Release

In chapter 668 case, defendant may introduce evidence that plaintiff has made claims against other parties and has released those parties.

Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991)

Sole Proximate Cause

As a result of multiple-vehicle accident, defendants asserted affirmative defense of act of God. Jury could find that at time of accident, highway was icy and snow covered, with center line obscured and road surface slippery. Visibility was reduced by darkness, falling snow, and the snow kicked up by travelling vehicles. District court submitted act of God as an affirmative defense and jury found no fault on defendants.

HELD: Defendants did not adduce substantial evidence that the driving conditions could not have been anticipated or expected, which is the third element of act of God defense under Oats v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965).

COMMENT: Court reaffirmed Renze, 418 N.W.2d at 641-42, which held that God is not a party under section 668.2 and therefore cannot be assigned percentages of fault for his/her acts, and that concluded that act-of-God defense may be used, therefore, only as a particularization of the sole proximate cause argument.

Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991)

Sole Proximate Cause

Bokhoven and his employer, Renaud, were servicing augers in a grain bin on a farm owned by Klinker. Bokhoven and Renaud were inside the bin and asked Klinker, who was outside, to turn on the motor. Everyone knew that Klinker was unfamiliar with the controls. When Klinker started the motor, a sweep auger clutch was inadvertently engaged and swept into Bokhoven, causing him serious injuries. Bokhoven sued Klinker. District court refused to instruct as requested by Bokhoven on last clear chance. Jury found Bokhoven 51% at fault.

HELD: "[D]octrine of last clear chance, even when considered a part of proximate cause, has no further function to perform where contributory negligence is no longer a complete bar to plaintiff's recovery. We abolished last clear chance as a separate doctrine in Stuart [v. Madison, 278 N.W.2d 284 (Iowa 1979)]. . . . [A]doption of chapter 668 . . . did not resurrect the doctrine. When a party wishes to assert last clear chance, the district court need not instruct more than by reference to standard proximate cause language.

COMMENT: Court approves ICJI 700.3:

> The conduct of a party is proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except

for the conduct. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991)

Stuart v. Pilgrim

Lanz was operating her employer's vehicle with consent at the time of an accident that injured Lanz and damaged the employer's vehicle. Lanz and the employer sued. At trial, court refused to impute (by instruction or ruling) Lanz' percentage of fault to her employer. HELD: Enactment of Chapter 668 does not abrogate or revise Stuart v. Pilgrim.

COMMENT: In refusing to overrule Stuart v. Pilgrim, court makes no mention of section 668.3(2)(b), which authorizes trial court to treat two or more persons as a single party for purposes of assessing percentages of fault.

Court did not explain its express refusal to rule on the applicability of any employer-employee exception to Pilgrim under these facts.

Opinion also is silent on issue of whether in employer's property damage claim, jury can assess percentages of fault against consent-driver Lanz, the practical effect of which would be to force employer to sue Lanz or forsake the benefits of Stuart v. Pilgrim.

Bales v. Warren County, 478 N.W.2d 398 (Iowa 1991)

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Subrogation

A personal injury plaintiff whose medical expenses were paid by DHS and whose comparative fault was likely to be significant settled with his defendants in a document that gave him no money for his medical expense, indemnified him from any claim by DHS, and assigned his claim against DHS for attorney fees and expenses to defendants. Defendants deposited the amount of plaintiff's medical expenses with the court and filed a declaratory judgment action against DHS.

HELD: Because DHS proceeds against its payee's tortfeasor only on the basis of subrogation, a personal injury plaintiff's comparative fault reduces DHS' entitlement to recovery of medical expenses proportionately.

COMMENT: Court rejected DHS's attempt to rely prospectively on 1989 Iowa Acts Ch. 111, § 1 (codified at section 249A.6(1)), which purports to apply DHS' subrogation rights to <u>all</u> of the assistance beneficiary's claims against tortfeasors.

CONFLICTS

<u>Radley v. Transit Authority</u>, 486 N.W.2d 299 (Iowa 1992)

Transit Authority of Omaha operates buses that travel into Council Bluffs. Plaintiff was injured while departing an Omaha Transit bus while it was in Iowa. Her commencement of a civil-damage action against the Transit Authority in Iowa was timely under Iowa law but not under Nebraska law. HELD: Iowa law governs.

<u>Zurn v. State Farm Mutual Automobile Insurance Co.</u>, 482 N.W.2d 923 (Iowa 1992)

<u>Choice of Law</u>

Zurn, a Minnesota resident, was struck by Jenkins' vehicle while Zurn was walking along the highway. Jenkins had been drinking at a bar and was intoxicated. Zurn recovered Jenkins' insurance limits of $25,000. Zurn settled with the bar for its insurance limit of $50,000. Zurn sued State Farm for benefits under the $50,000 underinsured motorist provisions of his automobile policy. By previous appeal, Minnesota law governed Zurn's claim against State Farm. Zurn and State Farm stipulated that his damages exceeded $125,000.

On the date of accident, Minnesota's underinsured motorist statute calculated State Farm's obligation to Zurn by the "difference of limits" method (State Farm owes only the amount by which the underinsured limit exceeds the amounts paid by others to the insured). Even though Minnesota amended its law prospectively to comport with Iowa's "add-on" method, the court declined to impose the change retrospectively on State Farm.

Minnesota has never decided, however, whether or not a recovery under the dram shop law is to be deducted from the underinsured limit. Because the parties did not plead or prove Minnesota law, the Court presumed Minnesota law to be the same as

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Iowa, which would require reduction of the dram shop settlement from the total damages, not the underinsured limit. Accordingly, Zurn is entitled to $25,000 from State Farm.

CONSTITUTIONAL LAW

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Due Process/Equal Protection

Section 25A.4 ("the State shall not be liable for interest prior to judgment") does not violate equal protection.

Duntz v. Zeimet, 478 N.W.2d 635 (Iowa 1991)

Due Process/Equal Protection

Zeimet was not wearing her seat belt when her vehicle collided with the vehicle operated by Duntz. He challenged the constitutionality of section 321.445(4), which provides for actions arising on or after July 1, 1986, as follows:

> [F]ailure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault .... However, ... the failure to wear a seat belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances:
>
> (1) [Defendant] must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.
>
> (2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may reduce the amount of plaintiff's recovery by an amount not to exceed 5% of the damages awarded after any reductions for comparative fault.

HELD: Limitation on amount jury may reduce plaintiff's recovery for violation of seat belt law does not deny defendant his constitutional right to trial by jury or violate equal protection.

DISSENT (4-1): "[A]rbitrary limitation of 5% ... unconstitutionally infringes on a defendant's right to a trial."

West Des Moines State Bank v. Mills, 482 N.W.2d 432 (Iowa 1992)

Due Process/Equal Protection

1986 legislation provided a new procedure for accomplishing the waiver of homestead exemptions without limiting the language to agricultural real estate, even though the preamble and introductory language of the act justified the amendment on the farm crisis. One year later, the legislature rectified the error by amending the new section and by making the amendment retroactive to the effective date of the enactment one year earlier.

Mills refinanced a loan secured by mortgage on non-agricultural land during the year after the new enactment but before the retroactive amendment. HELD: Application of the retroactive amendment to Mills' financial transaction violates neither the contract, due process, or equal protection clauses of the federal or state constitutions. Unlike Arnold, 426 N.W.2d 153 (Iowa 1988), this retroactive amendment does not terminate homestead rights but merely seeks to clarify a new procedure for the protection of certain homestead rights.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at 612 (Iowa 1991)

Due Process/Equal Protection

Section 668A.1's creation of the civil reparation trust fund and the resulting allocation of punitive damages away from plaintiff does not violate due process or equal protection.

City of Maquoketa v. Russell, 484 N.W.2d 179 (Iowa 1992)

First Amendment

Municipal ordinance prohibited "any person under the age of 18" to be on public property between the hours of 11:00 p.m. and 6:00 a.m., unless accompanied by a parent or guardian or other adult having care and custody, or unless "travelling a direct route between home and bona fide employment or between home and a

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parentially approved supervised activity." Three minors "cruising" on Maquoketa thoroughfares were stopped and ultimately arrested for violation of the ordinance.

HELD: Ordinance is overly broad because it applies to emancipated minors and to activities protected by First Amendment Rights of religion, speech, assembly, and association.

CONTRACTS

Davenport Bank & Trust Co. v. State Central Bank, 485 N.W.2d 476 (Iowa 1992)

Accord and Satisfaction

DB&T agreed to purchase from SCB the amount of SCB's loan to a farmer that exceeded SCB's loan limits. The participation agreements initially contained a pro-rata provision for the sharing of collateral in the event of a default. DB&T later submitted a new form that contained a last-in, first-out (LIFO) provision, which SCB signed. Farmer failed to pay and SCB started collection proceedings. SCB discovered the inconsistency in the recovery provisions, which generated a dispute between the two banks as to how to divide the proceeds of liquidation. SCB claimed that all proceeds should be divided pro-rata, and DB&T sought to recover on a LIFO basis. Finally, SCB proposed the following by letter to DB&T:

> The first $600,000 collected is [DB&T's]. The slight adjustment from your $650,000 could be subscribed to the attorney fees we will absorb. After the first $600,000, [SCB] will receive $600,000. We recognize we might not collect $600,000, but we're working on it. Once [SCB's] $600,000 is collected, we will share 50/50. There's a chance it might exceed $1,200,000, but everything will have to break just right.

(emphasis added) DB&T accepted the proposal in writing.

One of the farmer's principal assets turned out to be worth substantially less than SCB believed. As a result, SCB recovered only a total of $720,000 from the liquidation process. SCB proposed splitting the recovery 50-50. DB&T sued for breach of the accord and satisfaction resulting from the final correspondence between SCB and DB&T.

HELD: Substantial evidence supported jury's finding that SCB's letter and DB&T's acceptance of the proposal therein constituted an accord and satisfaction that substituted the new agreement for an old contract and discharged old obligations. Both parties provided consideration by giving up their previously asserted positions as to the proper procedure for sharing liquidation proceeds.

District court properly rejected SCB's defense of mistake as a matter of law and properly overturned jury finding in SCB's favor. The agreement allocated the risk of mistake to SCB. The parties proceeded from the assumption, among others, that SCB "might not collect $600,000."

PEB Practice Sales, Inc. v. Wright, 473 N.W.2d 624 (Iowa App. 1991)

Agency

Dentist executed exclusive listing agreement to sell his dental practice in his own name, even though his P.C. owned the practice. Dentist then sold practice through a competing broker. Defending against PEB's action for the commission it would have earned, dentist argued that PEB had no contract with the entity which could sell the practice: his P.C. HELD: Dentist had authority to bind his corporation and "is equitably estopped from taking different opposing legal positions in this action to the detriment of another relying upon his representations."

Stockton v. Shelter General Insurance Co., 477 N.W.2d 872 (Iowa App. 1991)

Agency

Stockton had existing policy with insurer. In oral conversation with agent, they requested insurance coverage on another property and agent assured them that "he would take care of it." Several months later, Stockton suffered fire loss and discovered that agent had died before preparing the paperwork on their new coverage. HELD: Insurer had burden to prove that agent intended to write insurance through another insurer.

West v. Jayne, 484 N.W.2d 186 (Iowa 1992)

Breach

Attorney West hired Attorney Jayne as an associate. Their oral agreement required West to be responsible for the overhead for Jayne's practice and to pay Jayne a weekly salary and certain

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percentages of any contingent fees collected by Jayne, those percentages depending upon who secured the client for the law firm and who performed the work.

In 1985, while an ethics complaint against West was pending, West notified Jayne that he could not pay Jayne's weekly salary. Several months later, with no further salary payments forthcoming from West, Jayne moved out without notice but with over 60 files (with written consent of the clients). West sued Jayne for West's share of the fees Jayne collected on these files.

HELD: West's failure to pay Jayne's weekly salary did not permit Jayne to rescind the contract and retain all fees earned in files that had come into Jayne's possession pursuant to their oral agreement. West had already performed his obligations that merit his right under the agreement to certain percentages of the fees ultimately collected. Jayne never attempted to enforce his contractual right to the weekly salary. West's suspension does not annul the West-Jayne contract. While Supreme Court Rule 118.12 and supporting advisory opinions affect what fees a suspended attorney can earn in contingent fee cases that commence before the suspension and end during the suspension, neither the rule nor the opinions impact upon matters of contract between two attorneys.

Federal Land Bank v. Woods, 480 N.W.2d 61 (Iowa 1992)

Consideration

Facing foreclosure, Schmitt refinanced with Thorp and gave Thorp authority to auction the farm. Moser purchased the farm at auction, and entered into a contract with Schmitt. Schmitt refused to close or to leave the property. Thorp foreclosed. Moser sued Schmitt for specific performance and joined Thorp as a defendant. District court permitted Thorp to foreclose. Thorp purchased at the sheriff's sale. Schmitt conveyed redemption rights to a trustee, who sold the farm just as the redemption rights expired to Woods. Woods borrowed money from FLB to fund the purchase.

The Iowa supreme court held in Moser I that Moser had a valid contract. The court found in Moser II that Woods was not a good faith purchaser, because Woods had notice of Moser's claim. "In the current brouhaha," FLB sued Woods to recover on its loan. Woods defended in part by asserting the affirmative defense of failure of consideration. Woods contended that FLB was to obtain a first security position on the farm such that FLB would look to the farm first rather than Woods in the event of default.

HELD: Woods' argument on failure of consideration is really a claim by Woods that FLB should have assured Woods that Woods was the fee owner of the farm before taking a mortgage from Woods. The documents do not reflect any such obligation or description of consideration. In fact, documents reflect a representation by

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Woods, not FLB, that Woods was the fee owner. "Indeed, there was a failure of consideration. But FLB was not responsible for that failure; the Woods were."

COMMENT: This is Moser VI.

In re Estate of Claussen, 482 N.W.2d 381 (Iowa 1992)

Consideration

Defendant sold real estate by written contract to plaintiff. One provision of contract granted to buyer the option to purchase additional adjacent real estate. After defendant's death, plaintiff attempted to exercise option, but estate refused on grounds that option was void for lack of consideration. HELD: Contract was a single, non-severable agreement, with interdependent obligations and promises that were supported by common consideration. Option did not fail for lack of consideration.

South Ottumwa Bancshares, Inc. v. First Interstate of Iowa, Inc., 484 N.W.2d 586 (Iowa 1992)

Consideration

Holtsinger and Curran were general partners in Centar, which acquired 14% of the common stock in First Interstate. Centar threatened to acquire a controlling interest in First Interstate and liquidate it unless First Interstate purchased its shares back from Centar at a premium. Centar and First Interstate executed a "stock purchase and option agreement," in which First Interstate purchased all of its stock held by Centar for a specified price. The agreement also gave First Interstate the right to purchase stock in the South Ottumwa Savings Bank (Bank) from a holding company (plaintiff), contemporaneously formed by Holtsinger and Curran.

> Consideration for the option was a $250,000 note which, among other things, was conditioned upon [plaintiff] acquiring 80% of [Bank] shares. Nothing in the agreement provided for monetary payment to [plaintiff] for the option.

The agreement provided that First Interstate could not exercise the option for three years and that plaintiff could avoid the option at that time by paying $250,000 plus interest to First Interstate.

At the expiration of the three-year period, Bank's stock had risen in value above the option price. First Interstate timely exercised the option. Plaintiff commenced a declaratory judgment action to declare the option invalid and paid $250,000 into an

account in order to avoid the option in the event it were ruled valid. Plaintiff later amended its petition also to seek damages for breach of fiduciary duty and fraud.

HELD: The $250,000 note was valid consideration for the option.

<u>PEB Practice Sales, Inc. v. Wright</u>, 473 N.W.2d 624 (Iowa App. 1991)

<u>Exclusive Listing</u>

Dentist signed exclusive listing agreement with PEB in his own name, even though practice was owned by his P.C. Although PEB introduced dentist to the eventual purchaser, dentist sold practice through a competitor of PEB. After trial on PEB's claim for the commission it would have earned, district court found for PEB but made no finding as to whether the competing broker acted as an agent for the dentist as opposed to the purchaser. Dentist did not file a 179(b) motion.

HELD: Although "an owner may sell property through his own efforts without necessarily being liable for a commission under an exclusive right-to-sell agreement," appellate court will assume that district court found (but did not state) that competitor was an agent for the selling dentist. Such an implicit finding negates the dentist's argument that he has no liability for selling "through his own efforts."

<u>Garren v. First Realty</u>, 481 N.W.2d 335 (Iowa 1992)

<u>Exclusive Listing</u>

Plaintiff purchased land that turned out to be in a flood fringe zone and sued "their" realty company when a flood damaged their property and possessions. The realty company had contracted with sellers to act as sellers' agent. Buyers were aware that the realtor with whom they worked was employed by the realty company who was the "listing agent." HELD: Buyers had no contract with the realtor or realty company and had no claim against them for breach.

<u>Bradshaw v. Wakonda Club</u>, 476 N.W.2d 743 (Iowa App. 1991)

<u>Interpretation</u>

In 1956, the Wakonda Club provided in its articles of incorporation:

> Any resident-member that has reached the age of 70 and has been a member for 20 consecutive years may, at his option, surrender his membership to the club and become an honorary member for the term of 20 years. An honorary member will be entitled to all of the privileges of the club but will pay no dues.

The articles empowered the board of directors

> to fix the dues for each class of membership and ... have all powers which may be necessary and proper to be exercised in conducting the affairs of the corporation.

After 1974, the board passed a series of resolutions that impacted upon the eligibility requirements for honorary membership and the obligation of honorary members to pay dues. By 1988, the board had fixed dues for honorary members at $100 per month.

Plaintiffs had been regular members, had qualified for honorary membership, had elected to become honorary members, and had paid dues as honorary members, all in accordance with the more recent resolutions. They complained for the first time in 1988 when the board changed their dues from a specific dollar amount to a percentage of the regular members' monthly dues. Plaintiffs sued Wakonda Club for negligent misrepresentation and breach of contract and sought other relief based on equitable and promissory estoppel. District court sustained Wakonda Club's motion for summary judgment.

HELD: District court should not have granted summary judgment on breach of contract. Plaintiffs presented questions of fact with respect to whether the articles of incorporation, bylaws, and club rules and regulations vested certain rights to all members with respect to qualifying for honorary membership and paying no dues.

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Rohlin Construction Co. v. City of Hinton, 476 N.W.2d 78 (Iowa 1991)

Liquidated Damages

Construction contracts containing $400-per-day liquidated damages clauses were penalties, when the City and County provided no justification or rationale for the calculations that resulted in the $400 figure, when they failed to present any evidence establishing that any damages of significance were suffered due to delay, and when they presented no evidence that significant damages had been anticipated.

Davenport Bank & Trust Co. v. State Central Bank, 485 N.W.2d 476 (Iowa 1992)

Mistake

DB&T agreed to purchase from SCB the amount of SCB's loan to a farmer that exceeded SCB's loan limits. The participation agreements initially contained a pro-rata provision for the sharing of collateral in the event of a default. DB&T later submitted a new form that contained a last-in, first-out (LIFO) provision, which SCB signed. Farmer failed to pay and SCB started collection proceedings. SCB discovered the inconsistency in the recovery provisions, which generated a dispute between the two banks as to how to divide the proceeds of liquidation. SCB claimed that all proceeds should be divided pro-rata, and DB&T sought to recover on a LIFO basis. Finally, SCB proposed the following by letter to DB&T:

> The first $600,000 collected is [DB&T's]. The slight adjustment from your $650,000 could be subscribed to the attorney fees we will absorb. After the first $600,000, [SCB] will receive $600,000. We recognize we might not collect $600,000, but we're working on it. Once [SCB's] $600,000 is collected, we will share 50/50. There's a chance it might exceed $1,200,000, but everything will have to break just right.

(emphasis added) DB&T accepted the proposal in writing.

One of the farmer's principal assets turned out to be worth substantially less than SCB believed. As a result, SCB recovered only a total of $720,000 from the liquidation process. SCB proposed splitting the recovery 50-50. DB&T sued for breach of the accord and satisfaction resulting from the final correspondence between SCB and DB&T.

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HELD: Substantial evidence supported jury's finding that SCB's letter and DB&T's acceptance of the proposal therein constituted an accord and satisfaction that substituted the new agreement for an old contract and discharged old obligations. Both parties provided consideration by giving up their previously asserted positions as to the proper procedure for sharing liquidation proceeds.

District court properly rejected SCB's defense of mistake as a matter of law and properly overturned jury finding in SCB's favor. The agreement allocated the risk of mistake to SCB. The parties proceeded from the assumption, among others, that SCB "might not collect $600,000."

Quigley v. Wilson, 474 N.W.2d 277 (Iowa App. 1991)

Modification

Quigley sold farm on contract to Wilson in 1980. In 1986, Wilson notified Quigley that it could not make payments. Quigley and Wilson agreed to reduce the contract price and change other terms. Their agreement was reduced to writing by Quigley's counsel and was executed and recorded. Wilsons proceeded to perform in accordance with the 1986 agreement.

After Quigley established a voluntary conservatorship, the conservator sued Wilson for failing to perform in accordance with the 1980 contract. Wilson answered by denying the allegations and by asserting that the 1986 agreement modified the 1980 contract. The conservator alleged in a trial brief that the 1986 agreement was unenforceable due to lack of consideration. District court found that the 1986 agreement constituted a waiver. See In re Guardianship of Collins, 327 N.W.2d 230 (Iowa 1982).

HELD: The change of purchase price and corresponding changes in payment schedule

> constitute more than the seller abandoning a contractual right arising from a contract. They create new and different obligations to be performed by the buyer. We therefore limit waiver to situations where a party to a contract abandons a right that party has under a contract. We categorize situations where contracting parties incur different duties and obligations from those in their original contract as modifications.

Restatement section 89D provides:

> A promise modifying a duty under a contract not fully performed on either side is binding
>
> (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made ....

The new Quigley-Wilson contract fits the restatement's recognition of modification "in view of circumstances not anticipated."

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The unanticipated circumstances were the drastic decrease in the value of the land coupled with the seller's concern about tax repercussions from reacquiring the land and the fact the Wilsons had not received any income from the farm for the previous year. Additionally, the new agreement followed negotiations lasting over a period of time, the document was written by the seller's attorney, the trial court found the reduced price was roughly the fair market value of the property at the time the re-negotiations occurred, and the buyers had already paid $58,000 toward principal on the original contract and the balance of the new contract price was $62,500.

COMMENT: Iowa Supreme Court granted further review, but then affirmed the court of appeals decision in a two-sentence per curiam decision that ordered publication of the court of appeals opinion.

In re Estate of Claussen, 482 N.W.2d 381 (Iowa 1992)

Option

Defendant sold real estate by written contract to plaintiff. One provision of contract granted to buyer the option to purchase additional adjacent real estate. After defendant's death, plaintiff attempted to exercise option, but estate refused on grounds that option was void for lack of consideration. HELD: Contract was a single, non-severable agreement, with interdependent obligations and promises that were supported by common consideration. Option did not fail for lack of consideration.

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Farmers State Bank v. Huebner, 475 N.W.2d 640 (Iowa App. 1991)

Parol Evidence

Walk rented farmland from Schultz and financed his farming operation on Schultz' land through Farmers State Bank. When Walk attempted to renew his loans, FSB required either additional security or a cosigner. Walk's friend, Huebner, cosigned without reading the note. The note mistakenly listed the Schultz property as collateral as a result of the bank's attempt to describe the location of the personal property pledged by Walk as collateral. Bank loaned other money to Walk that was secured by a mortgage on other real estate owned by Walk. When Walk eventually defaulted on all loans, Walk gave a deed to his real estate to the bank in lieu of foreclosure. The bank foreclosed on the other security and then sued Huebner for the difference.

HELD: FSB was entitled to utilize parol evidence to establish that its listing of the Schultz property in the collateral list was an error. Substantial evidence supported district court's finding that Huebner did not establish that FSB induced him to become a cosigner through the fraudulent representation that the note was secured by the Schultz property.

> [FSB president Bowers] testified that his conversations with Huebner during the execution of the notes were limited. Bowers testified that on neither occasion was there any discussion about the underlying security and on neither occasion did Huebner read the note he was signing.... Huebner recalled that Bowers had said both times that the note was safely secured by real estate. Huebner admitted that he did not know the contents of the notes when he signed them and that he never attempted to ascertain the status of the notes he had signed. Although the two bachelor farmers had known each other for 30 years, during which they had hunted and fished together and had even owned farm equipment together, Huebner testified that he did not know whether Walk owned the 160 acres he farmed.

COURTS

Reichs v. Farmers Commodities Corp., 474 N.W.2d 809 (Iowa 1991)

Arbitration

Customer of commodities brokerage firm suffered substantial losses and sought to arbitrate its differences with defendant FCC. Federal regulations require a "futures commission merchant" such as defendant to submit to arbitration at the request of the customer.

HELD: Compelling FCC to arbitrate this matter did not violate its due process or equal protection rights or its right to access to the courts to a jury trial. "As a commodities broker FCC may have been compelled to submit to a binding arbitration, but no one compelled FCC to become a commodities broker." FCC also is stuck with the shortcomings and imperfections that it perceives in the arbitration process.

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> A refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution. . . . It is no idle coincidence that the words "arbitration" and "arbitrary" are both derived from the same Latin word.

Without deciding whether federal-court standard of review on arbitration decisions - fundamentally irrational or in manifest disregard of the law - differs from Iowa's substantial evidence standard, record permits no interference of arbitration decision under either standard.

COMMENT: Because this was a tort case, the court ignored arguments by both sides that focused chapter 679A, which "addresses only written contracts for arbitration," and specifically exempts 'any sounding in tort whether or not involving a breach of contract.'"

Ahls v. Sherwood, 473 N.W.2d at 619 (Iowa 1991)

Interlocutory Order

Ahls sued Vacationland and Optimus, the seller and a component manufacturer, respectively, of a heater that exploded in the Ahls home. District court dismissed Optimus on personal jurisdiction grounds. Vacationland then cross-petitioned against Optimus for contribution and indemnity. District court dismissed Vacationland's cross-petition on the ground that the previous dismissal was the law of the case. The Supreme Court rejected Vacationland's request to appeal in advance of final judgment.

On the day set for trial, October 3, 1989, Ahls settled with all remaining defendants. District court entered an order noting the settlements and assessing a $500.00 late settlement penalty. The dismissal documents were filed on November 15. On November 27, Vacationland filed a notice of appeal from district court's dismissal of its cross-petition against Optimus. Optimus moved to dismiss the appeal.

HELD: The order dismissing Ahls' claim against Optimus was an interlocutory order and, therefore, subject to change at any time. As such, it cannot constitute the law of the case. District court should have proceeded to adjudicate Optimus' motion to dismiss in light of Vacationland's resistance.

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Feller v. Scott County, Civil Service Commission, 482 N.W.2d 154 (Iowa 1992)

Law of Case

Deputy sheriff who claims he was forced to resign without good cause appealed to the civil service commission. The commission rejected the deputy's request for a closed hearing. The deputy filed an action in district court against the commission for violation of Iowa's open-meetings-law and for violating deputy's civil rights. District court granted the commission summary judgment on the open-meetings-law claim and dismissed the civil rights claim after an evidentiary hearing.

The Iowa court of appeals reversed. The court held that the open-meetings-law afforded the deputy a remedy and that the district court should have considered whether the commission violated the open-meetings-law by failing to grant the deputy a closed hearing. The court also proceeded to hold that the commission had abused its discretion in denying the deputy's request for a closed hearing. The court of appeals remanded "for further proceedings consistent with this opinion." On remand, the district court denied the deputy's motion for entry of judgment, conducted a trial on whether or not the commission had violated the open-meetings-law, and ultimately decided that the commission's decision not to close the hearing was within its discretion.

HELD: Court of appeals' decision was the law of the case, whether right or wrong. The opinion that the commission had abused its discretion in denying the deputy's request for a closed hearing "was essential to the determination required of the court," and therefore was part of the law of the case. District court should have granted the deputy's motion for entry of judgment.

Production Credit Association v. Shirley, 485 N.W.2d 469 (Iowa 1992)

Proposed Findings and Conclusions

After trial to court in fraudulent conveyance action, district court directed PCA in ex parte communication to prepare findings of fact and conclusions of law. HELD: All parties should be given the same opportunity to submit proposed findings and to comment on findings proposed by others. Shirleys have failed, however, to establish impact on their substantial rights. They do not contend that any particular finding or conclusion was unsupported by the evidence or any correct as a matter of law except to the extent specifically briefed and adjudicated.

In re Estate of Olson, 479 N.W.2d 610 (Iowa App. 1991)

Recusal

Margaret Olson's nephew, who would have received the bulk of her estate under an earlier will, contested a newer will that gave her estate to Lea. After the jury found undue influence and lack of testamentary capacity, Judge Klotzbach set the verdict aside and upheld the newer will. The Court of Appeals reversed. As a result, the will favoring Huffy was admitted to probate.

While the appeal was pending, Lea's counsel filed an application for attorney fees. At a hearing scheduled after issuance of procedendo, Huffy questioned Judge Klotzbach's impartiality. He recused himself over Lea's strenuous objection. Judge VanMeter then denied the fee application.

HELD: Judge Klotzbach "acted within his discretion in recusing himself."

Harris v. Jones, 476 N.W.2d 54 (Iowa 1991)

Small Claims

Magistrate dismissed a counterclaim filed in small claims court as untimely filed, but provided that the dismissal was without prejudice. HELD: Rule regarding compulsory counterclaims does not apply in small claims court. See § 631.7(4). Magistrate acted properly in permitting defendant to re-file his counterclaim.

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DAMAGES

Hunter v. Board of Trustees, 481 N.W.2d 510 (Iowa 1992)

Breach of Contract

Hunter was a 13-year management employee at hospital. During his tenure, the hospital issued a personnel manual that, among other things, listed the circumstances for termination of employees and provided procedures for certain types of terminations. One circumstance was staff reduction. The procedures section of the manual provided that the hospital "may at its sole discretion layoff an employee whenever it is deemed necessary."

Hunter applied for executive director position, but hospital hired outsider Meyer, who terminated Hunter one month later pursuant to "staff reduction." Two months later, Meyer created a new management position and filled it with an associate from previous employment.

Hunter sued the hospital for breach of contract and Meyer for tortious interference. By ruling on competing motions for summary judgment, the district court held that the manual constituted a binding employment contract that limited the hospital's right to terminate Hunter to the listed circumstances. The jury returned verdicts for Hunter on breach of contract against the hospital and for interference against Meyer.

HELD: Plaintiff in wrongful-discharge case such as Hunter's is entitled to an award of future damages in the form of wages that would have been earned for the breach.

Loftsgard v. Dorrian, 476 N.W.2d 730 (Iowa App. 1991)

Collateral Source

In wrongful-death case, plaintiff testified as to medical expenses and the amount covered by insurance, the difference being $383.22, the exact amount then awarded by the jury for medical expenses. Section 668.14 provides:

> (1) In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.
>
> (2) If evidence and argument regarding previous payments or future rights of payment is permitted to subsection (1), the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

In Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990), the Iowa Supreme Court refused to read section 668.14 literally, because it would invite the jury to undertake the first step of an eventual double reduction. The Court said in Schonberger:

> We are convinced the legislature did not intend to call for this double reduction. To avoid this unintended result we interpret the statue so as to deem its requirements satisfied when the requirements of section 85.22 are complied with.

Three justices dissented, saying that the legislation "could not be more clear," and finding the majority's concerns easily resolvable by the appropriate use of instructions and special interrogatories.

The Court of Appeals discussed Schonberger:

> The dissent is instructive for it may well set the tune that should be struck in cases where subrogation and indemnity rights are not statutorily prescribed. ...
>
> The majority and minority opinions are similar in many respects. Each recognizes that one effect of the common-law collateral source rule is that in cases when plaintiff receives collateral benefits which are not paid subject to a right of subrogation ... and also is compensated for the same injuries from a tort suit ..., the plaintiff receives duplicate damages (double dipping) .... Each also recognizes that a plaintiff in Schonberger's position should not have his tort recovery reduced by the jury by the amount of collateral benefits ... and also have to repay the collateral benefits out of his remaining tort recovery.
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> The majority and minority differ, for the most part, only on the procedure that should be followed ... to avoid double dipping and yet make certain that the plaintiff does not have his recovery reduced twice. ...
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> ...
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> The result reached in this case is the very circumstance that Justice Harris envisioned in his majority opinion in Schonberger. ... But this result could have been avoided for once the collateral source evidence was received, the procedure suggested by the Chief Justice in his dissenting opinion and as set forth in section 668.14 should have been employed.

Because plaintiff did not object to the instructions and did not request instructions on section 668.14, the Court of Appeals concluded that it could not remand for new trial. Instead, it remanded

> for a proceeding in which it must be established that the proceeds of any recovery received by the plaintiff for medical and hospital expenses are pledged to reimburse United Fire and Casualty. Upon such a showing, the judgment for medical expenses is to be increased to the amount of $10,562.10.

Spencer v. Spencer, 479 N.W.2d 293 (Iowa 1991)

Defamation

L.J. Spencer's farm was placed in trust upon his death, pursuant to his will. Several of his sons and grandsons farmed on the land pursuant to leases. Son Harold filed objections to the trustee's 1987 annual report. Lyle filed a response and wrote several letters to the trustee's attorney. He sent copies of a couple letters to Harold's banker, to a friend of Lyle, to a newspaper, to a state legislator, and to Tom Harkin. Harold sued Lyle for defamation, and a jury awarded Harold $25,000 in compensatory damages and $35,000 in punitive damages.

HELD: Harold adduced substantial evidence of emotional distress, causation, and a "conscious disregard [by Lyle] for the rights of his brother Harold."

Kosmacek v. Farm Service Co-op, 485 N.W.2d 99 (Iowa App. 1992)

Emotional Distress

Co-op employees and customers mixed water with farm chemicals on Co-op's property in a manner that permitted contaminated runoff onto plaintiff's adjoining property. Plaintiff sued for damage to real estate, medical expenses, emotional distress, and punitive damages. District court awarded plaintiffs $45,000 for emotional distress for their claimed fear of an enhanced risk of developing a serious illness in the future because of the exposure to herbicides.

HELD:

> "[M]ere possibility of future harm is not sufficient [to justify emotional distress damages]. There has to be a threshold regarding the

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likelihood of development of the feared disease. ... [T]here should be a showing that plaintiffs are aware they possess an increased statistical likelihood of developing cancer, and from this knowledge brings a reasonable apprehension which manifests itself in mental distress."

Snipes v. Chicago, Central & Pacific Railroad, 484 N.W.2d 162 (Iowa 1992)

FELA

Snipes was a "carman" engaged in repairing and rerailing train cars and locomotives for the railroad. Co-employee Jones, whose job required him to inspect cars and identify those in need of repair, asked Snipes to help him close a boxcar door that was "rough shutting." While they worked on the door together, it closed quickly and unexpectedly and caused injury to Snipes.

Snipes' original treating physician found trauma to Snipes' foot and rupture to his right bicipital tendon, but found no tear in Snipes' rotator cuff. Although the physician agreed that injuries to the biceps tendon will generally result in damage to the rotator cuff, he found only chronic rotator cuff impingement syndrome due to years of heavy lifting. A second physician diagnosed rotator cuff tear and performed two surgical procedures.

Snipes sued railroad under Federal Employers' Liability Act (FELA) and obtained a verdict of $357,500. The jury assigned 100% of the fault to the railroad.

HELD: Verdict was not excessive. Although second physician agreed that Snipes' heavy lifting over the years had caused the rotator cuff tear, he also testified that the fall aggravated this condition and ultimately caused the tear. Snipes was forced to retire at fifty-five. He had earned $25,000 per year. He adduced evidence that his prospects for other employment were slim to nonexistent.

COMMENT: Court also followed federal case law in refusing to construe section 55 of FELA (authorizing offset for certain company payments to injured employees) to apply to disability payments made pursuant to Railroad Retirement Act (RRA).

Connolly v. Bain, 484 N.W.2d 207 (Iowa App. 1992)

Fiduciary Duty

Connolly, Bain, and Hoing attempted to start a new business selling medical malpractice coverage for tail liability or prior acts. They consulted an actuary and counsel and executed a pre-incorporation agreement. The agreement provided that they would share equally in ownership and expenses. They agreed to a non-competition clause and agreed not to disclose information to third parties without prior execution of a non-disclosure agreement by the third party. The three then formed BCH Corporation, with each owning 1/3 of the stock. Counsel advised them of the need for a shareholders' agreement and submitted a recommended form that required unanimous consent for certain actions in order to protect minority shareholders.

Bain and Hoing began to disagree with and distrust Connolly, and the feelings were mutual. Counsel subsequently proposed a second agreement, which was less protective of the interest of minority shareholders. Connolly refused to execute the agreement and threatened to develop the product on his own. At BCH's organizational meeting, Connolly, Bain, and Hoing were elected to the board of directors, but Connolly was not elected to any officer position.

Several months later, Bain, Hoing, and another investor formed a corporation named Physicians Management Co. (PMC). At the same time, Connolly sought other investors and also sought to incorporate under the name PMC. Bain and Hoing met with an entity previously interested in investing in BCH and reached agreement with that investor.

Several months later, the three original investors agreed to dissolve BCH. Bain and Hoing granted Connolly the right to use the business plan and insurance policy, BCH's only tangible assets.

Connolly sued Bain and Hoing for breach of fiduciary duty and PMC for conversion. District court found for defendants on the conversion claim but for Connolly on the fiduciary duty. The district court awarded Connolly $14,000 for his out-of-pocket expenses (but rejected Connolly's claim for lost profits, lost salary and benefits, and punitive damages) and imposed a constructive trust in favor of Connolly against 1/3 of the stock in PMC.

HELD: District court properly rejected Connolly's claim for lost profits and lost salary and benefits. Evidence of anticipated profits was too speculative and "ignores reality." At the time of trial, PMC had sold only one policy and was over one million dollars in debt. Connolly had no expectation through the pre-incorporation agreement that he, like Bain and Hoing, would be

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employed by the corporation, let alone at any particular salary or with any particular benefits. District court likewise did not abuse its discretion in declining to award punitive damages.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at 612 (Iowa 1991)

Good Will

Shepherd's building suffered damage when excavation for city sewer project next door cracked a wall. The crack and particularly the defendants' continuation of the excavation work after the crack was discovered interfered with Shepherd's conduct of his business, because part of his building was rendered unusable during the remainder of the construction project. HELD: Shepherd was entitled to recover damages for loss of good will, even though his business was not profitable.

Connolly v. Bain, 484 N.W.2d 207 (Iowa App. 1992)

Lost Profits

Connolly, Bain, and Hoing attempted to start a new business selling medical malpractice coverage for tail liability or prior acts. They consulted an actuary and counsel and executed a pre-incorporation agreement. The agreement provided that they would share equally in ownership and expenses. They agreed to a non-competition clause and agreed not to disclose information to third parties without prior execution of a non-disclosure agreement by the third party. The three then formed BCH Corporation, with each owning 1/3 of the stock. Counsel advised them of the need for a shareholders' agreement and submitted a recommended form that required unanimous consent for certain actions in order to protect minority shareholders.

Bain and Hoing began to disagree with and distrust Connolly, and the feelings were mutual. Counsel subsequently proposed a second agreement, which was less protective of the interest of minority shareholders. Connolly refused to execute the agreement and threatened to develop the product on his own. At BCH's organizational meeting, Connolly, Bain, and Hoing were elected to the board of directors, but Connolly was not elected to any officer position.

Several months later, Bain, Hoing, and another investor formed a corporation named Physicians Management Co. (PMC). At the same time, Connolly sought other investors and also sought to incorporate under the name PMC. Bain and Hoing met with an entity previously interested in investing in BCH and reached agreement with that investor.

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Several months later, the three original investors agreed to dissolve BCH. Bain and Hoing granted Connolly the right to use the business plan and insurance policy, BCH's only tangible assets.

Connolly sued Bain and Hoing for breach of fiduciary duty and PMC for conversion. District court found for defendant on the conversion claim but for Connolly on the fiduciary duty. The district court awarded Connolly $14,000 for his out-of-pocket expenses (but rejected Connolly's claim for lost profits, lost salary and benefits, and punitive damages) and imposed a constructive trust in favor of Connolly against 1/3 of the stock in PMC.

HELD: District court properly rejected Connolly's claim for lost profits. Evidence of anticipated profits was too speculative and "ignores reality." At the time of trial, PMC had sold only one policy and was over one million dollars in debt.

Kosmacek v. Farm Service Co-op, 485 N.W.2d 99 (Iowa App. 1992)

Medical Expense

Co-op employees and customers mixed water with farm chemicals on Co-op's property in a manner that permitted contaminated runoff onto plaintiff's adjoining property. Plaintiff sued for damage to real estate, medical expenses, emotional distress, and punitive damages. District court awarded plaintiff $2,500 in medical expenses. Plaintiff submitted expert testimony on causation. HELD: Although Co-op adduced considerable evidence refuting causation, district court had substantial evidence to support its finding of causation.

Loftsgard v. Dorrian, 476 N.W.2d 730 (Iowa App. 1991)

Pain and Suffering

In wrongful-death action, jury awarded $500 for pain and suffering. Evidence was in dispute as to whether or not descendant suffered between the time of accident and time of death. HELD: Substantial evidence supported the verdict.

Kosmacek v. Farm Service Co-op, 485 N.W.2d 99 (Iowa App. 1992)

Property Damage

Co-op employees and customers mixed water with farm chemicals on Co-op's property in a manner that permitted contaminated runoff onto plaintiff's adjoining property. Plaintiff sued for damage to

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real estate, medical expenses, emotional distress, and punitive damages. District court found that plaintiff's property was not marketable as a homestead due to chemical contamination and awarded plaintiff the difference in the property's appraised values as homestead versus farmland. HELD: Plaintiff did not adduce substantial evidence to support a finding that property had been rendered permanently uninhabitable. Evidence established only that the contamination was minimal and well below acceptable levels for human habitation.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at 612 (Iowa 1991)

Punitive Damages

City contracted with engineer Brice to prepare plans and specifications for city sewer project. City contracted with Peterson to perform the excavation work.

Brice's plans did not detail any protective methods to be used for Shepherd's property. Peterson used another engineer to design a protective system, and Brice approved those drawings. Nevertheless, Peterson departed from his own engineer's drawings and conducted the excavation in a manner that caused a wall in Shepherd's building to crack. When the crack was discovered, Brice, Peterson, and Shepherd met and discussed it. Peterson elected to proceed in the same manner. He instructed Shepherd not to use the damaged corner while the construction proceeded and to place scaffolding inside the building. Brice sent three letters expressing concern over further deterioration of the wall. At the end of the project, when the scaffolding was removed, the entire wall collapsed.

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Shepherd sued Brice and Peterson. After trial, the jury assessed 30% of the fault against Brice and 70% against Peterson. The jury awarded compensatory damages including loss of good will, and punitive damages. By special verdict, the jury found that Peterson's conduct was not directed specifically at Shepherd. District court allocated 25% of the punitive damage award to Shepherd and 75% to the civil reparation trust fund. All parties appealed.

HELD: Shepherd adduced substantial evidence of wrongful conduct committed and continued by Peterson with a willful or reckless disregard for Shepherd's rights. As to distribution of punitives, jury found that Peterson's conduct was not directed specifically at plaintiff. Substantial evidence supported jury's finding. Section 668A.1's creation of the civil reparation trust fund and the resulting allocation of punitive damages away from plaintiff does not violate due process or equal protection.

<u>Burke v. Hawkeye National Life Insurance Co.</u>, 474 N.W.2d 110 (Iowa 1991)

<u>Punitive Damages</u>

Burke was an independent agent who sold life insurance for, among other companies, Hawkeye National Life. Burke's contract with Hawkeye provided that his right to commissions was vested (he would continue to receive renewal commissions on policies so long as premiums were paid, even if Burke's contract with Hawkeye were terminated).

In an effort to compete in the industry, Hawkeye developed new insurance products and contracted with Preferred Marketing Associates (PMA) to market them. Hawkeye gave PMA agents a list of the Hawkeye insureds that had been sold policies by Burke. When Burke learned that PMA salesmen were calling on "his" customers, Burke complained. Hawkeye terminated Burke's contract. Burke sued for breach of contract. In the fourth day of trial, district court granted Burke's motion for leave to amend to add a claim for interference with contract and/or prospective business relations and a prayer for punitive damages.

HELD: Hawkeye continued to pay commissions to Burke on policies that remained in force after Hawkeye terminated Burke. Burke had no written agreement with Hawkeye concerning "ownership" of Burke's customers. The Burke-Hawkeye contract was terminable at will. As a matter of contract law, therefore, Burke had no cause of action against Hawkeye.

On the other hand, Burke adduced substantial evidence of an industry-wide custom and practice that rendered Hawkeye's conduct improper.

> This "hands-off" policy recognizes that while the company furnishes the product, the agent provides the customers; that customer loyalty to the company is fostered through agency relationships; and that agents are recruited and retained on the prospect of generating a customer base that - if left undisturbed - will provide years of renewal premiums for the company and renewal commissions for the agent. Within this framework, agents protect their vested renewals by refraining from deliberately placing company policies with competitors' products. And companies assume a corresponding duty not to solicit new business from policyholders unless they are "orphaned," that is, no longer serviced by an active agent.
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> . . .
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> . . . By soliciting and encouraging Burke's customers to strip the cash values from existing policies in order to replace them with new ones,

> Hawkeye agents not only interfered with Burke's contractual rights to renewal commissions on the old policies, but demonstrably reduced Burke's chances of writing new business for these customers in the future.
>
> . . . In the competitive insurance market, the details of a policyholder's existing coverage are guarded closely, since receipt of such information would give a significant selling advantage to the recipient. Thus, while Hawkeye maintains that preservation of business was its sole motive for providing Burke's customer list to its other agents, the record suggests that company officials anticipated rewriting those customers' policies and knew the result would be injury to Burke's business, i.e., vested renewal commissions and other future income.

COMMENT: After modifying district court's $100,000 judgment on compensatory damages to correct a mathematical calculation, Court reversed the award of punitive damages in the amount of $250,000.

> To allow Burke to recover substantial punitive damages on its late-filed amendment is quite another matter. The amendment substantially changed the issues on the fourth day of trial, four years after the case was filed.

Spencer v. Spencer, 479 N.W.2d 293 (Iowa 1991)

Punitive Damages

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L.J. Spencer's farm was placed in trust upon his death, pursuant to his will. Several of his sons and grandsons farmed on the land pursuant to leases. Son Harold filed objections to the trustee's 1987 annual report. Lyle filed a response and wrote several letters to the trustee's attorney. He sent copies of a couple letters to Harold's banker, to a friend of Lyle, to a newspaper, to a state legislator, and to Tom Harkin. Harold sued Lyle for defamation, and a jury awarded Harold $25,000 in compensatory damages and $35,000 in punitive damages.

HELD: Harold adduced substantial evidence of emotional distress, causation, and a "conscious disregard [by Lyle] for the rights of his brother Harold."

Larson v. Great West Casualty Co., 482 N.W.2d 170 (Iowa App. 1992)

Punitive Damages

Plaintiff, an Alaska resident, was involved in an accident in Iowa and suffered property damage to his vehicle. He placed his vehicle in storage and returned to Alaska. The tort-feasor's adjuster offered plaintiff $12,000 for his property damage. Plaintiff did not accept. Plaintiff asked the adjuster to handle storage problems in Iowa for him. The adjuster sold the vehicle at salvage for $3,200. Plaintiff sued the adjuster for conversion. The jury awarded compensatory damages of $3,200 and punitive damages in the amount of $225,000.

Court of Appeals rejected adjuster's argument that standard industry practices and the dealings between plaintiff and adjuster established that adjuster was no worse than merely negligent in selling plaintiff's vehicle for salvage. Court concluded, however, that the same evidence prevented plaintiff from establishing either malice or a wanton disregard for plaintiff's rights. Court of Appeals affirmed the finding of liability for conversion, reversed the award of punitive damages, and remanded for a new trial on compensatory damages. Retrial on damages was necessary because "[t]here was uncontroverted evidence the plaintiff suffered other damages as a result of the conversion."

Connolly v. Bain, 484 N.W.2d 207 (Iowa App. 1992)

Punitive Damages

Connolly, Bain, and Hoing attempted to start a new business selling medical malpractice coverage for tail liability or prior acts. They consulted an actuary and counsel and executed a pre-incorporation agreement. The agreement provided that they would share equally in ownership and expenses. They agreed to a non-competition clause and agreed not to disclose information to third parties without prior execution of a non-disclosure agreement by the third party. The three then formed BCH Corporation, with each owning 1/3 of the stock. Counsel advised them of the need for a shareholders' agreement and submitted a recommended form that required unanimous consent for certain actions in order to protect minority shareholders.

Bain and Hoing began to disagree with and distrust Connolly, and the feelings were mutual. Counsel subsequently proposed a second agreement, which was less protective of the interest of minority shareholders. Connolly refused to execute the agreement and threatened to develop the product on his own. At BCH's organizational meeting, Connolly, Bain, and Hoing were elected to the board of directors, but Connolly was not elected to any officer position.

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Several months later, Bain, Hoing, and another investor formed a corporation named Physicians Management Co. (PMC). At the same time, Connolly sought other investors and also sought to incorporate under the name PMC. Bain and Hoing met with an entity previously interested in investing in BCH and reached agreement with that investor.

Several months later, the three original investors agreed to dissolve BCH. Bain and Hoing granted Connolly the right to use the business plan and insurance policy, BCH's only tangible assets.

Connolly sued Bain and Hoing for breach of fiduciary duty and PMC for conversion. District court found for defendants on the conversion claim but for Connolly on the fiduciary duty. The district court awarded Connolly $14,000 for his out-of-pocket expenses (but rejected Connolly's claim for lost profits, lost salary and benefits, and punitive damages) and imposed a trust in favor of Connolly against 1/3 of the stock in PMC.

HELD: Substantial evidence supports district court's finding that Bain and Hoing, through PMC, deprived BCH and Connolly of a corporate opportunity. Although the shareholders' failure to execute a shareholders' agreement prevented BCH from utilizing the opportunity, it was Bain and Hoing's insistence on oppressive provisions in the proposed agreement that prevent BCH from obtaining a shareholders' agreement. Although a finding of corporate opportunity will be denied when "the company is unable to avail itself of the opportunity," see Ontjes v. MacNider, 232 Iowa 562, 579-80, 5 N.W.2d 860, 869-70 (1942), BCH's inability is traceable strictly to Bain and Hoing's position. Connolly's own conduct does not preclude a breach by Bain and Hoing of fiduciary duty. "Connolly did nothing Bain and Hoing were not already doing. [They] are in no position to complain about Connolly's conduct."

District court properly rejected Connolly's claim for lost profits and lost salary and benefits. Evidence of anticipated profits was too speculative and "ignores reality." At the time of trial, PMC had sold only one policy and was over one million dollars in debt. Connolly had no expectation through the pre-incorporation agreement that he, like Bain and Hoing, would be employed by the corporation, let alone at any particular salary or with any particular benefits. District court likewise did not abuse its discretion in declining to award punitive damages.

West v. Jayne, 484 N.W.2d 186 (Iowa 1992)

Punitive Damages

Attorney West hired Attorney Jayne as an associate. Their oral agreement required West to be responsible for the overhead for Jayne's practice and to pay Jayne a weekly salary and certain

percentages of any contingent fees collected by Jayne, those percentages depending upon who secured the client for the law firm and who performed the work.

In 1985, while an ethics complaint against West was pending, West notified Jayne that he could not pay Jayne's weekly salary. Several months later, with no further salary payments forthcoming from West, Jayne moved out without notice but with over 60 files (with written consent of the clients). West sued Jayne for West's share of the fees Jayne collected on these files.

HELD: West's failure to pay Jayne's weekly salary did not permit Jayne to rescind the contract and retain all fees earned in files that had come into Jayne's possession pursuant to their oral agreement. West had already performed his obligations that merit his right under the agreement to certain percentages of the fees ultimately collected. Jayne never attempted to enforce his contractual right to the weekly salary. West was not entitled to punitive damages, however.

<u>Kosmacek v. Farm Service Co-op</u>, 485 N.W.2d 99 (Iowa App. 1992)

<u>Punitive Damages</u>

Co-op employees and customers mixed water with farm chemicals on Co-op's property in a manner that permitted contaminated runoff onto plaintiff's adjoining property. Plaintiff sued for damage to real estate, medical expenses, emotional distress, and punitive damages. District court awarded $28,000 in lost value to real estate, $2,500 in medical expenses, $45,000 for emotional distress, and $10,000 in punitives.

Court of appeals reversed the property damage and emotional distress damages, the former because there was no evidence that contamination had rendered the property useful only as farmland and the latter because there was no evidence that the contamination threatened plaintiff with future illness. Court affirmed the punitive award, however. Co-op's use of its property "was in disregard of plaintiff's rights." Chemical containers were left strewn around. Co-op acted in total disregard of the plaintiff's interests.

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<u>Loftsgard v. Dorrian</u>, 476 N.W.2d 730 (Iowa App. 1991)

<u>Wrongful Death</u>

Jury awarded 30-year-old single and childless male who lived with his parents $32,000 for the present value of the loss to his estate by virtue of his premature death. HELD: Substantial evidence supported the verdict.

ESTOPPEL

PEB Practice Sales, Inc. v. Wright, 473 N.W.2d 624 (Iowa App. 1991)

Dentist executed exclusive listing agreement to sell his dental practice in his own name, even though his P.C. owned the practice. Dentist then sold practice through a competing broker. Defending against PEB's action for the commission it would have earned, dentist argued that PEB had no contract with the entity which could sell the practice: his P.C. HELD: Dentist had authority to bind his corporation and "is equitably estopped from taking different opposing legal positions in this action to the detriment of another relying upon his representations."

Bradshaw v. Wakonda Club, 476 N.W.2d 743 (Iowa App. 1991)

In 1956, the Wakonda Club provided in its articles of incorporation:

> Any resident-member that has reached the age of 70 and has been a member for 20 consecutive years may, at his option, surrender his membership to the club and become an honorary member for the term of 20 years. An honorary member will be entitled to all of the privileges of the club but will pay no dues.

The articles empowered the board of directors

> to fix the dues for each class of membership and ... have all powers which may be necessary and proper to be exercised in conducting the affairs of the corporation.

After 1974, the board passed a series of resolutions that impacted upon the eligibility requirements for honorary membership and the obligation of honorary members to pay dues. By 1988, the board had fixed dues for honorary members at $100 per month.

Plaintiffs had been regular members, had qualified for honorary membership, had elected to become honorary members, and had paid dues as honorary members, all in accordance with the more recent resolutions. They complained for the first time in 1988 when the board changed their dues from a specific dollar amount to a percentage of the regular members' monthly dues. Plaintiffs sued Wakonda Club for negligent misrepresentation and breach of contract and sought other relief based on equitable and promissory estoppel. District court sustained Wakonda Club's motion for summary judgment.

HELD: District court properly sustained Wakonda Club's motion for summary judgment as to misrepresentation. Plaintiffs failed to establish that Wakonda Club knew or should have known in 1956 that its policy regarding honorary membership would change 20 years later. District court properly rejected plaintiffs' equitable estoppel claim for the same reason. As to promissory estoppel, however, Wakonda Club was not entitled to summary judgment.

> The plaintiffs allege a clear and definite oral agreement. The Wakonda Club denies such an agreement ever existed. There is arguably evidence supporting either side. Thus there is a genuine issue of fact on the first element [clear and definite oral agreement].
>
> At least one plaintiff alleges he joined the Wakonda Club rather than the Des Moines Country Club, partially in consideration of the more attractive honorary membership provisions of the Wakonda Club. Thus, at least as to the single member and possibly others, there is a genuine issue of fact on detrimental reliance, the second element.

Humiston Grain Co. v. Rowley Interstate Transportation Co., 483 N.W.2d 832 (Iowa 1992)

Humiston and Rowley entered into an independent contractor agreement in which Humiston provided a semi-tractor and a driver, and Rowley provided trailers and cargo to be hauled. Rowley agreed to pay Humiston a percentage of the revenues earned by Rowley for transporting its customer's cargo. The written agreement provided that Rowley would furnish cargo insurance and Humiston would furnish liability insurance. The contract made no mention of insurance for physical damage to Rowley trailers, but the contract provided that Humiston would be responsible for all loss incurred by Rowley that was caused by Humiston's negligence.

Humiston provided a copy of the contract to insurance agent Ernest and instructed him to provide Humiston with the appropriate insurance coverage. Ernest contacted Rowley and was told by "the insurance person for Rowley" that Rowley would provide physical damage coverage on its trailers. As a result, Ernest did not procure insurance covering damage to Rowley's trailers.

A Humiston operator had an accident that was his fault and that damaged a Rowley trailer in the amount of $32,000. Humiston sued Rowley for unpaid rental fees, and Rowley counterclaimed on theories of breach of contract and negligence for damages to its trailer. Humiston raised estoppel as an affirmative defense to Rowley's counterclaim. District court entered judgment for

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Humiston on its claim for rental fees, and dismissed Rowley's counterclaim on grounds of estoppel. Humiston's estoppel claim does not impact on Rowley's claim against Humiston for negligence. In fact, the agreement specifically provided that Humiston would be responsible for losses suffered by Rowley as a result of Humiston's negligence. The conversation between Ernest and Rowley's insurance person related only to which party should obtain insurance for the loss. District court should have entered judgment in favor of Rowley on its claim of negligence against Humiston for the amount of Rowley's loss.

Ezzone v. Hansen, 474 N.W.2d 548 (Iowa 1991)

Ezzone sued a bank, bankers, a lawyer, and a business advisor for conspiring to permit the business advisor to "steal" Ezzone's corporation. All of Ezzone's claims depended upon him establishing first that he was the sole owner of the corporation. In the several months before filing suit, however, Ezzone testified under oath in three other legal proceedings (his divorce, a judgment debtor exam, and a hearing on his application for social security disability) that he had no ownership interest in the corporation. In this case, he affirmatively contends and testifies that his testimony in those proceedings was perjury.

Defendants moved for summary judgment on the doctrine of judicial estoppel. District court sustained the motion and dismissed Ezzone's lawsuit.

HELD: "Without totally rejecting any possibility of applying the doctrine in the absence of privity or prejudice," judicial estoppel will not be applied in this case, because no moving defendant was involved in any of the other proceedings in which Ezzone claims to have perjured himself, and because no moving defendant can claim prejudicial reliance upon the perjured testimony in those other proceedings. "Although harsh consequences should attend the giving of false testimony, we see no need to include among such consequences an arbitrary forfeiture of property to the benefit of third persons who were in no way prejudiced by the falsehoods."

COMMENT: Court's previous listings of the elements of judicial estoppel never mentioned privity or prejudice. See, e.g., Vennerberg Farms, Inc. v. IGF Insurance Co., 405 N.W.2d 810 (Iowa 1987). Most courts have viewed judicial estoppel as protecting the judicial system from injury or abuse by perjurers, have not examined the status of the party raising the doctrine as a defense, and regard such elements as irrelevant to the policies furthered by the doctrine.

Chipokas v. Hugg, 477 N.W.2d 688 (Iowa App. 1991)

Chipokas sought to lease commercial property to Hugg and showed him architectural plans for revising the property to meet Hugg's needs. Chipokas and Hugg executed a "proposal to lease," which described property and named rent and term of lease, but which was "conditional upon a final lease acceptable to both lessee and lessor and the plans and specifications also acceptable to both parties." Five days later, Chipokas provided Hugg with a 40-paragraph lease that contained three items that the parties could not agree on after extensive negotiations. Chipokas thereafter sued Hugg for breach of oral lease, breach of written agreement to lease, and promissory estoppel. District court entered summary judgment in favor of defendants.

HELD: Chipokas did not establish a clear and definite agreement that Hugg would reasonably understand to induce reliance by Chipokas.

Humiston Grain Co. v. Rowley Interstate Transportation Co., 483 N.W.2d 832 (Iowa 1992)

Humiston and Rowley entered into an independent contractor agreement in which Humiston provided a semi-tractor and a driver, and Rowley provided trailers and cargo to be hauled. Rowley agreed to pay Humiston a percentage of the revenues earned by Rowley for transporting its customer's cargo. The written agreement provided that Rowley would furnish cargo insurance and Humiston would furnish liability insurance. The contract made no mention of insurance for physical damage to Rowley trailers, but the contract provided that Humiston would be responsible for all loss incurred by Rowley that was caused by Humiston's negligence. The written contract also contained an integration clause that prohibited oral modification.

Humiston provided a copy of the contract to insurance agent Ernest and instructed him to provide Humiston with the appropriate insurance coverage. Ernest contacted Rowley and was told by "the insurance person for Rowley" that Rowley would provide physical damage coverage on its trailers. As a result, Ernest did not procure insurance covering damage to Rowley's trailers.

A Humiston operator had an accident that was his fault and that damaged a Rowley trailer in the amount of $32,000. Humiston sued Rowley for unpaid rental fees, and Rowley counterclaimed on theories of breach of contract and negligence for damages to its trailer. Humiston raised estoppel as an affirmative defense to Rowley's counterclaim. District court entered judgment for Humiston on its claim for rental fees, and dismissed Rowley's counterclaim on grounds of estoppel.

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HELD: Even though the contract contained an integration clause that prohibited oral modifications, Humiston can defeat Rowley's contract claim by establishing estoppel through oral conversations. Humiston adduced substantial evidence to support district court's finding that Rowley was estopped from suing Humiston for breach of contract, because of the representations by Rowley's insurance person.

EVIDENCE

Loftsgard v. Dorrian, 476 N.W.2d 730 (Iowa App. 1991)

Collateral Source

In wrongful-death case, plaintiff testified as to medical expenses and the amount covered by insurance, the difference being $383.22, the exact amount then awarded by the jury for medical expenses. Section 668.14 provides:

> (1) In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.
>
> (2) If evidence and argument regarding previous payments or future rights of payment is permitted to subsection (1), the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

In Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990), the Iowa Supreme Court refused to read section 668.14 literally, because it would invite the jury to undertake the first step of an eventual double reduction. The Court said in Schonberger:

> We are convinced the legislature did not intend to call for this double reduction. To avoid this unintended result we interpret the statue so as to deem its requirements satisfied when the requirements of section 85.22 are complied with.

Three justices dissented, saying that the legislation "could not be more clear," and finding the majority's concerns easily resolvable by the appropriate use of instructions and special interrogatories.

The Court of Appeals discussed Schonberger:

> The dissent is instructive for it may well set the tune that should be struck in cases where subrogation and indemnity rights are not statutorily prescribed. ...
>
> The majority and minority opinions are similar in many respects. Each recognizes that one effect of the common-law collateral source rule is that in cases when plaintiff receives collateral benefits which are not paid subject to a right of subrogation ... and also is compensated for the same injuries from a tort suit ..., the plaintiff receives duplicate damages (double dipping) .... Each also recognizes that a plaintiff in Schonberger's position should not have his tort recovery reduced by the jury by the amount of collateral benefits ... and also have to repay the collateral benefits out of his remaining tort recovery.
>
> The majority and minority differ, for the most part, only on the procedure that should be followed ... to avoid double dipping and yet make certain that the plaintiff does not have his recovery reduced twice. ...
>
> ...
>
> The result reached in this case is the very circumstance that Justice Harris envisioned in his majority opinion in Schonberger. ... But this result could have been avoided for once the collateral source evidence was received, the procedure suggested by the Chief Justice in his dissenting opinion and as set forth in section 668.14 should have been employed.

Because plaintiff did not object to the instructions and did not request instructions on section 668.14, the Court of Appeals concluded that it could not remand for new trial. Instead, it remanded

> for a proceeding in which it must be established that the proceeds of any recovery received by the

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plaintiff for medical and hospital expenses are pledged to reimburse United Fire and Casualty. Upon such a showing, the judgment for medical expenses is to be increased to the amount of $10,562.10.

Snipes v. Chicago, Central & Pacific Railroad, 484 N.W.2d 162 (Iowa 1992)

Collateral Source

Railroad employee suffered work-related injury that rendered him permanently disabled. Under the Railroad Retirement Act (RRA), employe who had been earning $25,000 per year began receiving benefits of $1,300 per month. Employee sued railroad under Federal Employers' Liability Act (FELA) for the negligence of a co-employee, and obtained a $357,500 verdict. At trial, the district court excluded evidence of the disability pension payments. HELD: Federal case law interpreting FELA and RRA consistently hold that evidence of disability payments is not to be admitted. Such case law is consistent with section 668.14(1).

Carson v. Webb, 486 N.W.2d 278 (Iowa 1992)

Collateral Source

The collateral source rule set forth in section 668.14 (which, of course, is actually an exception to the traditional collateral source rule) does not apply to intentional torts.

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Brunner v. Brown, 480 N.W.2d 33 (Iowa 1992)

Hearsay

In will contest, plaintiff presented expert testimony on the subject of the decedent's testamentary capacity in the form of a psychiatrist, who based his opinions on interviews he performed with decedent's social acquaintances and his treating physician. District court permitted the opinions based on the interviews but not the psychiatrist's version of the content of the interviews themselves.

HELD: Rules of Evidence 703 and 705, read together, provide that the expert may disclose in direct examination the facts on which the expert bases his opinion. The testimony will constitute, in an sense, an "indirect exception" to the hearsay rule and will entitle the opponent to a limiting instruction.

COMMENT: The court distinguished Barrett, 445 N.W.2d 749 (Iowa 1989), as holding simply "that an expert witness's bare statement that other experts agreed with him did not establish that such opinions were reasonably relied on by experts in that field." But see Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992).

Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992)

Hearsay

Purchaser of real estate sued listing realtor for failing to disclose that property was in a flood fringe zone. Purchaser attempted to adduce evidence of conversations between purchaser's expert witness and buyers of similarly situated property. HELD: No abuse of discretion in precluding hearsay, even though it may constitute a fact on which expert bases his opinion.

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Opinion

Cook sued State for injuries suffered in two-vehicle accident at intersection that Cook alleged was inadequately "signed." Cook adduced testimony from expert witnesses "concerning plaintiff's pattern of driving, perception, and reaction immediately prior to the accident." One expert "testified concerning the reasonableness of plaintiff's behavior based upon assumptions gleaned from [plaintiff's] testimony." The expert "opined what plaintiff's conduct and reactions might reasonably have been ... when the intersection first came into view."

HELD: District court did not abuse its discretion in admitting the experts' testimony.

> Our conclusions ... are buttressed by the fact that the jury [sic], based on other evidence, ultimately found that plaintiff had not been adequately prewarned by the existing traffic control instrumentalities, a factor upon which [the expert's] conclusions were at least partially based.

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Federal Land Bank v. Woods, 480 N.W.2d 61 (Iowa 1992)

Opinion

Facing foreclosure, Schmitt refinanced with Thorp and gave Thorp authority to auction the farm. Moser purchased the farm at auction, and entered into a contract with Schmitt. Schmitt refused to close or to leave the property. Thorp foreclosed. Moser sued Schmitt for specific performance and joined Thorp as a defendant. District court permitted Thorp to foreclose. Thorp purchased at the sheriff's sale. Schmitt conveyed redemption rights to a trustee, who sold the farm just as the redemption rights expired to Woods. Woods borrowed money from FLB to fund the purchase.

The Iowa supreme court held in Moser I that Moser had a valid contract. The court found in Moser II that Woods was not a good faith purchaser, because Woods had notice of Moser's claim.

"In the current brouhaha," FLB sued Woods to recover on its loan. Woods counterclaimed for violations of the Farm Credit Act of 1971, 12 U.S.C. § 2001, which provides that all loans by FLB "shall be secured by first liens on interest in real estate." At trial, Woods sought to adduce expert testimony from a lawyer to the effect that FLB did not have a first lien and therefore violated the Farm Credit Act.

HELD: District court properly rejected the offer to testimony as calling for a legal conclusion.

State v. Fox, 480 N.W.2d 897 (Iowa App. 1991)

Opinion

In sexual abuse case, psychiatrist testified regarding criteria she uses in determining truthfulness of sexual abuse allegations, such as degree of detail used by the alleged victim, willingness of victim to talk, and corroborating physical evidence. Psychiatrist also explained why some children delay in reporting sexual abuse. Psychiatrist did not talk specifically about the instant alleged victims. HELD: No abuse of discretion in permitting a opinion testimony, which "clearly served to help the jurors, themselves, evaluate the children's credibility."

State v. Payton, 481 N.W.2d 325 (Iowa 1992)

Opinion

In prosecution for sexual abuse of minors, therapist who had never interviewed these victims testified in state's case-in-chief that children may repeatedly deny that abuse occurred, until after

they feel safe. Therapist conceded on cross that fabrication of abuse stories in the context of child custody and visitation matters was possible, and then opined on re-direct that such fabrication would be difficult.

HELD: I. General opinion as to validity of delayed-reporting phenomenon and evidence of therapist's experiences with other children was admissible. Therapist's lack of contact with these victims actually militated against any prejudicial inferences from her general opinion. Because defendant had already attempted to impeach the children's versions on cross, state could use the therapist in its case-in-chief instead of on rebuttal. Limiting instruction need not be given at time of testimony.

II. Therapist's opinion as to likelihood of fabrication normally is not admissible, see State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986), but defendant opened door.

State v. Hulbert, 481 N.W.2d 329 (Iowa 1992)

Opinion

In prosecution for sexual abuse, defendant sought unsuccessfully to adduce expert testimony that defendant's psychological test results did not match the "profile" of known child molesters. HELD: District court did not abuse its discretion in precluding the expert's testimony as not a proper subject of expert testimony, because it went to the ultimate question of guilt or innocence.

Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992)

Opinion

Purchaser of real estate sued listing realtor for failing to disclose that property was in a flood fringe zone. Purchaser attempted to adduce evidence of conversations between purchaser's expert witness and buyers of similarly situated property. HELD: No abuse of discretion in precluding hearsay, even though it may constitute a fact on which expert bases his opinion.

Hunter v. Board of Trustees, 481 N.W.2d 510 (Iowa 1992)

Opinion

Hunter was a 13-year management employee at hospital. During his tenure, the hospital issued a personnel manual that, among other things, listed the circumstances for termination of employees

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and provided procedures for certain types of terminations. One circumstance was staff reduction. The procedures section of the manual provided that the hospital "may at its sole discretion layoff an employee whenever it is deemed necessary."

Hunter applied for executive director position, but hospital hired outsider Meyer, who terminated Hunter one month later pursuant to "staff reduction." Two months later, Meyer created a new management position and filled it with an associate from previous employment.

Hunter sued the hospital for breach of contract and Meyer for tortious interference. HELD: Hunter's expert, whose expertise lay in marketing management, was sufficiently qualified to testify on matters of corporate structure, which is a subject on which expert testimony would assist trier of fact. The expert's failure to examine all of the hospital's reorganization plan went to the weight of the expert's testimony, not its admissibility.

<u>Terrell v. Reinecker</u>, 482 N.W.2d 428 (Iowa 1992)

<u>Opinion</u>

In two-vehicle accident litigation, investigating officer expressed his opinion as to the cause of the accident and that plaintiff's vehicle "failed to yield the right-of-way to the Reinecker vehicle." HELD: Opinion that plaintiff failed to yield the right-of-way constituted a legal conclusion and was inadmissible.

DISSENT (7-2): "Failure to yield" is a commonly used descriptive phrase with ordinary meaning that does not necessarily imply a legal conclusion.

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<u>Palmer v. Women's Christian Association</u>, 485 N.W.2d 93 (Iowa App. 1992)

<u>Privilege</u>

Employer sent a letter to Job Service, listing employer's reasons for terminating employee. Employee sued for wrongful discharge and for defamation. At time of letter, section 96.11(7)(b)(2) provided:

> A report or statement, whether written or verbal, made by a person to the [Job Service] Department or to a person administering this law is a privileged communication. A person is not liable for slander or liable on account of such a report or statement.

Thereafter, legislature amended section 96.11(7)(b)(2) to add exception language for statements "made with malice."

HELD: Amendment applies prospectively only.

Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992)

Release

In chapter 668 case, defendant may introduce evidence that plaintiff has made claims against other parties and has released those parties.

Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991)

Relevance

Patient acquired HIV from post-surgical blood transfusion and sued for lack of informed consent. At trial, patient also contended that transfusion was unnecessary, because surgery notes established a lower-than-average loss of blood during surgery and no post-operative event that required a transfusion. Defense experts supported the wisdom of a transfusion due to declining hematocrit and hemoglobin levels, and defendant presented photographic depictions of the type of surgery performed on patient. Plaintiff objected that the photographs were gruesome and prejudicial.

HELD: No abuse of discretion in admitting the photographs.

Springer v. Weeks & Leo Co., 475 N.W.2d 630 (Iowa 1991)

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Relevance

In Springer I, the Court recognized a cause of action for the retaliatory discharge of an at-will employee, at least when "employment is terminated for reasons contrary to public policy." Springer had adduced substantial evidence in support of her claim that she was fired because she pursued a workers' compensation claim, and the Court reversed a directed verdict in favor of defendant. On retrial, district court admitted medical evidence about plaintiff's condition and its connection to her employment and letter by employer's attorney to Springer's attorney six days after termination, in which counsel for the employer said:

> [I]f Mary now believes her injury was not caused by her job, the company would be willing to review

this situation. Of course, she would have to return the money she's received from the insurance company.

HELD: Because employer claimed that its discharge of Springer occurred due to her misrepresentations as to cause of her injury, the medical testimony was admissible. Because counsel's letter was written before "there was . . . litigation or controversy between the parties," it did not constitute an inadmissible offer of compromise under Rule of Evidence 408.

The court also found no abuse of discretion in admitting evidence of the settlement of Springer's workers' compensation claim, the amounts paid, and the filings by defendant with the Industrial Commissioner. They were relevant to the employer's motive and intent and, as to the amount of the settlement, were responsive to the employer's claim that it discharged her because she misrepresented her injury.

Gary v. Heritage National Healthplan Services, Inc., 485 N.W.2d 851 (Iowa App. 1992)

Relevance

In wrongful/discriminatory/retaliatory discharge case, Court found no abuse of discretion in admitting plaintiff's academic record as relevant to defendant's claim that termination was for poor performance, even though employer made no inquiry into employee's academic record when it hired or promoted her.

Simons Feed Store, Inc. v. Leslein, 478 N.W.2d 598 (Iowa 1991)

Standards

Defendant farmer's property is accessible only by gravel lane that crosses creek via wooden-plank bridges that defendant constructed. Defendant occasionally permitted neighbor Burke to use this lane to access some of Burke's farmland. Burke called plaintiff and requested a truck for hauling grain from his field. Plaintiff's vice president, Roger Simon, became involved. No "straight-truck" was available, even though it was the preferred vehicle for traveling over defendant's bridges. Burke asked defendant whether a semi had ever been over his bridges, and defendant said yes. Roger Simon knew that his 36-foot semis had been over defendant's bridges. He was concerned about the rear wheels of the trailer and warned his driver "to make sure you're on the bridge" and "make sure you hit the bridge at the right angle." The driver had been over defendant's bridges on at least 16 occasions, but with smaller trucks.

The driver crossed the truck in the presence of Burke and defendant, who both noticed that it was larger than usual. Defendant warned plaintiff's driver "to go slowly and to keep toward the center when crossing the bridge" on his return trip.

By the time plaintiff's truck was loaded, "it was dark, snowing, and slippery." Plaintiff's driver approached the bridge from a curve, did not line up the trailer squarely behind the tractor, and lost the back end of the trailer off the side of the bridge. Unbeknownst to the driver, the outside portions of the bridge planking were not supported by steel underpinnings.

Plaintiff sued defendant for damage to the truck. Jury assessed 85% to defendant.

HELD: District court's instruction on custom and practice was error. District court instructed as follows:

> Evidence has been introduced concerning a practice of use of design criteria in the design of bridges including standards and regulations of professional associations and governmental agencies. Such governmental standards and regulations are directly applicable only to public bridges, and therefore a failure, if any, of the Defendant. To comply with governmental standards and regulations does not necessarily constitute negligence. You are instructed, however, that you may consider evidence of the use of design criteria, standards and regulations in the design of bridges as evidence of custom generally. Conformity to a custom is evidence of ordinary care, and non-conformity is evidence of negligence.

Plaintiff did not adduce any substantial evidence that the design criteria applicable to bridges on public highways is generally followed in designing bridges on private roadways.

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Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992)

Standards

Employer constructed a grain processing machine under existing high voltage lines installed by Interstate Power. Plaintiff's co-employee Jones instructed plaintiff how to operate plant in his absence. Plaintiff climbed on top of plant when it malfunctioned, inserted long metal pole into fabricated openings on top of plant in effort to unclog it, and was electrocuted when he pulled pole back up.

Plaintiff sued Interstate Power, who cross-petitioned against employer and co-employee for indemnity. Experts for plaintiff and Interstate Power agreed that Interstate Power's electrical lines complied with the 1973 National Electrical Safety Code (NESC) standards, which were the most recent version in effect the last time that Interstate Power made any changes to the lines. The experts also agreed that such standards applied at the time of the accident.

Interstate cross-examined plaintiff's expert on 1977 NESC requirements, which increased the minimum clearances beyond that present at the employer's site. When Johnson offered the 1977 NESC standard, Interstate Power did not object.

HELD: Interstate Power opened the door to the admission of the 1977 NESC standard and could not object to a verdict on grounds that it may have been premised on an industry standard that did not apply. Subsequent standards were relevant because plaintiff's experts described them as "represent[ing] the up-to-date thinking of the industry. Although the jury could not consider a breach of the 1977 NESC minimum clearance requirements as negligence per se, the jury was certainly entitled to consider such requirements as evidence of negligence."

Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991)

Subsequent Remedial Measure

Patient acquired HIV from post-surgical blood transfusion in 1985. Patient did not discover that he had AIDS until 1987. At the time of the surgery, defendant surgeon was not advising patients of the risk of acquiring AIDS from blood transfusions or of the option of autologous transfusions. Before anyone knew that patient had acquired AIDS from the blood transfusion in 1985, and for reasons totally unrelated to this particular patient or his particular surgical procedure or post-operative course of treatment, surgeon began to advise patients of the risk and the alternative.

HELD: District court properly excluded surgeon's change in his informed-risk procedures as a subsequent remedial measure. Rule of Evidence 407 provides:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

"Event" refers to the conduct giving rise to the claim of negligence, not the plaintiff's discovery of injury.

> [T]he policy behind the rule . . . is to encourage people to take steps to increase public safety.... [It] would not be served if evidence of defendants' changed behavior could be used to prove liability just because defendant was unaware that any injury or accident had occurred.... [It] should apply not only when the safety measures are taken in reaction to an accident, but also when they are taken merely upon discovery that change is needed.

Citing Petree v. Victor Fluid Power Inc., 831 F.2d 1191 (3rd Cir. 1987).

COMMENT: Court opines that Rule 407 and particularly its commentary about "accidents and repairs . . . seems to us poorly suited to cases involving medical treatment," and reserves the question of whether this holding will apply to cases outside medical malpractice. Introductory remarks in this division of the opinion suggest that the court would not apply Johnston in product liability cases to changes made after manufacture but before the accident.

Bingham v. Marshall & Huschart Machinery Co., 485 N.W.2d 78 (Iowa 1992)

Subsequent Remedial Measures

Bingham injured himself while working with a straight-line table-feed drill sold to his employer, John Deere, by defendant. Bingham sued on strict liability, breach of implied warranty, and negligence, but went to trial only on a claim that defendant was negligent in failing to give proper safety instructions and warnings to Deere. District court prohibited Bingham from adducing evidence that Deere changed the control mechanisms on the drill after Bingham's accident.

HELD: Although Iowa Rule of Evidence 407 does not prohibit a subsequent remedial measure by someone other than the Defendant, Rule 403 provides ample authority for excluding otherwise relevant evidence that unduly prejudices a party, confuses the issues, or misleads the jury. Deere's modification had little to do with whether defendant should have given certain safety instructions and warnings to Deere.

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GOVERNMENT

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Experts

Section 68B.6, which bars a State employee from being compensated for performing expert witness services "against the interest of the State," does not bar such an employee from actually testifying as an expert adversely to the State.

Menke Hardware, Inc. v. City of Carroll, 474 N.W.2d 579 (Iowa 1991)

Immunity

Section 613A.4(4) retains municipal immunity for "[a]ny claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute." Section 364.16 permits a municipal fire department to answer calls outside the City's corporate limits and provides: "The City shall have the same governmental immunity outside its corporate limits when providing fire protection as when operating within the corporate limits." Plaintiff sued City of Carroll for the negligence of its fire department in allowing a fire that it extinguished outside Carroll's city limits to rekindle and destroy plaintiff's property.

HELD: Section 364.16 does not render a city immune from liability for all fire protection activity outside the city's corporate limits. Summary judgment in favor of City was error.

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Keller v. State, 475 N.W.2d 174 (Iowa 1991)

Immunity

On August 21, 1985, OSHA inspectors were on the premises of plaintiff's employer to discharge the Department of Employment Services' statutory duty to provide "on-site" consultative services to employers." Plaintiff's employer had directed plaintiff to conduct some spray painting. Before he did so, the inspectors happened on the scene and examined the materials, written information about them, the immediate work environment, and the mask plaintiff intended to wear. Plaintiff adduced evidence that the mask was not effective against inhalation of toxic vapors produced by the paints he was directed to spray. Plaintiff also adduced evidence that effective masks were available at the work site. Plaintiff also adduced substantial evidence that the inspectors gave affirmative approval directly to plaintiff of his use of the ineffective mask.

HELD: "Assuming that plaintiff was within a class of persons for whose benefit [the inspectors] were required to act . . ., these statutes and regulations did not impose a duty to instruct, warrant, or supervise plaintiff." The statues and regulations imposed only "the obligation to review the employer's safety and health program within the scope of the employer's request and provided advice on modifications or additions to make the program more effective." If in discharging this obligation the inspector identifies a hazard, "their obligation is to assist the employer in developing a plan to correct the hazard, affording a reasonable period of time to accomplish that result. It is not the obligation of these [inspectors] to act directly to alleviate work site hazards contemporaneously with the discovery of same."

Plaintiff's alternative claim that the inspectors breached a duty voluntarily assumed when they affirmatively misadvised him, is barred by the misrepresentation exception to tort liability in § 25A.14(4).

<u>Cook v. State</u>, 476 N.W.2d 617 (Iowa 1991)

<u>Immunity</u>

Section 25A.4 ("the State shall not be liable for interest prior to judgment") does not violate equal protection.

<u>Sullivan v. Wickwire</u>, 476 N.W.2d 69 (Iowa 1991)

<u>Immunity</u>

Sullivan was killed when she encountered dense fog on state highway where it passes next to factory that predates the highway. Fog was caused by the combination of steam from the factory's vapor towers and cold climatic conditions. Sullivan adduced evidence that state was aware of the potential for fog due to the proximity of the factory to the proposed location of the highway and the climate, "but did not implement design features that would have minimized the risk of accidents on the adjacent roadway."

HELD: State's preservation of immunity under section 25A.14(1) for "discretionary functions" applies to location of highway but not its design. District court should not have entered summary judgment for state in connection with design aspects of Sullivan's negligence allegations. On the other hand, district court erred in submitting Sullivan's "warning" allegations against the state. State has preserved immunity against liability for such conduct under section 668.10(1).

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City of McGregor v. Janett, 480 N.W.2d 576 (Iowa App. 1991)

Immunity

McGregor's city engineer owns shoreline property immediately north of McGregor's sewage treatment plant. Janett owns the property immediately south of the plant. When McGregor decided to expand its facility, engineer proposed a plan that would expand the plant to the south. Janett sued city and engineer.

HELD: Janett cannot articulate a clearly established constitutional right that engineer knew or should have known that he was violating, so engineer is protected from liability by qualified immunity.

Hanson v. Flores, 486 N.W.2d 294 (Iowa 1992)

Immunity

Without deciding whether an attorney-client relationship is established between the custodial parent and the county attorney by the attorney's prosecution of a child-support recovery action under chapter 252B, prosecutorial immunity bars a suit by the custodial parent for negligent prosecution.

Radley v. Transit Authority, 486 N.W.2d 299 (Iowa 1992)

Immunity

Transit Authority of Omaha operates buses that travel into Council Bluffs. Plaintiff was injured while departing an Omaha Transit bus while it was in Iowa. Her commencement of a civil-damage action against the Transit Authority in Iowa was timely under Iowa law but not under Nebraska law. HELD: Iowa law governs.

City of McGregor v. Janett, 480 N.W.2d 576 (Iowa App. 1991)

Immunity

McGregor's city engineer owns shoreline property immediately north of McGregor's sewage treatment plant. Janett owns the property immediately south of the plant. When McGregor decided to expand its facility, engineer proposed a plan that would expand the plant to the south. Janett sued city and engineer.

HELD: Janett cannot articulate a clearly established constitutional right that engineer knew or should have known that he was violating, so engineer is protected from liability by qualified immunity.

Genetzky v. Iowa State University, 480 N.W.2d 858 (Iowa 1992)

Immunity

Iowa State University hired Genetzky as an assistant professor in the Department of Veterinary Clinical Sciences. Genetzky developed personal problems with other members of the department, including but not limited to Dr. Lundvall, head of the Equine section. When Genetzky reported behavior by Lundvall that he deemed unprofessional and violative of the faculty handbook, ISU notified Genetzky of its intent to terminate him. A faculty appeals committee reversed that decision and granted Genetzky an additional one-year contract, provided that Genetzky would agree to an external evaluation. The evaluation did not go well and ISU notified Genetzky at the end of the additional year that he would not be rehired.

Genetzky sued ISU for defamation. HELD: State has not waived sovereign immunity for such a claim.

INDEMNITY

P

Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992)

Employer constructed a grain processing machine under existing high voltage lines installed by Interstate Power. Plaintiff's co-employee Jones instructed plaintiff how to operate plant in his absence. Plaintiff climbed on top of plant when it malfunctioned, inserted long metal pole into fabricated openings on top of plant in effort to unclog it, and was electrocuted when he pulled pole back up.

Plaintiff sued Interstate Power, who cross-petitioned against employer and co-employee for indemnity. At trial, district court refused to permit Interstate Power to introduce evidence relating to OSHA standards requiring employer to educate employees as to electrical safety. District court subsequently sustained employer's and co-employee's motions for a directed verdict.

HELD: I. OSHA regulations cited by Interstate Power expressly relate to construction industry and were not relevant. Moreover, violation of an OSHA standard by an employer does not generate for an independent tort-feasor a right of indemnity from the employer.

II. Contract between employer and Interstate Power for the purchase and sale of electricity does not contain, expressly or impliedly, duty on part of employer to train its employees in electricity safety or to warn employees of the dangers of electricity. Testimony by employer that it intended to use electricity safely and that it assumed that Interstate Power expected employer to use electricity safely does not create an independent duty but simply describes "the general duty that every member of society owes to every other member - the duty not to harm him through a tortious act."

III. District court properly directed a verdict against Interstate Power's cross-petition against plaintiff's co-employee, Jones. Interstate Power failed to adduce evidence that Jones was aware of any metal pole on the top of the plant, or of any use by other employees of metal poles to unclog the plant from the top of it. Jones did not instruct plaintiff to use such a pole to unclog the plant, and no similar accidents had occurred.

INSURANCE

P

Stockton v. Shelter General Insurance Co., 477 N.W.2d 872 (Iowa App. 1991)

Agent

Stockton had existing policy with insurer. In oral conversation with agent, they requested insurance coverage on another property and agent assured them that "he would take care of it." Several months later, Stockton suffered fire loss and discovered that agent had died before preparing the paperwork on their new coverage. HELD: Insurer had burden to prove that agent intended to write insurance through another insurer.

Baker v. Grinnell Mutual Reinsurance Co., 475 N.W.2d 672 (Iowa App. 1991)

Coverage

Baker purchased insurance from Grinnell through an agent. She did not purchase collision or comprehensive coverage. The policy excluded from liability coverage "damage to property ... in the care, custody or control of any insured person." Baker damaged an un-owned vehicle while operating it. She filed a claim on her Grinnell policy, but Grinnell denied coverage.

HELD: Baker did not adduce substantial evidence in support of her reasonable-expectations argument, and district court properly sustained Grinnell's motion for summary judgment. Liability and collision insurance are separate and distinct coverages.

> Baker argues, however, even though the supreme court recognizes a distinction between liability and collision coverage, this does not mean an "ordinary layman" would have similar expectations regarding the extent of their insurance coverage. In effect, this argument asks the court to convert liability coverage into collision coverage which was not purchased. Accepting this argument allows the insurance contract to be merely a framework of coverage to be filled in as occurrences arise. Because the limitation provision is not bizarre or oppressive, we reject Baker's argument.

Baker testified that her agent promised her that the policy "would cover any damage caused to another person's property or automobile while [Baker] was driving." Her testimony was insufficient as a matter of law to contradict express terms of the policy.

> [T]he representation of [Grinnell's] agent to Baker was general and consistent with the policy terms. Moreover, Baker explicitly rejected collision coverage .... Baker knew her own vehicle was not covered for acts of her own negligence.... [I]t was not reasonable for Baker to expect greater coverage when operating a vehicle not insured under the policy than when operating her vehicle.

Last but not least, the exclusionary language did not eliminate the dominant purpose of the insurance transaction.

P

A.Y. McDonald Industries, Inc. v. Insurance Co. of North America, 475 N.W.2d 607 (Iowa 1991)

Coverage

McDonald's manufacturing process caused the dumping of lead as a component of brass residue on its foundry site from 1949 to October 31, 1983. In 1984, EPA commenced administrative proceedings against McDonald for violations of the Resource Conservation and Recovery Act. Ultimately, EPA found violations, imposed a civil penalty, and required McDonald to submit and perform closure and postclosure plans that included groundwater monitoring systems.

McDonald sued its general liability, umbrella, and excess insurers from 1949 through 1986 to obtain coverage and to require a defense (payment of litigation expenses). The Federal District Court certified three questions to the Iowa Supreme Court:

> 1. Does the language "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage" include coverage for amounts expended by plaintiff in order to comply with the EPA's decision and resulting consent order?
>
> 2. Is coverage for the same matters provided by policy language of the following two types?
>
> > (a) "To indemnify the insured for all sums which the insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of 'ultimate net loss' . . . ."
> >
> > (b) "The corporation hereby agrees to indemnify the insured against such ultimate net loss in excess of the insured's primary liability as the insured sustains by reason of liability, imposed upon the insured by law or assumed by the insured under contract, for damages because of personal injury or property damage to which this policy applies, caused by an occurrence anywhere in the world."
>
> 3. Did INA with coverage language as described in paragraph 1 above have a duty to defend McDonald during the EPA proceedings as a result of INA's policy language that INA "shall have the right and duty to defend any suit against the insured"? In other words, were the proceedings before the EPA a "suit"?

QUESTIONS 1 & 2

Insurers contend that their obligation to pay "all sums" is limited by the word "damages." In other words, only those "sums" which the insured is obligated to pay "as damages" are covered. The policy does not define "damages." HELD: "Damages" is ambiguous and must be interpreted to include government-mandated response or clean-up costs under environmental protection statutes. Injury to the environment from contamination by hazardous waste constitutes "property damage." Response costs for preventive measures required after pollution has occurred are covered; costs of preventive measures taken in advance of pollution are not. Record on certification does not permit allocation of the remedial measures required by the consent decree, but some of those costs may be covered because they constitute legally compelled expenses for the clean-up of existing pollution.

The civil penalty does not come within any reasonable reading of "damages," so there is no coverage for it.

QUESTION 3

HELD: "Suit" is not defined in the policy and is susceptible to more than one meaning. We define it to include "any attempt to gain an end by legal process." The EPA proceeding easily fits within that definition, so Insurance Company of North America had a duty to defend.

Werner's, Inc. v. Grinnell Mutual Reinsurance Co., 477 N.W.2d 868 (Iowa App. 1991)

Coverage

Plaintiff lost their vehicle to theft while on vacation in Mexico. Grinnell's insurance policy expressly excluded coverage for losses other than those occurring within the United States. Plaintiff sued Grinnell on a theory, among others, of reasonable expectations of coverage "while in the southern part of the United States." HELD: Mexico is not part of the southern United States. Plaintiff did not make an accurate reasonable expectations argument, and it would have failed if they had. Grinnell's exclusion is clear, unambiguous, and typical. District court properly sustained Grinnell's motion for summary judgment.

P

Ellsworth-William Co-op v. United Fire & Casualty Co., 478 N.W.2d 77 (Iowa App. 1991)

Coverage

United Fire sold Meyerhoff a comprehensive general liability insurance policy. Meyerhoff agreed to construct grain storage bins and conveying equipment for the co-op. After Meyerhoff completed construction and the bins were loaded with grain, the co-op discovered the floors to be defective. The co-op had to remove all grain from the bins to keep it from spoiling. The co-op sued Meyerhoff for, among other things, the expense of removing the grain and the lost income due to co-op's inability to use the bins constructed by Meyerhoff and other pre-existing but connected bins. United Fire denied coverage for these damage claims.

HELD: Cost of removing grain was property damage covered by policy. Property damage as defined in the coverage portions of policy includes loss of use. Even though Meyerhoff did not construct the pre-existing but connected grain bins, his conduct caused injury to the bins in the sense of making them unusable. Meyerhoff does not have coverage, however, for the co-op's claim for loss of use with respect to the bins constructed by Meyerhoff. Such "property damage to the named insured's products" was expressly excluded.

Hofco, Inc. v. National Union Fire Insurance Co., 482 N.W.2d 397 (Iowa 1992)

Coverage

Wieder accomplished a leveraged by-out of Hofco. As Hofco eventually became unable to repay its obligations, Hofco sold stock to the employees' profit-sharing plan and trust. IRS investigated and ultimately imposed excise taxes on each transaction prohibited by ERISA.

Wieder had purchased a pension trust liability policy which obligated the insurer to pay certain amounts that either Wieder or Hofco became obligated to pay "as loss because of any breach of fiduciary duty." The policy defined loss to exclude "fines or penalties imposed by law."

HELD: Although Congress used the word "tax" as opposed to penalty, legislative history establishes that Congress intended to impose a "penalty" on any disqualified person who participates in a prohibited transaction. Hofco has no coverage for the excise taxes it paid.

Smithway Motor Xpress, Inc. v. Liberty Mutual Insurance Co., 484 N.W.2d 192 (Iowa 1992)

Coverage

Liberty Mutual issued a standard comprehensive liability policy to Smithway. Smithway tendered defense of an action by a former employee against Smithway for retaliatory discharge to Liberty Mutual. Liberty Mutual declined to defend, and Smithway commenced a declaratory judgment action.

HELD: Smithway's termination was intentional and not an accident. The resulting damages claimed by the employee are intended and expected. A wrongful discharge claim is not an occurrence for which there is coverage. The damages do not fit a standard definition of property damage ("physical injury to or destruction of tangible property ... including the loss of use thereof"). Liberty Mutual's endorsement affording coverage "with respect to liability assumed under an incidental contract," does not cover liability that arises out of the termination of an employment contract. The incidental contract must itself constitute the assumption of liability. The liability asserted against Smithway arises from breach of contract, not performance of contract. Smithway adduced no evidence in support of any reasonable expectations argument. The policy terms are not ambiguous.

Ellsworth-William Co-op v. United Fire & Casualty Co., 478 N.W.2d 77 (Iowa App. 1991)

Declaratory Judgment

Liability insurer commenced declaratory judgment action after sending a reservation of rights letter to insured and undertaking to defend insured in damage action. The only basis asserted for of no obligation to defend or indemnify, however, was insured's failure to cooperate. District court dismissed insurer's petition. Insurer then commenced a second declaratory judgment action against insured, and raised issues of coverage.

HELD: Judgment of dismissal in first declaratory judgment action did not preclude insurer from litigating in second action the merits of its coverage questions.

P

Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992)

Implied Co-Insured

Neubauers purchased fire insurance for their farmhouse from Farmers Mutual. Neubauers rented the farmhouse to Hostetters pursuant to an oral agreement that did not discuss insurance. After the house sustained wind damage, Neubauers informed Hostetters that Neubauers carried insurance on the house. When similar damage re-occurred, Neubauers informed Hostetters that Neubauers' insurance covered only the structure and that Hostetters should obtain renters' insurance for their personal belongings. Hostetters purchased such insurance after yet another incident caused damage to their personal property in the house.

Mrs. Hostetter was negligent in tending to a fire that spread to and destroyed the farmhouse. Farmers Mutual paid Neubauers $22,000, leaving an uninsured loss of $6,000. Farmers Mutual commenced an action in Neubauers' names against Mrs. Hostetter to recover Farmers Mutual's payment and the Neubauers' uninsured loss. Mrs. Hostetter moved for summary judgment on grounds that a landlord's insurer is precluded as a matter of law from exercising any subrogation rights against the tenant. Although they were not named by Farm Mutual as insureds, Mrs. Hostetter argued that the Hostetters were "implied co-insureds" for purposes of Farm Mutual's subrogation claim.

Cases from several jurisdictions have used the "implied co-insured" doctrine to bar the subrogation action by a landlord's insurer against the negligent tenant. These courts' rationale is that both landlord and tenant have an insurable interest, that the tenant pays at least part of the insurance premium (through rent), that tenant has a reasonable expectation of coverage, and that it is equitable to place the risk of fire loss on one who has collected premiums for the risk.

The Court declined to follow these cases and instead sided with the leading commentator. See 6A J. Appleman, Insurance Law and Practice § 4055 (1991 Supp.). The argument that fire insurance covers the interest of both landlord and tenant

> disregards the fact that these are separate estates capable of being separately valued and separately insured. To the extent that [Hostetters] also had a property interest in the dwelling, it was not automatically insured under the landlords' policy. There is nothing in the present record to suggest that the proceeds paid to the Neubauers by Farmers Mutual exceeded the value of the landlords' reversionary interest in the property. Even if such evidence existed, this would only establish an overvaluation by the insurer of the landlords' loss.

Mrs. Hostetter failed to establish that Neubauers had ever agreed to provide insurance covering her tenancy estate.

Century Companies v. Krahling, 484 N.W.2d 197 (Iowa 1992)

Life

Century issued life insurance policy to Krahling that contained double indemnity provisions in the case of accidental death, defined as "the result of bodily injury caused directly and independently of all other causes by external, violent, and purely accidental means." HELD: Failure of a prosthetic aortic heart valve seven years after surgical implantation is not the cause of an "accidental death."

Stockton v. Shelter General Insurance Co., 477 N.W.2d 872 (Iowa App. 1991)

Limitations of Action

Stockton had existing policy with insurer. In oral conversation with agent, they requested insurance coverage on another property and agent assured them that "he would take care of it." Several months later, Stockton suffered fire loss and discovered that agent had died before preparing the paperwork on their new coverage. Almost nine years later, Stockton sued insurer. Stockton raised issue of waiver in order to defeat section 515.138 (any action against insurer must be commenced within 12 months of loss). HELD: Section 614.1(5) (ten years for action on written contract) applies to Stockton's action because Stockton had existing written contract with insurer "and had taken reasonable steps to obtain one for their new property."

P

Balboa Insurance Co. v. Pixler Electric of Spencer, Iowa, Inc., 484 N.W.2d 396 (Iowa App. 1992)

Subrogation

Insurer paid insured for damage resulting from fire caused by electrical repairs. Insured's loss exceeded the insurance payment, and the insurance policy had a $500 deductible. Insured disclaimed any interest in suing electrician, and insurer commenced litigation in its own name. When electrician moved for summary judgment on grounds that insurer was the real party in interest, more than five years had passed from the time of the fire and the insured had

never commenced any action. HELD: Although Iowa law on real-party-in-interest would mandate that this action be prosecuted in the name of the insured, the purpose of the rule would not be served by enforcing it under these circumstances.

Vasquez v. LeMars Mutual Insurance Co., 477 N.W.2d 404 (Iowa 1991)

Underinsured Motorist

Vasquez sued LeMars to recover underinsured motorist benefits. HELD: Section 535.3, not section 668.13, controls Vasquez' right to prejudgment interest, and such interest is not an element of damages that is subject to the combined limits of the underinsured motorist policies.

Zurn v. State Farm Mutual Automobile Insurance Co., 482 N.W.2d 923 (Iowa 1992)

Underinsured Motorist

Zurn, a Minnesota resident, was struck by Jenkins' vehicle while Zurn was walking along the highway. Jenkins had been drinking at a bar and was intoxicated. Zurn recovered Jenkins' insurance limits of $25,000. Zurn settled with the bar for its insurance limit of $50,000. Zurn sued State Farm for benefits under the $50,000 underinsured motorist provisions of his automobile policy. By previous appeal, Minnesota law governed Zurn's claim against State Farm. Zurn and State Farm stipulated that his damages exceeded $125,000.

On the date of accident, Minnesota's underinsured motorist statute calculated State Farm's obligation to Zurn by the "difference of limits" method (State Farm owes only the amount by which the underinsured limit exceeds the amounts paid by others to the insured). Even though Minnesota amended its law prospectively to comport with Iowa's "add-on" method, the court declined to impose the change retrospectively on State Farm.

Minnesota has never decided, however, whether or not a recovery under the dram shop law is to be deducted from the underinsured limit. Because the parties did not plead or prove Minnesota law, the Court presumed Minnesota law to be the same as Iowa, which would require reduction of the dram shop settlement from the total damages, not the underinsured limit. Accordingly, Zurn is entitled to $25,000 from State Farm.

Cronbaugh v. Farmland Mutual Insurance Co., 475 N.W.2d 652 (Iowa App. 1991)

Underinsured Motorist

Danny Cronbaugh, the named insured, executed a separate sheet of paper prepared by his insurer for the rejection of uninsured and underinsured coverages. Eight years later, Danny's wife, Judith, was injured in an accident caused by an underinsured motorist.

HELD: Plaintiffs cannot overcome Danny's execution of a waiver form that complies with section 516A.1 by alleging that he did not "clearly understand the ramifications" and by criticizing the agent for failing to "fully explain the rejection and its implications." Farmland was entitled to summary judgment on Cronbaugh's suit for coverage.

Thomas v. American Family Mutual Insurance Co., 485 N.W.2d N.W.2d 298 (Iowa 1992)

Underinsured Motorist

Plaintiff was seriously injured in motor vehicle accident. Tort-feasor's insurer became insolvent more than one year after the accident. At the time, section 516A.3 defined "uninsured motor vehicle" to include vehicles that were insured by an insurer that was "insolvent at the time of ... accident or becomes insolvent within one year after such an accident." Thomas was covered by two insurance policies, both of which defined uninsured motor vehicle to include a vehicle insured by an insurer who "is or becomes insolvent."

Thomas sought to recover under the underinsured provisions of both policies (rather than the uninsured provisions, for which there was an anti-stacking clause) and argued that the uninsured provisions violated section 516A.3 and were ineffective because they defined "uninsured motor vehicle" more expansively than the statute. HELD: Thomas' insurance policies differ from the statute only to the extent that the uninsured motorist provisions provide greater uninsured motorist coverage than that required by statute. The one-year limitation on insolvency proceedings provided in section 516A.3 is not incorporated into the policies. A reasonable insured would not expect otherwise.

COMMENT: Section 516A.3 was amended in 1991 to eliminate the one-year extension. Now, a vehicle is "uninsured" only if the insurer is insolvent at the time of the accident.

Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992)

Workers' Compensation

Fisher sued third-party tort-feasor for injuries suffered in the course of Fisher's employment. Hartford paid workers' compensation benefits of $83,000 and filed a notice of lien pursuant to section 85.22. At trial, the jury assessed 50% of the fault to Fisher and 50% to the third-party tort-feasor and found Fisher's damages to be $182,000. District court entered a judgment in favor of Fisher in the amount of $91,000.

HELD: District court properly refused to reduce Hartford's lien by Fisher's fault. Hartford elected indemnity, so the reduction ordered in Bales v. Warren County, 478 N.W.2d 398 (Iowa 1991), is distinguishable as a subrogation claim by the employer-insurer. Hartford also is entitled to pre-judgment interest on its payments, and Fisher's "recovery of damages" for purposes of defining the scope of Hartford's lien includes the interest awarded by the district court on Fisher's recovery. Language in section 85.22(1) that authorizes reduction of the insurer's recovery for the employee's attorney fees implicitly authorizes reduction for the employee's litigation expenses. Hartford is not entitled, however, to a credit for future payments that it will make under section 85.22(1). Compare section 85.22(2).

JUDGMENTS

P

Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991)

Court Costs

Jury found plaintiff 51% at fault, so he did not recover from defendant. Section 625.1 provides: "Costs shall be recovered by the successful against the losing party." Section 625.3 provides:

> Where the party is successful as to a part of the party's demand, and fails as to part, . . . the court on rendering judgment may make an equitable apportionment of costs.

HELD: Plaintiff was not successful on his claim, so district court had no authority under section 625.3 to make an equitable apportionment of costs. Section 625.4, dealing with multiple parties, was not applicable because defendant's cross-petition for indemnity was rendered moot by a 51% verdict.

Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991)

Court Costs

District court lacks authority to impose more than the statutory $150 per day for the costs of expert witnesses. District court has no authority to impose the prevailing party's cost of procuring a copy of a deposition paid for by the opposing party as court costs.

Printen v. James, 474 N.W.2d 807 (Iowa 1991)

Execution

A judgment debtor's motor vehicle is exempt from execution under section 627.6(9). Judgment creditor directed sheriff to levy on debtor's automobile, but only by noting the levy on its certificate of title, so that creditor would recover upon debtor's sale of automobile. HELD: Notation of lien on certificate of title presupposes that a valid lien exists. Debtor's car was not subject to levy.

Conklin v. Iowa District Court, 482 N.W.2d 444 (Iowa 1992)

Execution

House garnished Conklin's employer, who surrendered non-exempt wages to the sheriff. House promptly condemned the garnished wages and applied them to his judgment against Conklin. After a second garnishment, House did not condemn promptly and the clerk held the wages as uncondemned funds. Thereafter, Conklin proceeded through a chapter 7 bankruptcy without claiming the garnished wages as either an asset of the estate or as exempt property. HELD: Conklin waived (or is estopped from asserting) title to the funds. Creditor acquired lien at time sheriff took possession of the wages, which was pre-petition.

P

Eagle Leasing v. Amandus, 476 N.W.2d 35 (Iowa 1991)

Foreign Judgment

Car rental agency obtained default judgment in West Virginia against Iowa resident who rented vehicle from agency in West Virginia and then intentionally and maliciously damaged vehicle. Agency obtained jurisdiction over defendant in accordance with West Virginia's long-arm statute, which is similar in content to section 617.3. Defendant received notification of service of original notice on West Virginia's secretary of state by certified mail.

HELD: Court in West Virginia acquired personal jurisdiction over defendant by agency's compliance with long-arm statute. Under chapter 626B, judgment entered by court in West Virginia with personal jurisdiction is final, conclusive, and enforceable in Iowa.

Cook v. State, 476 N.W.2d 617 (Iowa 1991)

Interest

Section 25A.4 ("the State shall not be liable for interest prior to judgment") does not violate equal protection.

Vasquez v. LeMars Mutual Insurance Co., 477 N.W.2d 404 (Iowa 1991)

Interest

Vasquez sued LeMars to recover underinsured motorist benefits. HELD: Section 535.3, not section 668.13, controls Vasquez' right to prejudgment interest, and such interest is not an element of damages that is subject to the combined limits of the underinsured motorist policies.

Hagan v. Val-Hi, Inc., 484 N.W.2d 173 (Iowa 1992)

Interest

Hagan sued Liberty Loan Corp., an Iowa corporation, for slander of title and fraudulent misrepresentation. While suit was pending, Liberty was merged into Oklahoma Morris Plan Co., an Oklahoma corporation. Morris Plan then was merged into Liberty Financial Management Co., a Delaware corporation. Hagan's case went to trial and resulted in a $64,000 judgment against Liberty. While Liberty's appeal was pending, Liberty Financial Management merged with Amalgamated Sugar Co., a Utah corporation. The resulting corporation was renamed Val-Hi. After the Court of Appeals affirmed the judgment against Liberty, Hagan sued Val-Hi for the amount of judgment. Val-Hi moved for dismissal based on lack of personal jurisdiction.

HELD: Hagan was entitled to pre-judgment interest on the compensatory portion of the original judgment from the date of filing of the original lawsuit against Liberty.

P

Houghton State Bank v. Peterson, 477 N.W.2d 94 (Iowa 1991)

Limitations of Action

Peterson borrowed money from Bank and gave second mortgage on real estate and homestead. Peterson defaulted. Bank obtained judgment on promissory note, but did not foreclose second mortgage because Peterson owed first mortgagee more money than value of Peterson's real estate. When first mortgagee foreclosed, district court found that first mortgage covered only the homestead. After decision was affirmed, and more than two years after Bank obtained judgment on note, Bank attempted to execute on non-homestead property. Peterson and first mortgagee resisted execution.

Section 615.3 provides:

> Judgments ... rendered on promissory obligations secured by mortgage ..., but without foreclosure ..., shall not be subject to renewal by action ... and, after the lapse of two years ..., shall be without force and effect ... except as a setoff or counterclaim.

HELD: Section 615.3 bars Bank's execution. Fact that judgment had no value until first mortgagee's priority was eliminated by judicial degree is irrelevant. Case law that found section 615.3 to be tolled by other litigation focused on validity of judgment, not its value.

First Interstate Bank v. Gray, 476 N.W.2d 52 (Iowa 1991)

Notes

Mr. and Mrs. Paul and Judith Gray executed a promissory note in favor of First Interstate Bank. The Grays were jointly and severally liable. When they defaulted, First Interstate sued Paul and obtained a default judgment against him. Pursuant to rule 228, First Interstate submitted the note to the district court clerk, who stamped it "canceled by judgment." With the judgment against Paul unsatisfied, First Interstate sued Judith on the note. District court granted her motion for summary judgment, based upon the cancellation. HELD: Cancellation applies to the judgment debtor (Paul) only. To the extent that the debt remains unsatisfied, rule 228 does not bar suits against other joint severally obligees.

Ellsworth-William Co-op v. United Fire & Casualty Co., 478 N.W.2d 77 (Iowa App. 1991)

Preclusion

Liability insurer commenced declaratory judgment action after sending a reservation of rights letter to insured and undertaking to defend insured in damage action. The only basis asserted for of no obligation to defend or indemnify, however, was insured's failure to cooperate. District court dismissed insurer's petition. Insurer then commenced a second declaratory judgment action against insured, and raised issues of coverage.

HELD: Judgment of dismissal in first declaratory judgment action did not preclude insurer from litigating in second action the merits of its coverage questions.

Tri-State Refining & Investment Co. v. Opdahl, 481 N.W.2d 710 (Iowa App. 1991)

Preclusion

Opdahl placed all of his assets into several trusts. Tri-State sued one of the trusts, Appaloosa, and Opdahl in South Dakota for certain tortious conduct, and obtained a judgment. Tri-State's judgment against Appaloosa was reversed on appeal for lack of service. Tri-State then sued Appaloosa in South Dakota in an effort to execute against Appaloosa property on the judgment against Opdahl. The South Dakota district court found that Opdahl's transfer of assets to Appaloosa was fraudulent and granted execution to Tri-State.

Tri-State then sued Appaloosa in Iowa in an effort to execute on the same judgment but against property owned by Appaloosa in Iowa. Opdahl attempted without success to litigate the validity of the Appaloosa trust. HELD: South Dakota court's findings as to validity of Appaloosa trust were preclusive on litigation in Iowa.

P

JURISDICTION

Meyers v. Kallestead, 476 N.W.2d 65 (Iowa 1991)

Kallestead owns and operates a tavern in Savanna, Illinois. After the tavern sold and served alcohol to a customer known to be intoxicated, the customer drove first into Iowa and second into a vehicle driven by Meyers. Kallestead moved to dismiss for lack of jurisdiction. She adduced evidence that she does not advertise in Iowa media or in any other media that is circulated or broadcast into Iowa. HELD: Iowa does not have jurisdiction over Kallestead.

Heslinga v. Bollman, 482 N.W.2d 921 (Iowa 1992)

Minimum Contacts

Bollman resided in Iowa for an undisclosed period of time in order to care for her sister. After her sister's death, Bollman took charge of her assets and distributed some of them before taking the rest back to Kansas. The executor sued Bollman for conversion. HELD: Bollman's activities in Iowa were sufficient to justify the exercise of personal jurisdiction by the Iowa courts.

Hagan v. Val-Hi, Inc., 484 N.W.2d 173 (Iowa 1992)

Successor Corporation

Hagan sued Liberty Loan Corp., an Iowa corporation, for slander of title and fraudulent misrepresentation. While suit was pending, Liberty was merged into Oklahoma Morris Plan Co., an Oklahoma corporation. Morris Plan then was merged into Liberty Financial Management Co., a Delaware corporation. Hagan's case went to trial and resulted in a $64,000 judgment against Liberty. While Liberty's appeal was pending, Liberty Financial Management merged with Amalgamated Sugar Co., a Utah corporation. The resulting corporation was renamed Val-Hi. After the Court of Appeals affirmed the judgment against Liberty, Hagan sued Val-Hi for the amount of judgment. Val-Hi moved for dismissal based on lack of personal jurisdiction.

HELD: "Actions and conduct of a constituent corporation may be attributed to the surviving corporation following a merger for purposes of determining the surviving corporation's amenability to personal jurisdiction for liabilities incurred by the constituent corporation." Rule applies to the last resulting corporate entity after a series of mergers.

P

Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992)

Waiver

In action by injured employee against third-party tort-feasor and at the conclusion of trial and after entry of judgment, employee filed a "petition for declaratory judgment determining extent of lien." Employee never served workers' compensation insurer with original notice. Insurer moved to dismiss for lack of personal and subject matter jurisdiction and, in the same motion, sought the affirmative relief of a declaration that it was entitled to immediate distribution of its share of the proceeds of the employee's judgment against the third-party tort-feasor. HELD: Insurer's motion constituted a general appearance and a submission to jurisdiction. District court also had subject matter jurisdiction over issues relating to the insurer's right to indemnification and the amount of its claim.

Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992)

Workers' Compensation

In action by injured employee against third-party tort-feasor and at the conclusion of trial and after entry of judgment, employee filed a "petition for declaratory judgment determining extent of lien." Employee never served workers' compensation insurer with original notice. Insurer moved to dismiss for lack of personal and subject matter jurisdiction and, in the same motion, sought the affirmative relief of a declaration that it was entitled to immediate distribution of its share of the proceeds of the employee's judgment against the third-party tort-feasor. HELD: Insurer's motion constituted a general appearance and a submission to jurisdiction. District court also had subject matter jurisdiction over issues relating to the insurer's right to indemnification and the amount of its claim.

LIMITATIONS OF ACTION

Speer v. Blumer, 483 N.W.2d 599 (Iowa 1992)

Blumer assaulted Speer on August 25, 1986. On May 8, 1987, the district court sentenced Blumer on his guilty plea and ordered him to make restitution. The court suspended sentence and placed Blumer on unsupervised probation, on the condition that he pay the fine and costs and make a restitution agreement. After a hearing on January 27, 1989, and because Blumer asserted that Speer's claimed injuries did not arise out of the assault, the district court closed the criminal proceedings, discharged Blumer from probation, "and reserved whatever rights the parties had for future civil proceedings."

Speer sued Blumer on April 7, 1989. Blumer moved for summary judgment on grounds that Speer had not filed within the two-year statute of limitations.

HELD: Section 910.8 provides:

> The institution of a restitution plan shall toll the applicable statute of limitations for a civil action arising out of the same facts or event for the period of time that the restitution plan is effective.

District court's order that Blumer make restitution as a condition of his probation constitutes "the institution of a restitution plan" for purposes of tolling the statute of limitations.

Bennett v. Johnson, 485 N.W.2d 481 (Iowa App. 1992)

The five-year statute of limitations for a claim by the holder of a remainder interest against the life tenant for waste begins to run at the time the waste occurs, rather than upon the death of the life tenant.

Grant v. Cedar Falls Oil Co., 480 N.W.2d 863 (Iowa 1992)

Amendment

Plaintiff sued Holiday Erickson Petroleum, Inc., d/b/a Food 4 Less, on the last possible day of a two-year statute of limitations. When plaintiff learned from defense counsel that the proper name of the store owner was Cedar Falls Oil Co., plaintiff amended and served. HELD: Civil Rule 89 permits relation back only if the correct party receives notice of the institution of the

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action "within the period provided by law for commencing the action against him." This means that the party the plaintiff intends to sue must actually receive notice of the institution of the action within the applicable statute of limitations.

COMMENT: Civil Rule 89 was promulgated in conformity with federal rule 15(c), which more recently has been amended to permit relation back if the correct party receives notification within the time permitted by the federal rules for service of process, measured by the filing of the original complaint.

Wilber v. Owens-Corning Fiberglass Corp., 476 N.W.2d 74 (Iowa 1991)

Discovery Rule

Plaintiff sued within two years of developing mesothelioma but not within two years of being diagnosed as having asbestosis. HELD: Wilber asserts a "pure latent" injury for which application of the discovery rule is necessary to preserve claims arising from later manifestations of one disease after an earlier diagnosis of another disease caused by the same condition.

Stockton v. Shelter General Insurance Co., 477 N.W.2d 872 (Iowa App. 1991)

Insurance

Stockton had existing policy with insurer. In oral conversation with agent, they requested insurance coverage on another property and agent assured them that "he would take care of it." Several months later, Stockton suffered fire loss and discovered that agent had died before preparing the paperwork on their new coverage. Almost nine years later, Stockton sued insurer. Stockton raised issue of waiver in order to defeat section 515.138 (any action against insurer must be commenced within 12 months of loss). HELD: Section 614.1(5) (ten years for action on written contract) applies to Stockton's action because Stockton had existing written contract with insurer "and had taken reasonable steps to obtain one for their new property."

Houghton State Bank v. Peterson, 477 N.W.2d 94 (Iowa 1991)

Judgment

Peterson borrowed money from Bank and gave second mortgage on real estate and homestead. Peterson defaulted. Bank obtained judgment on promissory note, but did not foreclose second mortgage because Peterson owed first mortgagee more money than value of

Peterson's real estate. When first mortgagee foreclosed, district court found that first mortgage covered only the homestead. After decision was affirmed, and more than two years after Bank obtained judgment on note, Bank attempted to execute on non-homestead property. Peterson and first mortgagee resisted execution.

Section 615.3 provides:

> Judgments ... rendered on promissory obligations secured by mortgage ..., but without foreclosure ..., shall not be subject to renewal by action ... and, after the lapse of two years ..., shall be without force and effect ... except as a setoff or counterclaim.

HELD: Section 615.3 bars Bank's execution. Fact that judgment had no value until first mortgagee's priority was eliminated by judicial degree is irrelevant. Case law that found section 615.3 to be tolled by other litigation focused on validity of judgment, not its value.

NEGLIGENCE

Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991)

Act of God

As a result of multiple-vehicle accident, defendants asserted affirmative defense of act of God. Jury could find that at time of accident, highway was icy and snow covered, with center line obscured and road surface slippery. Visibility was reduced by darkness, falling snow, and the snow kicked up by travelling vehicles. District court submitted act of God as an affirmative defense and jury found no fault on defendants.

HELD: Defendants did not adduce substantial evidence that the driving conditions could not have been anticipated or expected, which is the third element of act of God defense under Oats v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965).

COMMENT: Court reaffirmed Renze, 418 N.W.2d at 641-42, which held that God is not a party under section 668.2 and therefore cannot be assigned percentages of fault for his/her acts, and that concluded that act-of-God defense may be used, therefore, only as a particularization of the sole proximate cause argument.

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Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991)

Legal Excuse

Fifteen-year-old operator of moped collided head-on with garbage truck that had moved into moped's lane on residential street in order to go around a parked car. HELD: District court properly refused to instruct on affirmative defense of legal excuse for defendant's "impossibility" theory. District court properly instructed that truck had to remain right of the center line except when an obstruction (including but not limited to a parked car) requires truck to operate left of center. District court also properly instructed that such operation had to yield first to all vehicles travelling in the opposite direction. Defendant was entitled to no "impossibility" exception to this requirement.

Welte v. Bello, 482 N.W.2d 437 (Iowa 1992)

Proximate Cause

When evidence establishes that there may have been more than one actionable cause of the injury or damage, the standard proximate-cause instruction should include: "There can be more than one proximate cause of an injury or damage."

Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396 (Iowa 1991)

Res Ipsa

After unremarkable heart bypass surgery, plaintiff failed to regain consciousness. CT scan revealed brain damage suffered during surgery. All physicians testifying at trial acknowledged that stroke is a recognized risk of cardiac bypass surgery. Defendants' experts opined that the CT scan was consistent with stroke that is secondary to and sometimes an unavoidable risk of surgery. Plaintiff's expert said the evidence was consistent only with improper conduct by the perfusionist during surgery.

HELD: Plaintiff cannot establish second step of two-step test for application of res ipsa: injury would not have occurred in the ordinary course of events, absent negligence. Because all testifiers agreed that stroke can occur during uneventful and properly conducted bypass surgery, the doctrine does not apply.

> [I]f reasonable minds might differ about whether the injury could result from surgery in the absence of negligence, the court should instruct on res ipsa and allow the jury to accept or reject the inference that the doctrine affords. If, however, the evidence is undisputed that such injury may

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occur even in the absence of negligence, then the doctrine of res ipsa loquitur should not be submitted.

Wick v. Henderson, 485 N.W.2d 645 (Iowa 1992)

Res Ipsa

Plaintiff suffered permanent damage to her left arm from compression of the ulnar nerve during surgery. She sued the hospital, the anesthesiologist, and the anesthesiology group on specific allegations of negligence and on res ipsa. At trial, plaintiff adduced testimony from the responsible anesthesiologist that the nurse anesthetist was responsible for proper positioning and padding of the patient's arm during surgery to protect against ulnar-nerve injury. Plaintiff also adduced testimony from a neurologist, who opined that the main cause of ulnar-nerve injury during surgery is the mechanical compression of the nerve by improper positioning of the arm. He opined that the anesthetist failed to monitor the position of the arm properly. On cross-examination, the neurologist conceded that the injury also could have happened if a surgeon leaned against the patient's arm during surgery.

Defendants moved to strike the expert's testimony at the close of plaintiff's case. The court sustained the motion and granted a directed verdict as to all defendants. District court found that the neurologist did not qualify under section 147.139 or otherwise to opine as to the responsibilities or proper conduct of a nurse anesthetist. Section 147.139 provides:

> If the standard of care given by a physician and surgeon licensed pursuant to chapter 148, or osteopathic physician and surgeon licensed pursuant to chapter 150A, or a dentist licensed pursuant to chapter 153, is at issue, the court shall only allow a person to qualify as an expert witness and testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

HELD: District court abused its discretion in striking the expert's testimony. District court also failed to apply the doctrine of res ipsa to this case and improperly required plaintiff to adduce expert testimony.

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The medical defendants had concurrent or joint control, and plaintiff suffered an injury to a healthy portion of her body during a surgical procedure. The court should have submitted the case, at the very least, on the doctrine of res ipsa.

DISSENT (5-4): Impossible to conclude that district court "abused its discretion" in finding the neurologist to be unqualified in matters of anesthesiology. He had little training in anesthesiology other than the routine exposure in medical school and internship. His interest in the field of anesthesiology was limited to his study of the sources of damage to nerves during surgery. District court had no problem with neurologist's opinion as to the cause of injury but focused its ruling on the neurologist's opinions as to the responsibilities and proper conduct of a nurse anesthetist. Res ipsa fails because plaintiff did not establish exclusive control on the part of the defendants. Other personnel present in the operating room who could have been the cause of plaintiff's injury were not sued.

Meyer v. City of Des Moines, 475 N.W.2d 181 (Iowa 1991)

Rules of Road

Fifteen-year-old operator of moped collided head-on with garbage truck that had moved into moped's lane on residential street in order to go around a parked car. HELD: After instructing on truck's duty to drive on the right-hand side and to the right of the center line in accordance with section 321.297(1)(b), plaintiff was not entitled to a separate instruction, based on section 321.275(4), on the duty not to deprive a motorcycle or moped of the full use of his lane. That statute was designed to regulate the activity of vehicles travelling in the same direction as the motorcycle/moped.

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Wiersgalla v. Garrett, 486 N.W.2d 290 (Iowa 1992)

Standards

Wiersgalla and his two partners, Goodwin and Leagjeld, hired Garrett to perform crane work necessary for the partnership to erect a metal canopy over pumps at a gas station. While the partners and Garrett were working on the canopy, a portion of Garrett's crane came in contact with Iowa Electric power lines. Wiersgalla sued partner Goodwin, Garrett, and Iowa Electric for his resulting injuries.

District court instructed jury that violation of OSHA standards by Goodwin or Wiersgalla constituted negligence per se, while violation of such standards by Garrett or Iowa Electric merely constituted evidence of negligence. Koll v. Menant's

Transportation Co., 253 N.W.2d 265 (Iowa 1977), holds that "violation by an employer of an OSHA or IOSHA standard is negligence per se as to his employee."

HELD: Assuming that general partners can be characterized as employers, Wiersgalla clearly is not the employee of Goodwin. Accordingly, evidence of a violation of an OSHA standard by Goodwin or Wiersgalla should have been regarded by the jury only as evidence of negligence.

TORTS

Alden v. Genie Industries, 475 N.W.2d 1 (Iowa 1991)

Co-Employee Gross Negligence

School maintenance department employees Alden and Gibbs were using a manlift to paint flag poles and light poles. The manlift was equipped with stabilizing outriggers, but Alden and Gibbs were not using them because they were operating the manlift from the back of a pickup truck, which provided them with extra height and better mobility. Plaintiff adduced evidence that Alden's and Gibbs' supervisor, Dick Justice, was aware of their use of the manlift without the stabilizing outriggers and directed Gibbs (Alden was not present) to continue the project, despite Gibbs' concerns about the windy conditions. Gibbs and Alden proceeded on the day in question, and Alden was in the lift when it blew over. Alden was killed.

HELD: Plaintiff adduced substantial evidence that Justice knew or should have known that his direction placed Alden in a zone of imminent danger. While Justice denied knowledge of Alden's and Gibbs' use of the manlift without the stabilizing outriggers, he readily admits that such operation was unsafe, even on a windless day. Because plaintiff adduced substantial evidence that Justice knew of the manlift's improper use and even directed them to continue it, the district court should not have sustained Justice's motion for summary judgment.

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Dudley v. Ellis, 486 N.W.2d 281 (Iowa 1992)

Co-Employee Gross Negligence

Dudley and Ellis were co-employees who were attempting to repair fire damage in an underground electrical vault. Ellis was to touch a 120-volt wire to a "network protector" which then would permit Dudley to open a switch on a high voltage transformer. Dudley adduced evidence that Ellis touched the network protector prematurely and that several protective devices failed thereafter, causing an explosion. Dudley sued Ellis for gross negligence. The jury found Ellis to be 51% at fault and Dudley to be 49% at fault.

HELD: District court should have directed a verdict for Ellis. Dudley failed to adduce evidence satisfying step 2 of the three-step test in gross-negligence cases: knowledge that injury is a probable, as opposed to possible, result of the danger. Protective devices failed. Experts disagreed on exactly how the accident happened and how the circumstances combined to cause an accident. Ellis' negligence was but one factor; another was Dudley's negligence. The same procedure had been followed frequently without incident.

Larson v. Great West Casualty Co., 482 N.W.2d 170 (Iowa App. 1992)

Conversion

Plaintiff, an Alaska resident, was involved in an accident in Iowa and suffered property damage to his vehicle. He placed his vehicle in storage and returned to Alaska. The tort-feasor's adjuster offered plaintiff $12,000 for his property damage. Plaintiff did not accept. Plaintiff asked the adjuster to handle storage problems in Iowa for him. The adjuster sold the vehicle at salvage for $3,200. Plaintiff sued the adjuster for conversion. The jury awarded compensatory damages of $3,200 and punitive damages in the amount of $225,000.

Court of Appeals rejected adjuster's argument that standard industry practices and the dealings between plaintiff and adjuster established that adjuster was no worse than merely negligent in selling plaintiff's vehicle for salvage. Court concluded, however, that the same evidence prevented plaintiff from establishing either malice or a wanton disregard for plaintiff's rights. Court of Appeals affirmed the finding of liability for conversion, reversed the award of punitive damages, and remanded for a new trial on compensatory damages. Retrial on damages was necessary because "[t]here was uncontroverted evidence the plaintiff suffered other damages as a result of the conversion."

Spencer v. Spencer, 479 N.W.2d 293 (Iowa 1991)

Defamation

L.J. Spencer's farm was placed in trust upon his death, pursuant to his will. Several of his sons and grandsons farmed on the land pursuant to leases. Son Harold filed objections to the trustee's 1987 annual report. Lyle filed a response and wrote several letters to the trustee's attorney. He sent copies of a couple letters to Harold's banker, to a friend of Lyle, to a newspaper, to a state legislator, and to Tom Harkin. Harold sued Lyle for defamation, and a jury awarded Harold $25,000 in compensatory damages and $35,000 in punitive damages.

HELD: Lyle's letters were not absolutely privileged. Harold adduced substantial evidence that he published the defamatory persons to an audience outside the scope of his qualified privilege. Harold adduced substantial evidence of emotional distress, causation, and a "conscious disregard [by Lyle] for the rights of his brother Harold."

Palmer v. Women's Christian Association, 485 N.W.2d 93 (Iowa App. 1992)

Defamation

Employer sent a letter to Job Service, listing employer's reasons for terminating employee. Employee sued for wrongful discharge and for defamation. At time of letter, section 96.11(7)(b)(2) provided:

> A report or statement, whether written or verbal, made by a person to the [Job Service] Department or to a person administering this law is a privileged communication. A person is not liable for slander or liable on account of such a report or statement.

Thereafter, legislature amended section 96.11(7)(b)(2) to add exception language for statements "made with malice."

HELD: Amendment applies prospectively only.

Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991)

Dramshop

Bryant, Giannetto, and Carroll had consumed alcohol in their travels to and through Des Moines in Giannetto's vehicle. On their way to a tavern, they stopped at a convenience store owned by Sinclair. Giannetto and Carroll went in, purchased beer, and left.

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At least Giannetto and Carroll and perhaps Bryant consumed this beer in Giannetto's vehicle as they proceeded to a tavern. They arrived at defendant Boot Hill's tavern, the Outer Limits. Defendant bartender Goulden prohibited Bryant from entering because he had no ID. Giannetto gave Bryant his keys and told him to wait in Giannetto's vehicle. Later, Goulden received reports of a vehicle driving recklessly in the parking lot. He encountered Bryant doing so with Giannetto's vehicle. Despite evidence that Bryant was intoxicated, Goulden demanded that Bryant leave the premises and threatened to call the police. Bryant drove away, ran a stop sign, and killed one 16-year old and seriously injured another.

HELD: I. Legislature amended section 123.92 in 1986 to read, in part, as follows:

> Any person who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has a right of action for all damages actually sustained, severally or jointly, against any licensee or permittee, who ~~shall sell or give~~ sold and served any beer, wine, or intoxicating liquor to the intoxicated person when the licensee or permittee knew or should have known that the person was intoxicated ....

District court properly interpreted this amendment to preclude claims against establishments, such as convenience stores, that do not sell alcohol for on-premises consumption. This holding was implicit in *Thorp*, 446 N.W.2d 457 (Iowa 1989) (which held the new language to be constitutional), and has not received further legislative attention. Legislature's use of "and" between "sold" and "served" requires conclusion that legislature intended to reach only those establishments that not only sell but serve with the intent that the alcohol be consumed on the premises.

This interpretation of section 123.92 does not violate equal protection. First, it does not discriminate between victims of persons who were sold and served alcohol for on-premises consumption and victims of persons who were sold alcohol for off-premises consumption. The statute treats all victims of persons who were sold and served for on-premises consumption the same. Second, differentiating between establishments that sell and serve and establishments that only sell meets the rationale-basis test. The convenience store has no opportunity to observe consumption and behavior. The convenience store has no control over customers after they leave with their purchase.

II. Plaintiffs also assert a common-law negligence claim against Sinclair for selling beer in violation of section 123.49(1) to an intoxicated Giannetto, who later permitted Bryant to use it. Assuming without deciding (and expressing grave doubts about the validity of the assumption) that plaintiffs may assert a common-law

claim against Sinclair, Sinclair's conduct was not, as a matter of law, a proximate cause of plaintiffs' injuries. It was not a substantial factor in the injuries. Giannetto's and Bryant's conduct were "superseding" events.

> [T]wo events ... intervened between Sinclair's sale of alcohol to Giannetto and Bryant's accident with [plaintiffs]. ... [T]here need not be a certain number of intervening events ... to relieve the defendant of liability. Nevertheless, the number ... is certainly a factor in considering the proximity and foreseeability of the harm flowing from the defendant's conduct.
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> ... Giannetto's intoxication did not contribute to any "propensity" he may have had to later negligently entrust his truck to Bryant ... at Boot Hill's tavern; ... Bryant was a minor who by law could not be served alcohol ... [at] Boot Hill, and who was rightfully ordered off Boot Hill's premises by bartender Goulden. It was for <u>this</u> independent reason that Giannetto gave Bryant his truck keys.

(emphasis in original)

III. Plaintiffs' claim against Boot Hill seeks to hold it liable for serving alcohol to an intoxicated Giannetto, who then entrusted his keys to an intoxicated Bryant. Assuming that Boot Hill served Giannetto <u>before</u> he entrusted his vehicle to Bryant, Boot Hill's conduct was not a proximate cause of plaintiffs' injuries as a matter of law. The very same analysis applicable to plaintiffs' common-law claim against Sinclair is dispositive of their claim against Boot Hill.

> Boot Hill was not in any way responsible for the conduct of Bryant, a non-patron, who was intoxicated from drinking alcohol procured from other sources, and who illegally drove the truck which caused plaintiffs' injuries.
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> We acknowledge that imposing liability upon Boot Hill would promote one of the primary objectives of the dramshop act, which is to provide a mode of relief to innocent victims harmed by those who contribute to the serving of excess liquor. However, to impose liability upon a licensee or permittee in these circumstances would open the flood gates to a plethora of lawsuits, exposing licensees and permittees to almost limitless liability. Of course, this would not serve one of the other key purposes of the dramshop act, which is to discourage the serving of excess

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> liquor to patrons. ... [A] dramshop owner may find that even when he does what is legally required of him, i.e., refuse to serve a minor, he may nevertheless be exposed to liability for the conduct of that minor long after the minor was ordered off the premises. Indeed, it would be inconsistent for us to conclude, on the one hand, that bartender Goulden did not breach any legally recognized duty when he ordered an intoxicated Bryant onto the public roadway, and also to conclude, on the other hand, that Boot Hill's conduct in serving Giannetto somehow is a proximate cause of the accident between Bryant and [plaintiffs].

IV. Plaintiffs' claim against bartender Goulden is based on violation of a duty to avoid injuries to another from the conduct of a third person.

> [Generally] a person has no duty to prevent a third person from causing harm to another. In certain negligence cases, however, the existence of a legal duty may be based upon a special relationship between the parties. This may be true for those claims, such as the one before us, which are based on an alleged failure of a wrongdoer to control the conduct of a third party or to aid or protect another.
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> . . .
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> . . . [B]artender Goulden owed no duty to either Bryant or to [plaintiffs] because (1) there was no special relationship between Goulden and Bryant which imposed a duty upon Goulden to control Bryant's conducts; and because (2) there was no special relationship between Goulden and [plaintiffs] which gave the latter a right to protection.

Although "intoxication can be a circumstance giving rise to such a special relationship," see Hildenbrand, 369 N.W.2d 411 (Iowa 1985), the exception is limited to instances where the defendant engages in outrageous conduct.

DISSENT (7-2): Court should recognize a common-law cause of action against a licensee or permittee whose liability is not regulated by the dramshop statute. Causation is a jury question.

Nutting v. Zieser, 482 N.W.2d 424 (Iowa 1992)

Dramshop

Minor sued liquor licensee for providing alcohol to underage customer. Previous Iowa cases mandate dismissal. See Fuhrman, 398 N.W.2d 807 (Iowa 1987); Connolly, 371 N.W.2d 832 (Iowa 1985). Plaintiff urged court to reconsider Fuhrman and Connolly in light of more recent opinions permitting minors to sue social hosts. See Sage, 437 N.W.2d 582 (Iowa 1989); Bauer, 428 N.W.2d 658 (Iowa 1988); Blesz, 424 N.W.2d 451 (Iowa 1988).

Court declined to reconsider Fuhrman and Connolly because they are based on "perceived legislative pre-emption of the field of liquor license liability," while social host liability is a matter of common-law.

> Plaintiff urges that it is illogical to permit minors to recover damages from private citizens who have furnished them intoxicants for no reason other than camaraderie while denying recovery against commercial establishments who receive a financial gain from similar illegal activity. Unfortunately, from his point of view, the answer to plaintiff's dilemma does not lie in simple logic.

COMMENT: 5-4.

Eddy v. Casey's General Store, Inc., 485 N.W.2d 633 (Iowa 1992)

Dramshop

An allegedly intoxicated person purchased beer from a Casey's, took it outside, drank it, and then caused injury to Eddy, who then sued Casey's under section 123.92 and on a common-law claim.

HELD: Because Casey's never "served" the intoxicated purchaser, section 123.92 does not apply. Section 123.92's proscription of liability against licensees and permittees that only sell alcohol does not violate equal protection. See Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991). Because Casey's is a permittee, section 123.92 provides the exclusive remedy for Eddy against Casey's.

DISSENT (5-4): Casey's is a class "C" permittee. Iowa law does not authorize class "C" permittees to serve. "Consequently, current section 123.92 does not provide a remedy against a class "C" permittee for the conduct prohibited by this statute." When the legislature amended section 123.92 to require proof that the licensee or permittee "served" as well as "sold," the legislature withdrew from regulating liability for class "C" permittees. Common-law should re-enter the vacuum.

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Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at 612 (Iowa 1991)

Duty

City contracted with engineer Brice to prepare plans and specifications for city sewer project. City contracted with Peterson to perform the excavation work.

Brice's plans did not detail any protective methods to be used for Shepherd's property. Peterson used another engineer to design a protective system, and Brice approved those drawings. Nevertheless, Peterson departed from his own engineer's drawings and conducted the excavation in a manner that caused a wall in Shepherd's building to crack. When the crack was discovered, Brice, Peterson, and Shepherd met and discussed it. Peterson elected to proceed in the same manner, instructed Shepherd not to use the damaged corner while the construction proceeded, and to place scaffolding inside the building. Brice sent three letters expressing concern over further deterioration of the wall. At the end of the project, when the scaffolding was removed, the entire wall collapsed.

Shepherd sued Brice and Peterson. After trial, the jury assessed 30% of the fault against Brice and 70% against Peterson. The jury awarded compensatory damages, including loss of good will, and punitive damages. By special verdict, the jury found that Peterson's conduct was not directed specifically at Shepherd. District court allocated 25% of the punitive damage award to Shepherd and 75% to the civil reparation trust fund. All parties appealed.

HELD: Brice's motion for directed verdict should have been sustained. Although Brice's contractual argument (contract language disclosed a duty only to the city) does not determine existence of Brice's duty to Shepherd, Brice had no responsibility to control or supervise the day-to-day construction on site. The contractual duty on an engineer to inspect does not create responsibility for day-to-day construction methods or performance.

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Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991)

Duty

Bryant, Giannetto, and Carroll had consumed alcohol in their travels to and through Des Moines in Giannetto's vehicle. On their way to a tavern, they stopped at a convenience store owned by Sinclair. Giannetto and Carroll went in, purchased beer, and left. At least Giannetto and Carroll and perhaps Bryant consumed this beer in Giannetto's vehicle as they proceeded to a tavern. They arrived at defendant Boot Hill's tavern, the Outer Limits. Defendant bartender Goulden prohibited Bryant from entering because

he had no ID. Giannetto gave Bryant his keys and told him to wait in Giannetto's vehicle. Later, Goulden received reports of a vehicle driving recklessly in the parking lot. He encountered Bryant doing so with Giannetto's vehicle. Despite evidence that Bryant was intoxicated, Goulden demanded that Bryant leave the premises and threatened to call the police. Bryant drove away, ran a stop sign, and killed one 16-year old and seriously injured another.

HELD: Plaintiffs' claim against bartender Goulden is based on violation of a duty to avoid injuries to another from the conduct of a third person.

> [Generally] a person has no duty to prevent a third person from causing harm to another. In certain negligence cases, however, the existence of a legal duty may be based upon a special relationship between the parties. This may be true for those claims, such as the one before us, which are based on an alleged failure of a wrongdoer to control the conduct of a third party or to aid or protect another.
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> . . . [B]artender Goulden owed no duty to either Bryant or to [plaintiffs] because (1) there was no special relationship between Goulden and Bryant which imposed a duty upon Goulden to control Bryant's conducts; and because (2) there was no special relationship between Goulden and [plaintiffs] which gave the latter a right to protection.

Although "intoxication can be a circumstance giving rise to such a special relationship," <u>see</u> <u>Hildenbrand</u>, 369 N.W.2d 411 (Iowa 1985), the exception is limited to instances where the defendant engages in outrageous conduct.

DISSENT (7-2): Court should recognize a common-law cause of action against a licensee or permittee whose liability is not regulated by the dramshop statute. Causation is a jury question.

<u>Sullivan v. Wickwire</u>, 476 N.W.2d 69 (Iowa 1991)

<u>Duty</u>

Sullivan was killed when she encountered dense fog on state highway where it passes next to factory that predates the highway. Fog was caused by the combination of steam from the factory's vapor towers and cold climatic conditions. Sullivan adduced evidence that state was aware of the potential for fog due to the proximity

of the factory to the proposed location of the highway and the climate, "but did not implement design features that would have minimized the risk of accidents on the adjacent roadway."

HELD: State's preservation of immunity under section 25A.14(1) for "discretionary functions" applies to location of highway but not its design. District court should not have entered summary judgment for state in connection with design aspects of Sullivan's negligence allegations. On the other hand, district court erred in submitting Sullivan's "warning" allegations against the state. State has preserved immunity against liability for such conduct under section 668.10(1).

Young v. Gregg, 480 N.W.2d 75 (Iowa 1992)

Duty

Young finished playing in a three-man best-shot shotgun tournament on the second hole of the Clarmond Country Club. He drove his golf cart back to the club house by way of the second and first fairways. Gregg, also a club member but not a participant in the shotgun tournament, teed off on hole number one after being told earlier in the day when the tournament would be completed and after looking, unsuccessfully, for someone at the pro shop to give him permission to tee off. Gregg's second shot, from the fairway, hit Young in the face as Young came up over a ridge.

Young sued Gregg and Clarmond, settled with Gregg, and proceeded to trial against Clarmond, who was found 100% at fault.

HELD: Because Clarmond was being sued as the possessor of land but in the context of the act of a third-party, Restatement Section 344 applies instead of section 343. Section 344 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
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> (a) discover that such acts are being done or likely to be done, or
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> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Accordingly, Young did not have to prove that "Clarmond knew or should have known that there was a condition on the premises that

presented a risk of harm to the plaintiff," a requirement necessary only under section 343. District court's refusal to instruct on the basis of Iowa Civil Jury Instruction 900.1 was appropriate, since that instruction is based on Restatement Sections 343 and 343A. Clarmond's delegation of course management to golf pro Blake did not preclude jury from finding that Clarmond was the possessor of the course at the time of Young's injury.

COMMENT: Clarmond did not argue until its reply brief that it had no duty to Young because of the inherent risk of the game or because the risk was not foreseeable.

Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992)

Duty

Employer constructed a grain processing machine under existing high voltage lines installed by Interstate Power. Plaintiff's co-employee Jones instructed plaintiff how to operate plant in his absence. Plaintiff climbed on top of plant when it malfunctioned, inserted long metal pole into fabricated openings on top of plant in effort to unclog it, and was electrocuted when he pulled pole back up. Plaintiff testified that he knew the electric lines were present and would have avoided them "if he had looked." Jury assessed 25% of the fault against plaintiff and 75% against Interstate Power.

HELD: I. Power company was held to the highest degree of care consistent with the conduct and operation of its business, and may be negligent even though it has complied with the minimum requirements of safety codes and regulations, because of the great but subtle dangers to which persons coming into the zone of danger are exposed. Interstate Power need not have foreseen the very manner in which plaintiff was injured, because it should have known that employees were climbing onto the top of employer's plant. Ladders, handrails, and platforms were readily apparent to utility's casual observation, and any inspection by utility would have disclosed their frequent use by such employees.

II. Plaintiff's fault was not more than 50% as a matter of law. Plaintiff was not consciously aware of the electric lines just before coming into contact with them. They were not in his view as he climbed, nor when he was using the pole. The performance of job duties occupied his attention at the time of the accident.

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Downns v. A & H Construction, 481 N.W.2d 520 (Iowa 1992)

Duty

A & H was a general contractor in the business of constructing residential homes. It contracted with Crase to frame a residential structure on property owned by A & H. Crase employed Downs on an hourly basis as a construction worker. Downs seriously injured himself while standing on scaffolding owned in part by A & H and erected by Crase employees for their use in performing Crase's work pursuant to the contract between Crase and A & H.

HELD: District court properly sustained A & H's motion for summary judgment. The general rule is that an employer of an independent contractor is not liable for the contractor's negligence, due to lack of control by the employer over the contractor's work. Restatement sections 328E and 343, relating to possessors of land and dangerous conditions known or discoverable by the possessor of land, are a recognized exception to the general rule. A possessor of land, however, is "a person who is in occupation of the land with intent to control it." An employer like A & H of an independent contractor generally is not a possessor of land under Restatement section 328E because it does not retain sufficient control to justify imposition of liability. Downs failed to present any evidence to justify treating A & H differently than other employers of independent contractors.

Restatement section 414, relating to negligence in exercising control retained by employer, is also a recognized exception to the general rule. Again, the employer of an independent contractor generally does not retain sufficient control to impose liability under section 414.

> "It is not enough that [A & H] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations .... There must be such a retention of a right of supervision that the contractor is not entirely free to do the work his own way."

Fact that A & H owned scaffolding is irrelevant, given Crase's complete control of its direction and use.

Restatement sections 413 (duty to provide for taking of precautions against dangers involved in work entrusted to contractor) and 427 (negligence as to danger inherent in the work) also are exceptions to the general rule. Ordinary construction activities, however, are not inherently or intrinsically dangerous. "We hold as a matter of law that work on a scaffold at a residential structure is not the type of work that would immediately cause the reaction DANGER."

Husker News Co. v. South Ottumwa Savings Bank, 482 N.W.2d 404 (Iowa 1992)

Duty

Husker News, a wholesale distributor of magazines and books to retailers, entrusted financial transactions to a driver whose route was remote. Husker permitted the driver to deposit cash into his personal account, to inventory returns and credit customers for returned magazines, and to store excess returns at Husker News' cost. Driver provided false inventories, fabricated storage accounts, deposited checks made payable to Husker News to his personal account by falsely representing to his own bank that he had authority to do so, and misrepresented to Husker News the amounts of cash payments by retailers. Husker News sued retailers, driver's bank, and drawee banks for their role in permitting driver to embezzle from his employer. Husker News contended that retailer had a duty to check accuracy of driver's account of retailer's returns on driver's credit memo and to examine the back of its canceled checks for unauthorized endorsements.

HELD: Iowa law does "not recognize a good-Samaritan obligation to prevent the perpetration of a tort by another on a third party. There would be even less reason to impose a duty on an outsider to protect an employer from its own employee." Section 554.4406, which imposes a duty to discover and report unauthorized signatures or alterations, creates a duty in the retailer, but only to its bank.

Teunissen v. Orkin Exterminating Co., 484 N.W.2d 589 (Iowa 1992)

Duty

Orkin contracted to inspect and treat a home for termites. Orkin was not aware that the property would be sold. Five years later, plaintiff purchased property. She was not aware of Orkin's contract or its conduct. When she subsequently discovered that the house was infested and severely damaged by termites, she sued Orkin.

HELD: Orkin owed no duty to plaintiff. Relaxation of the requirements of privity in Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969), and Larsen v. United Federal Savings and Loan Association, 300 N.W.2d 281 (Iowa 1981), do not go beyond known third-parties who reasonably rely on the performance of certain contractually-obligated services. Orkin did not know, and plaintiff did not rely.

Snipes v. Chicago, Central & Pacific Railroad, 484 N.W.2d 162 (Iowa 1992)

FELA

Snipes was a "carman" engaged in repairing and rerailing train cars and locomotives for the railroad. Co-employee Jones, whose job required him to inspect cars and identify those in need of repair, asked Snipes to help him close a boxcar door that was "rough shutting." While they worked on the door together, it closed quickly and unexpectedly and caused injury to Snipes.

Snipes sued railroad under Federal Employers' Liability Act (FELA) and obtained a verdict of $357,500. The jury assigned 100% of the fault to the railroad.

HELD: Sufficient evidence supported the finding of liability. FELA provides that the employer is responsible for the fault of the plaintiff's co-employees. On this record, a reasonable finder of fact could decide that the accident was entirely Jones' fault for failing to inspect and discover the reason why the door was "rough shutting."

Connolly v. Bain, 484 N.W.2d 207 (Iowa App. 1992)

Fiduciary Duty

Connolly, Bain, and Hoing attempted to start a new business selling medical malpractice coverage for tail liability or prior acts. They consulted an actuary and counsel and executed a pre-incorporation agreement. The agreement provided that they would share equally in ownership and expenses. They agreed to a non-competition clause and agreed not to disclose information to third parties without prior execution of a non-disclosure agreement by the third party. The three then formed BCH Corporation, with each owning 1/3 of the stock. Counsel advised them of the need for a shareholders' agreement and submitted a recommended form that required unanimous consent for certain actions in order to protect minority shareholders.

Bain and Hoing began to disagree with and distrust Connolly, and the feelings were mutual. Counsel subsequently proposed a second agreement, which was less protective of the interest of minority shareholders. Connolly refused to execute the agreement and threatened to develop the product on his own. At BCH's organizational meeting, Connolly, Bain, and Hoing were elected to the board of directors, but Connolly was not elected to any officer position.

Several months later, Bain, Hoing, and another investor formed a corporation named Physicians Management Co. (PMC). At the same time, Connolly sought other investors and also sought to

incorporate under the name PMC. Bain and Hoing met with an entity previously interested in investing in BCH and reached agreement with that investor.

Several months later, the three original investors agreed to dissolve BCH. Bain and Hoing granted Connolly the right to use the business plan and insurance policy, BCH's only tangible assets.

Connolly sued Bain and Hoing for breach of fiduciary duty and PMC for conversion. District court found for defendants on the conversion claim but for Connolly on the fiduciary duty. The district court awarded Connolly $14,000 for his out-of-pocket expenses (but rejected Connolly's claim for lost profits, lost salary and benefits, and punitive damages) and imposed a constructive trust in favor of Connolly against 1/3 of the stock in PMC.

HELD: Substantial evidence supports district court's finding that Bain and Hoing, through PMC, deprived BCH and Connolly of a corporate opportunity. Although the shareholders' failure to execute a shareholders' agreement prevented BCH from utilizing the opportunity, it was Bain and Hoing's insistence on oppressive provisions in the proposed agreement that prevent BCH from obtaining a shareholders' agreement. Although a finding of corporate opportunity will be denied when "the company is unable to avail itself of the opportunity," see Ontjes v. MacNider, 232 Iowa 562, 579-80, 5 N.W.2d 860, 869-70 (1942), BCH's inability is traceable strictly to Bain and Hoing's position. Connolly's own conduct does not preclude a breach by Bain and Hoing of fiduciary duty. "Connolly did nothing Bain and Hoing were not already doing. [They] are in no position to complain about Connolly's conduct."

District court properly rejected Connolly's claim for lost profits and lost salary and benefits. Evidence of anticipated profits was too speculative and "ignores reality." At the time of trial, PMC had sold only one policy and was over one million dollars in debt. Connolly had no expectation through the pre-incorporation agreement that he, like Bain and Hoing, would be employed by the corporation, let alone at any particular salary or with any particular benefits. District court likewise did not abuse its discretion in declining to award punitive damages.

South Ottumwa Bancshares, Inc. v. First Interstate of Iowa, Inc., 484 N.W.2d 586 (Iowa 1992)

Fiduciary Duty

Holtsinger and Curran were general partners in Centar, which acquired 14% of the common stock in First Interstate. Centar threatened to acquire a controlling interest in First Interstate and liquidate it unless First Interstate purchased its shares back from Centar at a premium. Centar and First Interstate executed a

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"stock purchase and option agreement," in which First Interstate purchased all of its stock held by Centar for a specified price. The agreement also gave First Interstate the right to purchase stock in the South Ottumwa Savings Bank (Bank) from a holding company (plaintiff), contemporaneously formed by Holtsinger and Curran.

> Consideration for the option was a $250,000 note which, among other things, was conditioned upon [plaintiff] acquiring 80% of [Bank] shares. Nothing in the agreement provided for monetary payment to [plaintiff] for the option.

The agreement provided that First Interstate could not exercise the option for three years and that plaintiff could avoid the option at that time by paying $250,000 plus interest to First Interstate.

At the expiration of the three-year period, Bank's stock had risen in value above the option price. First Interstate timely exercised the option. Plaintiff commenced a declaratory judgment action to declare the option invalid and paid $250,000 into an account in order to avoid the option in the event it were ruled valid. Plaintiff later amended its petition also to seek damages for breach of fiduciary duty and fraud. Plaintiff alleged that its promoters brought pressure on First Interstate in order to advance the self-interest of plaintiff's promoters. Plaintiff alleged that First Interstate participated in or at least capitulated to the conduct of plaintiff's promoters.

HELD: Assuming plaintiff's allegations to be true, plaintiff cannot recover any damages from First Interstate.

Production Credit Association v. Shirley, 485 N.W.2d 469 (Iowa 1992)

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Fraudulent Conveyance

Lyle and Georgia Taylor and their farming corporation, Taylor Enterprises (TE), were indebted to Citizens State Bank (Citizens) and PCA. When Taylors and TE could not make payments, Citizens and PCA obtained judgments of foreclosure. PCA and Citizens resolved their competing claims for the assets of Taylors and TE by agreeing that PCA was subordinate to Citizens. While PCA and Taylors were engaged in mandatory mediation proceedings under section 654A.6, Lyle Taylor sold his stock in Lyco, Inc. to his nephew and niece, the Shirleys, for $90,000. Lyco owned the Taylors' vacation homes in Arizona and Minnesota and other miscellaneous personal property. The appraised value of the Lyco assets exceeded $180,000. The Shirleys were aware of PCA's judgment and the Taylors' inability to satisfy it from other assets. The sale occurred without any advertising, listing by brokers, an appraisal, a closing, and without the exchange of documents memorializing the transaction.

Shortly after the sale transaction, Shirleys orally agreed to lease the vacation homes back to the Taylors without exploring the fair market value of such leases. Taylors used the proceeds of the sale of Lyco to pay Citizens.

PCA sued the Taylors and Shirleys for fraudulent conveyance. HELD: PCA established by clear and convincing evidence that Taylors sold Lyco with the intent to defeat and defraud PCA and that the Shirleys intentionally participated in the fraudulent scheme. Shirleys were not a bona fide purchaser. If Shirleys had paid fair market value, Citizens would have bid less at the sheriff's sale, thus giving PCA the opportunity to acquire assets in satisfaction of its judgment. Shirleys are not entitled to a credit for the $90,000 they did pay. "To refund to the transferee the amount paid would be to remove all danger of loss and destroy the restraint which the law imposes upon such transactions."

Bartlett v. Chebuhar, 479 N.W.2d 321 (Iowa 1992)

Golf

Bartlett was playing hole number three when Chebuhar was playing hole number nine. Chebuhar's tee shot on nine "fell somewhat towards the right side of the fairway." His second shot "went sharply to the right and landed in front of the number four tee." Chebuhar had no people along his ball's intended path of flight for his third shot to the ninth green. Unfortunately, he again hit well to the right, and his ball hit Bartlett, who was putting for birdie on three.

District court dismissed Bartlett's claim after trial because he "was not in defendant's line of sight or intended flight of the ball." HELD: Although a bad shot does not necessarily constitute negligence, district court should have considered more than just what or who was in Chebuhar's intended line of flight, given Bartlett's evidence of Chebuhar's propensity to shank.

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City of McGregor v. Janett, 480 N.W.2d 576 (Iowa App. 1991)

Immunity

McGregor's city engineer owns shoreline property immediately north of McGregor's sewage treatment plant. Janett owns the property immediately south of the plant. When McGregor decided to expand its facility, engineer proposed a plan that would expand the plant to the south. Janett sued city and engineer.

HELD: Janett cannot articulate a clearly established constitutional right that engineer knew or should have known that he was violating, so engineer is protected from liability by qualified immunity.

Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396 (Iowa 1991)

Intentional Infliction of Emotional Distress

Days after plaintiff's wife failed to regain consciousness as a result of a stroke suffered during cardiac bypass surgery, surgeon encouraged plaintiff to "think ábout unplugging" his wife. When plaintiff replied that "he would spend every penny he had to keep her alive," surgeon called plaintiff a "fool" who would be broke in three months and said that his wife would die anyway. HELD: District court properly directed a verdict for surgeon on plaintiff's claim for intentional infliction of emotional distress. Plaintiff failed to establish outrageous conduct or severe emotional distress.

Burke v. Hawkeye National Life Insurance Co., 474 N.W.2d 110 (Iowa 1991)

Interference

Burke was an independent agent who sold life insurance for, among other companies, Hawkeye National Life. Burke's contract with Hawkeye provided that his right to commissions was vested (he would continue to receive renewal commissions on policies so long as premiums were paid, even if Burke's contract with Hawkeye were terminated).

In an effort to compete in the industry, Hawkeye developed new insurance products and contracted with Preferred Marketing Associates (PMA) to market them. Hawkeye gave PMA agents a list of the Hawkeye insureds that had been sold policies by Burke. When Burke learned that PMA salesmen were calling on "his" customers, Burke complained. Hawkeye terminated Burke's contract. Burke sued for breach of contract. In the fourth day of trial, district court granted Burke's motion for leave to amend to add a claim for interference with contract and/or prospective business relations and a prayer for punitive damages.

HELD: Hawkeye continued to pay commissions to Burke on policies that remained in force after Hawkeye terminated Burke. Burke had no written agreement with Hawkeye concerning "ownership" of Burke's customers. The Burke-Hawkeye contract was terminable at will. As a matter of contract law, therefore, Burke had no cause of action against Hawkeye.

On the other hand, Burke adduced substantial evidence of an industry-wide custom and practice that rendered Hawkeye's conduct improper.

> This "hands-off" policy recognizes that while the company furnishes the product, the agent provides the customers; that customer loyalty to the company is fostered through agency relationships; and that agents are recruited and retained on the prospect of generating a customer base that - if left undisturbed - will provide years of renewal premiums for the company and renewal commissions for the agent. Within this framework, agents protect their vested renewals by refraining from deliberately placing company policies with competitors' products. And companies assume a corresponding duty not to solicit new business from policyholders unless they are "orphaned," that is, no longer serviced by an active agent.
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> . . . By soliciting and encouraging Burke's customers to strip the cash values from existing policies in order to replace them with new ones, Hawkeye agents not only interfered with Burke's contractual rights to renewal commissions on the old policies, but demonstrably reduced Burke's chances of writing new business for these customers in the future.
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> . . . In the competitive insurance market, the details of a policyholder's existing coverage are guarded closely, since receipt of such information would give a significant selling advantage to the recipient. Thus, while Hawkeye maintains that preservation of business was its sole motive for providing Burke's customer list to its other agents, the record suggests that company officials anticipated rewriting those customers' policies and knew the result would be injury to Burke's business, i.e., vested renewal commissions and other future income.

COMMENT: After modifying district court's $100,000 judgment on compensatory damages to correct a mathematical calculation, Court reversed the award of punitive damages in the amount of $250,000.

> To allow Burke to recover substantial punitive damages on its late-filed amendment is quite another matter. The amendment substantially changed the issues on the fourth day of trial, four years after the case was filed.

Elliott v. Clark, 475 N.W.2d 663 (Iowa App. 1991)

Interference

In the estate of Clark's mother, Elliotts and Clark disputed title to a house previously owned by Clark's mother. Clark believed that she had a life estate under her mother's will. Elliotts believed that the house had been sold to them by Clark's brother on their mother's behalf before her death. The Court of Appeals determined that Elliotts had an enforceable contract that divested Clark's mother of the ability to convey any interest to Clark. See In re Estate of Clark, 447 N.W.2d 549 (Iowa App. 1989).

Clark sought a rehearing from the Court of Appeals, further review from the Iowa Supreme Court, a stay of enforcement from the Iowa Supreme Court and the United States Supreme Court, and a new trial based on newly-discovered evidence. Clark was unsuccessful in all of her efforts. Elliotts obtained physical possession of the property only after prosecuting a forcible entry and detainer action. Elliotts then sued Clark, her counsel, and the insurer of Clark's supersedeas bond for interference with contract and for malicious prosecution.

HELD: Substantial evidence supported district court's finding that Clark and her counsel had a good faith belief in the merits of Clark's claim of a life estate and did not pursue the litigation "solely to harass the Elliotts."

Hsu v. Vet-A-Mix, 479 N.W.2d 336 (Iowa App. 1991)

Interference

Hsu was a professor of veterinary pharmacology at ISU. He approached Lloyd, the president of Vet-A-Mix and a former faculty member at ISU, about developing a new drug to be used by veterinarians. Hsu, Vet-A-Mix, and ISU reached certain agreements. Hsu's research did not go well, Vet-A-Mix terminated its relationship with Hsu, and eventually used other researchers to complete the task. Hsu sued Vet-A-Mix for breach of contract and Lloyd for interference with contractual relationship.

HELD: District court properly measured Lloyd's conduct against a qualified privilege as a corporate fiduciary "to interfere with corporate business relationships so long as [he was] acting in good faith to protect the interests of the corporation."

Hunter v. Board of Trustees, 481 N.W.2d 510 (Iowa 1992)

Interference

Hunter was a 13-year management employee at hospital. During his tenure, the hospital issued a personnel manual that, among other things, listed the circumstances for termination of employees and provided procedures for certain types of terminations. One circumstance was staff reduction. The procedures section of the manual provided that the hospital "may at its sole discretion layoff an employee whenever it is deemed necessary."

Hunter applied for executive director position, but hospital hired outsider Meyer, who terminated Hunter one month later pursuant to "staff reduction." Two months later, Meyer created a new management position and filled it with an associate from previous employment.

Hunter sued the hospital for breach of contract and Meyer for tortious interference. By ruling on competing motions for summary judgment, the district court held that the manual constituted a binding employment contract that limited the hospital's right to terminate Hunter to the listed circumstances. The jury returned verdicts for Hunter on breach of contract against the hospital and for interference against Meyer.

HELD: Hunter adduced substantial evidence to support finding that Meyer exceeded his qualified privilege as officer and acted improperly. The fact that jury "appeared" to have divided Hunter's damage claim between hospital and Meyer is irrelevant, because "both the breaching party and the tort-feasor are joint wrongdoers and each is severally liable for the loss."

Downs v. A & H Construction, 481 N.W.2d 520 (Iowa 1992)

Interference

A & H was a general contractor in the business of constructing residential homes. It contracted with Crase to frame a residential structure on property owned by A & H. Crase employed Downs on an hourly basis as a construction worker. Downs seriously injured himself while standing on scaffolding owned in part by A & H and erected by Crase employees for their use in performing Crase's work pursuant to the contract between Crase and A & H. Crase had no insurance for workers' compensation liability.

HELD: Assuming that A & H knew that Crase did not have insurance, A & H violates no statute by proceeding to contract with Crase. If legislature wants to impose workers' compensation liability on general contractors for employees of uninsured subcontractors, it can do so. A & H's act of contracting likewise

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does not interfere with Downs' right to receive worker's compensation benefits. Downs had a statutory remedy against Crase for its failure to carry insurance.

First Medical, Inc. v. Embassy Manor Care Center, Inc., 483 N.W.2d 14 (Iowa App. 1992)

Interference

Pharmacy contracted with nursing home to provide certain pharmaceutical services. After a divorce between the owners of the nursing home, the spouse who was awarded the nursing home business terminated the pharmacy's contract. The pharmacy sued for intentional interference with prospective business advantage. In resisting the nursing home's motion for summary judgment, the pharmacy argued that the "improper purpose" element of the interference claim could be established by proof of improper means or improper motive.

HELD: District court properly sustained nursing home's motion for summary judgment. In claims for intentional interference with prospective business advantage, the Iowa Supreme Court consistently and clearly has required proof of "purpose on defendant's part to financially injure or destroy the plaintiff." Proof of improper means misses the point of the element and is not an acceptable alternative.

Hanson v. Flores, 486 N.W.2d 294 (Iowa 1992)

Legal Malpractice

Without deciding whether an attorney-client relationship is established between the custodial parent and the county attorney by the attorney's prosecution of a child-support recovery action under chapter 252B, prosecutorial immunity bars a suit by the custodial parent for negligent prosecution.

Elliott v. Clark, 475 N.W.2d 663 (Iowa App. 1991)

Malicious Prosecution

In the estate of Clark's mother, Elliotts and Clark disputed title to a house previously owned by Clark's mother. Clark believed that she had a life estate under her mother's will. Elliotts believed that the house had been sold to them by Clark's brother on their mother's behalf before her death. The Court of

Appeals determined that Elliotts had an enforceable contract that divested Clark's mother of the ability to convey any interest to Clark. See In re Estate of Clark, 447 N.W.2d 549 (Iowa App. 1989).

Clark sought a rehearing from the Court of Appeals, further review from the Iowa Supreme Court, a stay of enforcement from the Iowa Supreme Court and the United States Supreme Court, and a new trial based on newly-discovered evidence. Clark was unsuccessful in all of her efforts. Elliotts obtained physical possession of the property only after prosecuting a forcible entry and detainer action. Elliotts then sued Clark, her counsel, and the insurer of Clark's supersedeas bond for interference with contract and for malicious prosecution.

HELD: Substantial evidence supported district court's finding that Clark had probable cause to litigate her claim of life estate. Clark adduced substantial evidence that her mother had informed her that she would receive a life estate in return for Clark's assistance and care.

Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396 (Iowa 1991)

Medical Malpractice

After unremarkable heart bypass surgery, plaintiff failed to regain consciousness. CT scan revealed brain damage suffered during surgery. All physicians testifying at trial acknowledged that stroke is a recognized risk of cardiac bypass surgery. Defendants' experts opined that the CT scan was consistent with stroke that is secondary to and sometimes an unavoidable risk of surgery. Plaintiff's expert said the evidence was consistent only with improper conduct by the perfusionist during surgery.

HELD: I. Plaintiff cannot establish second step of two-step test for application of res ipsa: injury would not have occurred in the ordinary course of events, absent negligence. Because all testifiers agreed that stroke can occur during uneventful and properly conducted bypass surgery, the doctrine does not apply.

> [I]f reasonable minds might differ about whether the injury could result from surgery in the absence of negligence, the court should instruct on res ipsa and allow the jury to accept or reject the inference that the doctrine affords. If, however, the evidence is undisputed that such injury may occur even in the absence of negligence, then the doctrine of res ipsa loquitur should not be submitted.

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II. At least where district court instructs that surgeons "could be found negligent if the evidence revealed any negligent acts by perfusionist," no additional "captain of the ship" instruction is necessary or appropriate.

III. In informed-consent case, plaintiff is not entitled to instruction that jury may infer negligence from physician's failure to discuss every risk cited in the informed consent statute.

> Plaintiff cites no persuasive authority for the proposition that section 147.137, standing alone, creates a presumption to aid plaintiff in his burden of proving all the elements of his cause of action. A plain reading of the statute clearly suggests that the inference created by the law is intended to benefit medical professionals, not patients.

Wick v. Henderson, 485 N.W.2d 645 (Iowa 1992)

Medical Malpractice

Plaintiff suffered permanent damage to her left arm from compression of the ulnar nerve during surgery. She sued the hospital, the anesthesiologist, and the anesthesiology group on specific allegations of negligence and on res ipsa. At trial, plaintiff adduced testimony from the responsible anesthesiologist that the nurse anesthetist was responsible for proper positioning and padding of the patient's arm during surgery to protect against ulnar-nerve injury. Plaintiff also adduced testimony from a neurologist, who opined that the main cause of ulnar-nerve injury during surgery is the mechanical compression of the nerve by improper positioning of the arm. He opined that the anesthetist failed to monitor the position of the arm properly. On cross-examination, the neurologist conceded that the injury also could have happened if a surgeon leaned against the patient's arm during surgery.

Defendants moved to strike the expert's testimony at the close of plaintiff's case. The court sustained the motion and granted a directed verdict as to all defendants. District court found that the neurologist did not qualify under section 147.139 or otherwise to opine as to the responsibilities or proper conduct of a nurse anesthetist. Section 147.139 provides:

> If the standard of care given by a physician and surgeon licensed pursuant to chapter 148, or osteopathic physician and surgeon licensed pursuant to chapter 150A, or a dentist licensed pursuant to chapter 153, is at issue, the court shall only allow a person to qualify as an expert witness and

testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

HELD: District court abused its discretion in striking the expert's testimony. District court also failed to apply the doctrine of res ipsa to this case and improperly required plaintiff to adduce expert testimony.

Section 147.139 does not apply because neither the hospital nor the nurse anesthetist are covered by its provisions. The neurologist is qualified to express opinions as to the responsibilities and the proper conduct of an anesthetist.

The medical defendants had concurrent or joint control, and plaintiff suffered an injury to a healthy portion of her body during a surgical procedure. The court should have submitted the case, at the very least, on the doctrine of res ipsa.

DISSENT (5-4): Impossible to conclude that district court "abused its discretion" in finding the neurologist to be unqualified in matters of anesthesiology. He had little training in anesthesiology other than the routine exposure in medical school and internship. His interest in the field of anesthesiology was limited to his study of the sources of damage to nerves during surgery. District court had no problem with neurologist's opinion as to the cause of injury but focused its ruling on the neurologist's opinions as to the responsibilities and proper conduct of a nurse anesthetist. Res ipsa fails because plaintiff did not establish exclusive control on the part of the defendants. Other personnel present in the operating room who could have been the cause of plaintiff's injury were not sued.

Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991)

Medical Malpractice

Patient acquired HIV from post-surgical blood transfusion ordered by surgeon, who had not disclosed risk of contracting AIDS from a blood transfusion when advising patient of the risks of surgery. Patient sued surgeon for failing to disclose known risk and available alternative of autologous transfusions. Surgeon conceded knowledge of risk, but regarded it as too low to be disclosed. Jury returned defense verdict.

HELD: Physician's decision not to disclose known risk or availability of autologous transfusions does not constitute negligence as a matter of law. Both sides adduced expert testimony on levels of knowledge, technology, and practice at time of transfusion. Because the experts differed on the extent of the

actual risk, a jury question was generated. Because defendant adduced testimony that at the time of patient's transfusion, autologous transfusions were rare and were resisted by local blood banks, evidence of reasonable availability was in conflict and was for the jury to resolve.

For the same reasons, district court properly refused to instruct that autologous transfusion was feasible at the time of plaintiff's surgery. While defendant conceded the possibility of autologous transfusion he sharply disputed reasonable availability.

Welte v. Bello, 482 N.W.2d 437 (Iowa 1992)

Medical Malpractice

Immediately prior to surgery to correct a deviated septum, anesthesiologist secured Welte's execution of an informed-consent form. Hospital nurse failed to properly insert IV needle into Welte's vein. Neither nurses in operating room nor anesthesiologist detected the error before anesthesiologist began injecting sodium pentothal into the IV port. Welte suffered serious burns and permanent scarring on her arm. Welte sued hospital and anesthesiologist. Anesthesiologist obtained summary judgment on Welte's negligent-treatment claim, because Welte did not designate an expert witness.

HELD: I. Welte was entitled to res ipsa treatment of her negligent-treatment claim against anesthesiologist. Plaintiff's failure to designate expert should not have been fatal to her claim.

II. District court's instruction on Welte's res ipsa claim against hospital was defective because it required her to prove "the common experience of the health care professional."

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DISSENT (6-3):

> Ever closer does the goal appear that any unexpected bad result from surgery must have been due a surgeon's negligence. The "thing speaking for itself" has taken on a life of its own multiplying into the field of medicine with the self assurance of a crusader.
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> The common knowledge of lay persons hardly includes an understanding of the nature of sodium pentothal or what would happen if the sedative escaped from a vein to surrounding tissue. Nor is it commonly known how a needle is inserted into a vein, or how far it should be thrust. The majority's analysis is that the common knowledge

> exception is satisfied because people know that intravenous injections are often done. The misapprehension here is that knowledge of the frequency of an operative procedure equals knowledge that an unfavorable medical result must have been due to negligence. These two spheres of knowledge are not correlatives.
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> The majority's reversal of the jury's absolution of Mercy Hospital again elevates "common experience" to lofty heights. Plaintiff Welte did receive the benefit of the res ipsa loquitur doctrine in the case against Mercy Hospital. Even so, the majority decides that the jury must infer negligence without judging the resulting injury against the standard of care recognized by those most knowledgeable in the field - the health care professionals.

Farmers State Bank v. Huebner, 475 N.W.2d 640 (Iowa App. 1991)

Misrepresentation

Walk rented farmland from Schultz and financed his farming operation on Schultz' land through Farmers State Bank. When Walk attempted to renew his loans, FSB required either additional security or a cosigner. Walk's friend, Huebner, cosigned without reading the note. The note mistakenly listed the Schultz property as collateral as a result of the bank's attempt to describe the location of the personal property pledged by Walk as collateral. Bank loaned other money to Walk that was secured by a mortgage on other real estate owned by Walk. When Walk eventually defaulted on all loans, Walk gave a deed to his real estate to the bank in lieu of foreclosure. The bank foreclosed on the other security and then sued Huebner for the difference.

HELD: FSB was entitled to utilize parol evidence to establish that its listing of the Schultz property in the collateral list was an error. Substantial evidence supported district court's finding that Huebner did not establish that FSB induced him to become a cosigner through the fraudulent representation that the note was secured by the Schultz property.

> [FSB president Bowers] testified that his conversations with Huebner during the execution of the notes were limited. Bowers testified that on neither occasion was there any discussion about the underlying security and on neither occasion did Huebner read the note he was signing.... Huebner recalled that Bowers had said both times that the

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> note was safely secured by real estate. Huebner admitted that he did not know the contents of the notes when he signed them and that he never attempted to ascertain the status of the notes he had signed. Although the two bachelor farmers had known each other for 30 years, during which they had hunted and fished together and had even owned farm equipment together, Huebner testified that he did not know whether Walk owned the 160 acres he farmed.

Bradshaw v. Wakonda Club, 476 N.W.2d 743 (Iowa App. 1991)

Misrepresentation

In 1956, the Wakonda Club provided in its articles of incorporation:

> Any resident-member that has reached the age of 70 and has been a member for 20 consecutive years may, at his option, surrender his membership to the club and become an honorary member for the term of 20 years. An honorary member will be entitled to all of the privileges of the club but will pay no dues.

The articles empowered the board of directors

> to fix the dues for each class of membership and ... have all powers which may be necessary and proper to be exercised in conducting the affairs of the corporation.

After 1974, the board passed a series of resolutions that impacted upon the eligibility requirements for honorary membership and the obligation of honorary members to pay dues. By 1988, the board had fixed dues for honorary members at $100 per month.

Plaintiffs had been regular members, had qualified for honorary membership, had elected to become honorary members, and had paid dues as honorary members, all in accordance with the more recent resolutions. They complained for the first time in 1988 when the board changed their dues from a specific dollar amount to a percentage of the regular members' monthly dues. Plaintiffs sued Wakonda Club for negligent misrepresentation and breach of contract and sought other relief based on equitable and promissory estoppel. District court sustained Wakonda Club's motion for summary judgment.

HELD: District court properly sustained Wakonda Club's motion for summary judgment as to misrepresentation. Plaintiffs failed to establish that Wakonda Club knew or should have known in 1956 that its policy regarding honorary membership would change 20 years later.

Garren v. First Realty, 481 N.W.2d 335 (Iowa 1992)

Misrepresentation

Buyers sued listing realtor on theory of fraudulent misrepresentation for failing to disclose that realty was in a flood fringe zone. Buyers failed to adduce evidence that realtor knew that property was in flood fringe zone or that realtor had made any representations regarding the "zoning" of the property.

HELD: Realtor's negligence in failing to inquire (realtor did not appeal from adverse verdict on negligence count) is insufficient to establish reckless disregard.

Simons Feed Store, Inc. v. Leslein, 478 N.W.2d 598 (Iowa 1991)

Premises Liability

Defendant farmer's property is accessible only by gravel lane that crosses creek via wooden-plank bridges that defendant constructed. Defendant occasionally permitted neighbor Burke to use this lane to access some of Burke's farmland. Burke called plaintiff and requested a truck for hauling grain from his field. Plaintiff's vice president, Roger Simon, became involved. No "straight-truck" was available, even though it was the preferred vehicle for traveling over defendant's bridges. Burke asked defendant whether a semi had ever been over his bridges, and defendant said yes. Roger Simon knew that his 36-foot semis had been over defendant's bridges. He was concerned about the rear wheels of the trailer and warned his driver "to make sure you're on the bridge" and "make sure you hit the bridge at the right angle." The driver had been over defendant's bridges on at least 16 occasions, but with smaller trucks.

The driver crossed the truck in the presence of Burke and defendant, who both noticed that it was larger than usual. Defendant warned plaintiff's driver "to go slowly and to keep toward the center when crossing the bridge" on his return trip.

By the time plaintiff's truck was loaded, "it was dark, snowing, and slippery." Plaintiff's driver approached the bridge from a curve, did not line up the trailer squarely behind the

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tractor, and lost the back end of the trailer off the side of the bridge. Unbeknownst to the driver, the outside portions of the bridge planking were not supported by steel underpinnings.

Plaintiff sued defendant for damage to the truck. Jury assessed 85% to defendant.

HELD: Plaintiff generated a jury issue with respect to adequacy of defendant's warning. Although plaintiff's driver had been warned by both Simon and defendant to stay toward the middle of the bridge, no employee of plaintiff was aware that the "outer three feet of the bridge planking was unsupported."

Schnoor v. Deitchler, 482 N.W.2d 913 (Iowa 1992)

Premises Liability

Schnoor, a life-long farmer with several years of experience as a grain trucker, contracted with Deitchler to haul Deitchler's beans. Schnoor did this for several years, and as a result became familiar with Deitchler's open and unguarded auger. Schnoor's duties did not include loading the beans into his truck or in otherwise operating or even coming close to the auger. He walked to the back of his truck to check on Deitchler's progress in loading the beans, and slipped on beans that he knew were lying loose on hard ground. His foot came in contact with the auger and he was injured.

HELD: District court should have directed a verdict in favor of Deitchler. Invitee is entitled to nothing more than knowledge of the dangerous conditions he will encounter and the opportunity to appreciate the risk. The facts do not justify application of any exception, see Konicek, 457 N.W.2d 614 (Iowa 1990), for those instances in which the possessor of land should expect that an invitee's attention may be distracted or that an invitee will proceed to encounter a known and obvious danger because the advantage of doing so outweighs the apparent risk.

DISSENT (7-2): Whether or not possessor of land should expect that invitee will proceed to encounter known or obvious danger because the advantage of doing so outweighs the apparent risk is peculiarly a fact question, especially in light of chapter 668. While it was not Schnoor's obligation to operate the auger, it was his obligation to make sure that his truck did not become overloaded. Deitchler testified that it was expected and typical for Schnoor to be in the vicinity of the auger while it was operating.

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Kosmacek v. Farm Service Co-op, 485 N.W.2d 99 (Iowa App. 1992)

Premises Liability

Co-op employees and customers mixed water with farm chemicals on Co-op's property in a manner that permitted contaminated runoff onto plaintiff's adjoining property. Plaintiff sued for damage to real estate, medical expenses, emotional distress, and punitive damages. After trial, district court found defendant liable as a "possessor of land" under Restatement Section 344. Co-op argued that section 344 was inapplicable because plaintiff did not come onto Co-op's property, the negligent conduct was committed by Co-op's customers, and because the damage occurred off defendant's premises. HELD: Section 344 was not applicable, but substantial evidence supported district court's finding that Co-op's employees and customers regularly used local water source to mix chemicals on Co-op's premises.

Busselle v. Doubleday, 486 N.W.2d 45 (Iowa App. 1992)

Premises Liability

Plaintiff tripped on a raised portion of the sidewalk in front of defendant's residence in Ankeny. Section 364.12(2) provides:

> A city shall keep all public ... sidewalks ... in repair, and free from nuisance, with the following exceptions:
>
> ...
>
> c. The abutting property owner may be required by ordinance to maintain all property outside the lot and property lines and inside the curb lines upon the public streets ....

An Ankeny ordinance provided:

> The abutting property owner is required to maintain all property outside the lot and property line and inside the curb line upon public streets, including sidewalks.

HELD: Neither statute nor ordinance "expressly imposes" liability on abutting property owners for failing to maintain public sidewalk. After Supreme Court held in Peffers, 299 N.W.2d 675 (Iowa 1980), that same statute and subsection requiring landowner to remove snow and ice did not impose liability on property owners for injuries to pedestrians, legislature amended § 364.12 to expressly impose such liability. Legislature's failure to add liability language to subsection (c) requires Court of Appeals to follow Peffers.

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Hillrichs v. Avco Corp., 478 N.W.2d 70 (Iowa 1991)

Product Liability

Farmer using corn picker disengaged power to husking bed and attempted by hand to dislodge plugged husks in husking bed. When this did not work, farmer engaged the power and reached back in with his gloved hand. The rapidly revolving components caught the glove and trapped farmer's hand for one-half hour until an assistant returned and shut off the machine. Farmer lost four fingers and suffered other disfigurement to his hand.

Farmer sued manufacturer and dealer for negligence, strict liability, and breach of implied warranties. He alleged product defect in, among other things, the manufacturer's failure to provide an emergency shut-off device, which enhanced farmer's injury because he was unable to shut off the power immediately upon becoming trapped. At trial, farmer submitted requested jury instructions and special interrogatories that would have required the jury to apportion damages between the initial entanglement and any enhanced injury. District court refused to submit the "injury enhancement" theory. District court dismissed all claims against dealer except a general negligence particular of failure to warn.

Jury initially returned verdict allocating fault as follows:

Farmer	70%
Manufacturer	25%
Dealer	5%
	100%

Jury also answered the preliminary proximate cause question "no." After the court explained the inconsistency, the jury deliberated further and returned with a verdict allocating 100% to farmer.

HELD: I. District court should have submitted farmer's enhanced injury claim. He had adduced substantial evidence of all three elements described by the Court of Appeals in Wernimont v. International Harvestor Corp., 309 N.W.2d 137 (1981):

> (1) proof of an alternative safer design, practicable under the circumstances;
>
> (2) what injuries would have resulted had the alternative safer design been used; and
>
> (3) the extent of enhanced injuries attributable to the defective design.

Plaintiff adduced testimony from experts as to the feasibility of an emergency stop device. Those experts and a medical expert described the mechanics of farmer's injury so as to explain that most of his injuries occurred as a result of being trapped over an extended period of time.

> The extent of the enhanced injury is certainly not fixed to any degree of definiteness. We do not believe, however, that the degree of uncertainty is so great as to preclude the jury from quantifying the enhanced loss within a reasonable margin of error.
>
> ...
>
> Although the issue is close, we conclude that plaintiff's enhanced injury claim should have been submitted ....

COMMENT: Farmer lost his related argument that his comparative fault was not relevant to the enhanced injury. "The fault of the plaintiff, if any, in becoming entangled in the machinery would be a proximate cause of the enhanced injury as well as the initial injury."

The court also held in its remand order that the district court need only retry the negligence claim, because "application of the Wernimont standards to the present fact pattern will make the strict liability claim depend on virtually the same elements of proof as are required to establish the negligence claim." In a footnote, the court limited this direction to the present case but then noted:

> [A] growing number of courts and commentators have found that, in cases in which the plaintiff's injury is caused by an alleged defect in the design of a product, there is no practical difference between theories of negligence and strict liability.

The Court also took the opportunity to encourage district courts to use special interrogatories with the state-of-the-art defense.

> Had it done so, we would have known if the jury's ultimate assessment of percentages of fault was dictated by its belief that the state-of-the-art defense had been established. If this had been the basis for the jury's verdict, it might have greatly changed the issues on appeal and perhaps prevented a retrial of any issue. ...
>
> ... Rather than giving only a general instruction ..., the court should instruct that the defendant must establish this defense with respect to the specific claims that the plaintiff has made. Preferably, the instructions should be cast in an "even if" format. The jury should be advised that, even if the plaintiff has established a particular design defect, no percentage of fault should be

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assigned to the manufacturer if that party has established that the design was consistent with the state-of-the-art.

II. District court properly refused to submit claims against local dealer under strict liability or breach of implied warranty. Dealer only sold the power unit, which was not the target of plaintiff's claims. It did not sell the husking bed or corn bed, or the assembled corn husking system. It only provided mechanical services to connect the power unit to the other components. District court likewise should not have submitted any general negligence claim against the dealer, and properly refused to permit plaintiff's expert testify that dealer was negligent in failing to warn as a result of warning-label letters from manufacturer for other equipment with similar mechanical functions.

Schnoor v. Deitchler, 482 N.W.2d 913 (Iowa 1992)

Product Liability

Versatile Farm Equipment Operations manufactured a grain auger into which plaintiff stuck his foot. New Holland of Canada Ltd. acquired certain assets of Versatile through an asset purchase agreement. Thereafter, New Holland merged into another company, Ford New Holland Canada, which was a subsidiary of Ford New Holland, Inc. The purchase agreement provided that New Holland of Canada would be responsible for claims arising out of products manufactured by Versatile. Plaintiff sued Ford New Holland, Inc., not New Holland of Canada or Ford New Holland Canada.

HELD: The corporate entity that plaintiff sued did not agree to assume any responsibility for Versatile's products. The defendant is the parent corporation of the purchasing entity, and plaintiff offered no evidence to justify piercing the corporate veil. Although defendant's answers to interrogatories were evasive, defendant denied in its answer that it was successor in interest to Versatile.

COMMENT: Plaintiff asked defendant by interrogatory how it acquired Versatile. Instead of specifically stating that defendant did not acquire Versatile, defendant described the transaction that occurred and simply stated that the acquiring entity was a subsidiary of defendant. Plaintiff directly asked defendant whether or not it had agreed to be liable for Versatile's product liability claims. Instead of saying no, defendant attached a copy of the relevant portion of the agreement between its subsidiary and Versatile.

Bingham v. Marshall & Huschart Machinery Co., 485 N.W.2d 78 (Iowa 1992)

Product Liability

Bingham was injured in the course of his employment while working with a straight-line table-feed drill manufactured by Moline Tool Co. and sold to the employer by Marshall & Huschart (M&H). Bingham sued Moline Tool and M&H for strict liability, breach of implied warranty, and negligence. Moline Tool was bankrupt. Bingham moved for a declaration that M&H was liable under section 613.18(1). M&H moved to dismiss all claims by Bingham against M&H. District court denied Bingham's motion and granted M&H's motion as to the strict liability and breach of warranty claims pursuant to section 613.18(1)(a), leaving the negligence claim for trial.

Section 613.18 provides:

> 1. A person who is not the assembler, designer, or manufacturer, and who wholesales, retails, distributes, or otherwise sells a product is:
>
> a. Immune from any suit based upon strict liability in tort or breach of implied warranty of merchantability which arises solely from an alleged defect in the original design or manufacture of the product.
>
> b. Not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability for the product upon proof that the manufacturer is subject to the jurisdiction of the court of this state and has not been judicially declared insolvent.
>
> 2. A person who is a retailer of a product and who assembles a product, such assembly having no causal relationship to the injury from which the claim arises, is not liable for damages based upon strict liability in tort or breach of implied warranty of merchantability which arises from an alleged defect in the original design or manufacture of the product upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent.

HELD: "Although the statute is not a model of clarity," the immunity provided by section 613.18(1)(a) is not dependent upon jurisdiction over a solvent manufacturer. Subsection 1 pertains to "middlemen" who do not assemble the product. Subsection 2 pertains to retailers who do. Within subsection 1, subsection (a) provides

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immunity when the claim arises solely from defects in the original design or manufacture of the product. Subsection (b) precludes liability for damages and a claim does not arise solely from defects in the original design or manufacture. "Examples of suits arising under [subsection (b)] includes suits under strict liability for failure to warn about the dangers of a product."

Because M&H did not assemble the drill, subsection 2 is inapplicable. Because Bingham's claim arises solely from allegations of defect in the original design or manufacture of the drill, subsection 1(a) provides M&H with immunity without regard to Moline Tool's status. Moline Tool's status would be relevant only under subsection 2 or under subsection 1(b).

Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82 (Iowa 1992)

Product Liability

Legislature enacted section 613.18 relating to the product liability of "middlemen" in 1986 and provided that it would be applicable to "all cases filed on or after July 1, 1986." Plaintiff suffered property damage to his business during a fire that occurred on February 11, 1986. He sued a welding supply business on May 14. On March 30, 1987, plaintiff amended to add claims against Airco on claims of strict liability and negligence.

HELD: I. At least under the facts presented in this case, rule 89's relation-back provision does not apply to the addition of a party. Consequently, section 613.18 applied to Airco because plaintiff's "case" against Airco was filed after its effective date.

II. The immunity or limitation of liability provided by section 613.18 is not an affirmative defense.

> Before the adoption of section 613.18, the plaintiff need only show the defendant was a seller. Since the adoption of the statute, a plaintiff must establish the seller is not in the newly defined class of sellers immune from suit or whose liability is precluded by statute. The plaintiff must prove the elements of its case, including proof that the seller is not immune from suit or is subject to liability.

Scott v. Wright, 486 N.W.2d 40 (Iowa 1992)

Recreational Land Use Statute

Plaintiff attended a birthday party at the farm of her friend's parents. The parents' son-in-law took the celebrants on a hayrack ride. Plaintiff fell from the wagon and was injured. She sued the parents for their son-in-law's negligent operation of the tractor.

Section 111C.3 provides:

> [A]n owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

HELD: District court properly rejected parents' motion for summary judgment on grounds of section 111C.3. Plaintiff sued parents for a consent operator's negligent operation of a motor vehicle. Section 111C.3 relates to premises liability.

Duntz v. Zeimet, 478 N.W.2d 635 (Iowa 1991)

Seat Belt

Zeimet was not wearing her seat belt when her vehicle collided with the vehicle operated by Duntz. He challenged the constitutionality of section 321.445(4), which provides for actions arising on or after July 1, 1986, as follows:

> [F]ailure to wear a safety belt or safety harness in violation of this section shall not be considered evidence of comparative fault .... However, ... the failure to wear a seat belt or safety harness in violation of this section may be admitted to mitigate damages, but only under the following circumstances:
>
> (1) [Defendant] must first introduce substantial evidence that the failure to wear a safety belt or safety harness contributed to the injury or injuries claimed by the plaintiff.
>
> (2) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt or safety harness in violation of this section contributed to the plaintiff's claimed injury or injuries, and may

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reduce the amount of plaintiff's recovery by an amount not to exceed 5% of the damages awarded after any reductions for comparative fault.

HELD: Limitation on amount jury may reduce plaintiff's recovery for violation of seat belt law does not deny defendant his constitutional right to trial by jury or violate equal protection.

DISSENT (4-1): "[A]arbitrator limitation of 5% ... unconstitutionally infringes on a defendant's right to a trial."

Genetzky v. Iowa State University, 480 N.W.2d 858 (Iowa 1992)

State Action

Iowa State University hired Genetzky as an assistant professor in the Department of Veterinary Clinical Sciences. Genetzky developed personal problems with other members of the department, including but not limited to Dr. Lundvall, head of the Equine section. When Genetzky reported behavior by Lundvall that he deemed unprofessional and violative of the faculty handbook, ISU notified Genetzky of its intent to terminate him. A faculty appeals committee reversed that decision and granted Genetzky an additional one-year contract, provided that Genetzky agree to an external evaluation. The evaluation did not go well and ISU notified Genetzky at the end of the additional year that he would not be rehired.

Genetzky sued ISU for breach of contract and wrongful termination, intentional inflection of emotional distress, and defamation. HELD: On its face, Genetzky's claim for breach of contract and wrongful termination relate to agency actions governed by chapter 17A.

Sanderson v. Estate of Kinser, 477 N.W.2d 96 (Iowa 1991)

Vicarious Liability

Son drove father's car with father's consent. Father died. Son continued to drive car and had accident in which Sanderson was injured. HELD: Father's estate did not own car at time of accident. Ownership and title passed to heirs-at-law immediately upon father's death. Sanderson cannot impose vicarious liability on estate. Moreover, father's consent expired upon his death.

Scott v. Wright, 486 N.W.2d 40 (Iowa 1992)

Vicarious Liability

Plaintiff attended a birthday party at the farm of her friend's parents. The parents' son-in-law took the celebrants on a hayrack ride. Plaintiff fell from the wagon and was injured. She sued the parents for their son-in-law's negligent operation of the tractor.

HELD: Section 321.493's imposition of vicarious liability on owners for the injuries caused by consent operators is not restricted to accidents that occur on public property.

Downs v. A & H Construction, 481 N.W.2d 520 (Iowa 1992)

Workers' Compensation Insurance

A & H was a general contractor in the business of constructing residential homes. It contracted with Crase to frame a residential structure on property owned by A & H. Crase employed Downs on an hourly basis as a construction worker. Downs seriously injured himself while standing on scaffolding owned in part by A & H and erected by Crase employees for their use in performing Crase's work pursuant to the contract between Crase and A & H. Crase had no insurance for workers' compensation liability.

HELD: Assuming that A & H knew that Crase did not have insurance, A & H violates no statute by proceeding to contract with Crase. If legislature wants to impose workers' compensation liability on general contractors for employees of uninsured subcontractors, it can do so. A & H's act of contracting likewise does not interfere with Downs' right to receive worker's compensation benefits. Downs had a statutory remedy against Crase for its failure to carry insurance.

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Springer v. Weeks & Leo Co., 475 N.W.2d 630 (Iowa 1991)

Wrongful Discharge

In Springer I, the Court recognized a cause of action for the retaliatory discharge of an at-will employee, at least when "employment is terminated for reasons contrary to public policy." Springer had adduced substantial evidence in support of her claim that she was fired because she pursued a workers' compensation claim, and the Court reversed a directed verdict in favor of defendant. On retrial, defendant argued unsuccessfully that the Court's reversing language in Springer I - "We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and

defined public policy of the state" - required plaintiff on retrial to establish the elements of a tortious interference with contract in accordance with sections 766 and 766A of the Restatement (Second) of Torts. District court instead instructed in accordance with ICJI 3100.1 and required plaintiff to prove the following:

> 1. Plaintiff was an employee of defendant,
> 2. Defendant discharged plaintiff from employment,
> 3. Defendant discharged plaintiff because she filed a workers' compensation claim,
> 4. The discharge was a proximate cause of damage to the plaintiff, and
> 5. The nature and extent of the damage.

Jury awarded plaintiff $14,000 in lost wages and $5,000 for emotional distress. On appeal, defendant argued that the "tortious interference" language from Springer I constituted the law of the case.

The Supreme Court affirmed, disavowed all references in Springer I to the "interference" cause of action, and approved ICJI Instruction 3100.1. The court answered the "law-of-the-case" argument by holding that "an appellate court decision becomes the law of the case and is controlling . . . [unless it] has been clarified by judicial decisions following remand." Court listed all of the post-Springer I opinions in which it has referred to Springer's cause of action as "retaliatory or wrongful discharge."

Hulme v. Barrett, 480 N.W.2d 40 (Iowa 1992)

Wrongful Discharge

Termination of an employee while the employee's discrimination claim is pending with the civil rights commission is not presumptively a retaliatory discharge.

Hunter v. Board of Trustees, 481 N.W.2d 510 (Iowa 1992)

Wrongful Discharge

Hunter was a 13-year management employee at hospital. During his tenure, the hospital issued a personnel manual that, among other things, listed the circumstances for termination of employees and provided procedures for certain types of terminations. One circumstance was staff reduction. The procedures section of the manual provided that the hospital "may at its sole discretion layoff an employee whenever it is deemed necessary."

Hunter applied for executive director position, but hospital hired outsider Meyer, who terminated Hunter one month later pursuant to "staff reduction." Two months later, Meyer created a new management position and filled it with an associate from previous employment.

Hunter sued the hospital for breach of contract and Meyer for tortious interference. By ruling on competing motions for summary judgment, the district court held that the manual constituted a binding employment contract that limited the hospital's right to terminate Hunter to the listed circumstances. The jury returned verdicts for Hunter on breach of contract against the hospital and for interference against Meyer.

HELD: Defendants failed to generate a factual dispute as to the meaning of the plain language of the personnel manual. Hunter supported the clear language with extrinsic evidence in the form of deposition testimony by hospital employees, officers, and directors that the listed circumstances constituted a comprehensive list and that hospital employees reasonably understood it as such. Manual language was sufficiently definite to manifest assent to an employment contract terminable only for one or more of the listed circumstances.

Hospital's reservation of "sole discretion" to terminate for staff reduction did not deprive Hunter of the right to litigate whether or not Meyer's reliance on the "staff reduction" circumstance was pretextual.

Gary v. Heritage National Healthplan Services, Inc., 485 N.W.2d 851 (Iowa App. 1992)

Wrongful Discharge

In wrongful/discriminatory/retaliatory discharge case, district court defined "pretext" in the instructions as follows:

> If the Defendant has stated a legitimate non-discriminatory reason for their [sic] actions, then the Plaintiff may still recover if she proves that the Defendant's reasons were pretextual, either by:
>
> (a) Showing that a discriminatory intent prompted the Defendant's actions; or,
>
> (b) Showing that the Defendant's stated reasons for their [sic] treatment of the Plaintiff are unworthy of credence or belief.

Plaintiff requested an instruction on the definition of "pretext" as follows:

> The term "pretext" ... refers to the stating or assignment of a false reason or motive for the action(s) taken to cover for the real reason or motive. It refers to the use of a reason alleged for justification for action(s) taken, but which is only so in appearance.

District court also refused to instruct as requested on job qualifications as follows:

> [A]n inference of a discriminatory motive arises as a matter of law where the plaintiff meets the objective qualification for the job.

HELD: I. District court properly refused to give requested instruction on pretext, because it was "possibly confusing" and because the court's instruction adequately covered the definition.

II. Plaintiff's requested instruction on job qualifications did not include a description of Iowa law to the effect that employer has discretion to chose among equally qualified candidates and to select one based on lawful criteria.

Palmer v. Women's Christian Association, 485 N.W.2d 93 (Iowa App. 1992)

Wrongful Discharge

Employee handbook provided in prominent type on first page:

> [T]his Personnel Handbook does not constitute a contract between the Hospital management and the Hospital employees.

Hospital terminated employment of a registered nurse for her allegedly improper treatment of an emergency patient. At trial of her action for breach of employment contract, Hospital representative testified that Hospital "had to have just cause to terminate [plaintiff.]"

HELD: Handbook did not create a unilateral contract. Hospital representative's testimony established a Hospital policy to terminate only for just cause. The policy is not actionable.

DISSENT (4-2): Contrast express disclaimer in handbook with Hospital's own testimony that it "had to have just cause" to terminate plaintiff, that the handbook set out the procedures for doing so, and that Hospital relied on one of the itemized reasons for termination in discharging plaintiff. Plaintiff testified that

the Hospital told her at the time of employment that the handbook "defined her employment terms." Substantial evidence supported the jury's finding of an employment contract that permitted the plaintiff to be terminated only for a cause.

TRIAL

Callas v. City of Ottumwa, 477 N.W.2d 371 (Iowa 1991)

Continuance

Department of Human Services paid Callas' medical expenses and intervened in Callas' personal injury action. Callas and defendant settled during weekend before trial and notified DHS one day before trial. The settlement did not include any payment for medical expense.

HELD: District court abused its discretion in overruling DHS' motion for continuance. Parties "should be encouraged to include medical subrogees in the settlement negotiations when practicable."

Provenzano v. Wetrich, McKeown and Haas, 481 N.W.2d 536 (Iowa App. 1991)

Continuance

In medical malpractice case filed after effective date of section 668.11 (certification of experts in professional liability action), counsel agreed after deadlines for both parties had run that each party could add one additional expert. Defendant added two additional experts, but plaintiffs did not object. Sixty-two days before trial, defendant listed seven new experts. Plaintiffs moved to exclude four (the other three had been involved in treatment and care and were well known to plaintiffs). Judge Collett sustained plaintiffs' motion as to three of the new experts (the fourth was an annuitist and fell outside section 668.11). On the day before trial, Judge Jenkins expressed his opinion that counsel had waived the provisions of 668.11 and invited defendant to ask Jenkins to reconsider Collett's ruling. Defendant moved for reconsideration as to one of the three excluded experts. Judge Jenkins sustained the motion, authorized use of the expert, and offered plaintiffs a continuance. Plaintiff declined the

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continuance and proceeded to trial, which resulted in a defense verdict. The additional expert permitted by Judge Jenkins testified.

HELD: Though plaintiffs waived their right to the first additional expert and arguably waived their right to the second additional expert (due to no timely objection), waiver did not extend "to all experts that the defendant may wish to designate .... Such a holding would effectively undermine all amicable extrajudicial agreements between counsel." District court abused this discretion and plaintiffs were prejudiced. The ruling on the eve of trial forced plaintiffs to choose between an expensive continuance or proceeding without adequate time to prepare for the last additional expert.

Lanz v. Pearson, 475 N.W.2d 601 (Iowa 1991)

Examination of Witnesses

Defendant in car-accident litigation refused under work-product doctrine to produce copies of or disclose content of statements he made to his insurer. At trial, district court permitted plaintiff to ask defendant if he had made any statements about the accident, but refused to permit further questioning either for impeachment purposes or as a method of refreshing recollection.

After reversing the defense verdict for other reasons, the court noted for purposes of retrial that plaintiff was not entitled to the document absent the showing of substantial need in Rule 122(c), in accordance with Ashmead, 336 N.W.2d at 201. Court rejected plaintiff's alternative argument that she was entitled to production of the statements at trial in order to refresh recollection, because plaintiff had not yet established that defendant was unable to testify without refreshing his recollection. Court does not suggest that refreshing recollection is a way around work-product, but simply notes that, assuming the document was otherwise available to plaintiff, plaintiff had not met the foundational requirements for using a document to refresh recollection.

Tappe v. Iowa Methodist Medical Center, 477 N.W.2d 396 (Iowa 1991)

Examination of Witnesses

In action for medical malpractice, plaintiff discovered in the middle of trial by looking at original records and then consulting with an expert that defendant perfusionist was not the only author of pertinent medical notes, which was contrary to perfusionist's testimony. Plaintiff's counsel notified defense counsel of his discovery. Defense counsel put perfusionist back on stand, and he

confessed error and explained it. Plaintiff attempted to put handwriting expert on stand, and district court rejected witness as unnecessary. HELD:

> The plaintiff's only real complaint is that the court deprived him of the strategic impact of painting [perfusionist] a liar. Though regrettable from plaintiff's standpoint, the deprivation furnishes no basis for reversal.

State v. Payton, 481 N.W.2d 325 (Iowa 1992)

Examination Of Witnesses

In prosecution for sexual abuse of minors, therapist who had never interviewed these victims testified in state's case-in-chief that children may repeatedly deny that abuse occurred, until after they feel safe. Therapist conceded on cross that fabrication of abuse stories in the context of child custody and visitation matters was possible, and then opined on re-direct that such fabrication would be difficult.

HELD: I. General opinion as to validity of delayed-reporting phenomenon and evidence of therapist's experiences with other children was admissible. Therapist's lack of contact with these victims actually militated against any prejudicial inferences from her general opinion. Because defendant had already attempted to impeach the children's versions on cross, state could use the therapist in its case-in-chief instead of on rebuttal. Limiting instruction need not be given at time of testimony.

II. Therapist's opinion as to likelihood of fabrication normally is not admissible, see State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986), but defendant opened door.

Simons Feed Store, Inc. v. Leslein, 478 N.W.2d 598 (Iowa 1991)

Instructions

Defendant farmer's property is accessible only by gravel lane that crosses creek via wooden-plank bridges that defendant constructed. Defendant occasionally permitted neighbor Burke to use this lane to access some of Burke's farmland. Burke called plaintiff and requested a truck for hauling grain from his field. Plaintiff's vice president, Roger Simon, became involved. No "straight-truck" was available, even though it was the preferred vehicle for traveling over defendant's bridges. Burke asked defendant whether a semi had ever been over his bridges, and defendant said yes. Roger Simon knew that his 36-foot semis had

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been over defendant's bridges. He was concerned about the rear wheels of the trailer and warned his driver "to make sure you're on the bridge" and "make sure you hit the bridge at the right angle." The driver had been over defendant's bridges on at least 16 occasions, but with smaller trucks.

The driver crossed the truck in the presence of Burke and defendant, who both noticed that it was larger than usual. Defendant warned plaintiff's driver "to go slowly and to keep toward the center when crossing the bridge" on his return trip.

By the time plaintiff's truck was loaded, "it was dark, snowing, and slippery." Plaintiff's driver approached the bridge from a curve, did not line up the trailer squarely behind the tractor, and lost the back end of the trailer off the side of the bridge. Unbeknownst to the driver, the outside portions of the bridge planking were not supported by steel underpinnings.

Plaintiff sued defendant for damage to the truck. Jury assessed 85% to defendant.

HELD: District court's instruction on custom and practice was error. District court instructed as follows:

> Evidence has been introduced concerning a practice of use of design criteria in the design of bridges including standards and regulations of professional associations and governmental agencies. Such governmental standards and regulations are directly applicable only to public bridges, and therefore a failure, if any, of the Defendant. To comply with governmental standards and regulations does not necessarily constitute negligence. You are instructed, however, that you may consider evidence of the use of design criteria, standards and regulations in the design of bridges as evidence of custom generally. Conformity to a custom is evidence of ordinary care, and non-conformity is evidence of negligence.

Plaintiff did not adduce any substantial evidence that the design criteria applicable to bridges on public highways is generally followed in designing bridges on private roadways.

Wiersgalla v. Garrett, 486 N.W.2d 290 (Iowa 1992)

Instructions

Wiersgalla and his two partners, Goodwin and Leagjeld, hired Garrett to perform crane work necessary for the partnership to erect a metal canopy over pumps at a gas station. While the

partners and Garrett were working on the canopy, a portion of Garrett's crane came in contact with Iowa Electric power lines. Wiersgalla sued partner Goodwin, Garrett, and Iowa Electric for his resulting injuries. Wiersgalla settled with Goodwin and went to trial against Garrett and Iowa Electric. The jury found fault as follows:

Wiersgalla	45%
Goodwin	45%
Garrett	10%
Iowa Electric	0%
	100%

District court instructed jury that violation of OSHA standards by Goodwin or Wiersgalla constituted negligence per se, while violation of such standards by Garrett or Iowa Electric merely constituted evidence of negligence. Koll v. Menant's Transportation Co., 253 N.W.2d 265 (Iowa 1977), holds that "violation by an employer of an OSHA or IOSHA standard is negligence per se as to his employee."

HELD: Assuming that general partners can be characterized as employers, Wiersgalla clearly is not the employee of Goodwin. Accordingly, evidence of a violation of an OSHA standard by Goodwin or Wiersgalla should have been regarded by the jury only as evidence of negligence.

Young v. Gregg, 480 N.W.2d 75 (Iowa 1992)

Instructions

Young finished playing in a three-man best-shot shotgun tournament on the second hole of the Clarmond Country Club. He drove his golf car back to the club house by way of the second and first fairways. Gregg, also a club member but not a participant in the shotgun tournament, teed off on hole number one after being told earlier in the day when the tournament would be completed and after looking, unsuccessfully, for someone at the pro shop to give him permission to tee off. Gregg's second shot, from the fairway, hit Young in the face as Young came up over a ridge.

Young sued Gregg and Clarmond, settled with Gregg, and proceeded to trial against Clarmond, who was found 100% at fault.

HELD: Because Clarmond was being sued as the possessor of land but in the context of the act of a third-party, Restatement Section 344 applies instead of section 343. Section 344 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm

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> caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or likely to be done, or
>
> (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Accordingly, Young did not have to prove that "Clarmond knew or should have known that there was a condition on the premises that presented a risk of harm to the plaintiff," a requirement necessary only under section 343. District court's refusal to instruct on the basis of Iowa Civil Jury Instruction 900.1 was appropriate, since that instruction is based on Restatement Sections 343 and 343A. Clarmond's delegation of course management to golf pro Blake did not preclude jury from finding that Clarmond was the possessor of the course at the time of Young's injury.

COMMENT: Clarmond did not argue until its reply brief that it had no duty to Young because of the inherent risk of the game or because the risk was not foreseeable.

Welte v. Bello, 482 N.W.2d 437 (Iowa 1992)

Instructions

Immediately prior to surgery to correct a deviated septum, anesthesiologist secured Welte's execution of an informed-consent form. Hospital nurse failed to properly insert IV needle into Welte's vein. Neither nurses in operating room nor anesthesiologist detected the error before anesthesiologist began injecting sodium pentothal into the IV port. Welte suffered serious burns and permanent scarring on her arm. Welte sued hospital and anesthesiologist. Anesthesiologist obtained summary judgment on Welte's negligent-treatment claim, because Welte did not designate an expert witness.

HELD: District court's instruction on Welte's res ipsa claim against hospital was defective because it required her to prove "the common experience of the health care professional."

DISSENT (6-3):

> Ever closer does the goal appear that any unexpected bad result from surgery must have been due a surgeon's negligence. The "thing speaking

for itself" has taken on a life of its own multiplying into the field of medicine with the self assurance of a crusader.

. . .

The common knowledge of lay persons hardly includes an understanding of the nature of sodium pentothal or what would happen if the sedative escaped from a vein to surrounding tissue. Nor is it commonly known how a needle is inserted into a vein, or how far it should be thrust. The majority's analysis is that the common knowledge exception is satisfied because people know that intravenous injections are often done. The misapprehension here is that knowledge of the frequency of an operative procedure equals knowledge that an unfavorable medical result must have been due to negligence. These two spheres of knowledge are not correlatives.

. . .

The majority's reversal of the jury's absolution of Mercy Hospital again elevates "common experience" to lofty heights. Plaintiff Welte did receive the benefit of the res ipsa loquitur doctrine in the case against Mercy Hospital. Even so, the majority decides that the jury must infer negligence without judging the resulting injury against the standard of care recognized by those most knowledgeable in the field - the health care professionals.

Welte v. Bello, 482 N.W.2d 437 (Iowa 1992)

Instructions

Upon request, district court should instruct as to admissions made by a party. "Although identical testimony may be offered at trial, the jury is not required to believe the testimony of the witness."

Balboa Insurance Co. v. Pixler Electric of Spencer, Iowa, Inc., 484 N.W.2d 396 (Iowa App. 1992)

Instructions

Bowling alley suffered fire and retained Pixler to reconnect electricity. Upon completion of Pixler's work, a second fire occurred. Bowling alley sued Pixler and adduced evidence that Pixler failed to obtain an electrical permit, failed to conduct a

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visual inspection of insulation before re-energizing electrical lines, and failed to warn bowling alley against leaving electricity on overnight and immediately after repairs. Pixler adduced evidence that it instructed bowling alley to turn electricity off before leaving the building for the day. District court's instructions permitted jury to assess fault against bowling alley simply for failing "to exercise ordinary care for the preservation of its own property after the first fire and prior to the second fire." Jury assessed 90% of fault of bowling alley.

HELD: District court properly recognized that its instructions failed to specify the acts or omissions that Pixler alleged were negligent, and properly granted bowling alley's motion for new trial.

Gary v. Heritage National Healthplan Services, Inc., 485 N.W.2d 851 (Iowa App. 1992)

Instructions

In wrongful/discriminatory/retaliatory discharge case, district court defined "pretext" in the instructions as follows:

> If the Defendant has stated a legitimate non-discriminatory reason for their [sic] actions, then the Plaintiff may still recover if she proves that the Defendant's reasons were pretextual, either by:
>
> (a) Showing that a discriminatory intent prompted the Defendant's actions; or,
>
> (b) Showing that the Defendant's stated reasons for their [sic] treatment of the Plaintiff are unworthy of credence or belief.

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Plaintiff requested an instruction on the definition of "pretext" as follows:

> The term "pretext" ... refers to the stating or assignment of a false reason or motive for the action(s) taken to cover for the real reason or motive. It refers to the use of a reason alleged for justification for action(s) taken, but which is only so in appearance.

District court also refused to instruct as requested on job qualifications as follows:

> [A]n inference of a discriminatory motive arises as a matter of law where the plaintiff meets the objective qualification for the job.

HELD: I. District court properly refused to give requested instruction on pretext, because it was "possibly confusing" and because the court's instruction adequately covered the definition.

II. Plaintiff's requested instruction on job qualifications did not include a description of Iowa law to the effect that employer has discretion to chose among equally qualified candidates and to select one based on lawful criteria.

Doe v. Johnston, 476 N.W.2d 28 (Iowa 1991)

Jury

In medical-malpractice case, jury voted 7-1 in favor of defendant on fifth day of deliberations. Dissenting juror contacted plaintiff's counsel and disclosed that another juror had brought in a cartoon depicting a judge's instruction to a jury: The verdict should be guilty or not guilty. There's no provision for guiltyish." Plaintiff filed the juror's affidavit, which included a statement that the cartoon influenced the jury's vote in favor of defendant. Defendant submitted seven affidavits that the cartoon had no impact upon the vote.

HELD: The court may consider affidavits to determine whether extraneous matter was brought to the jury room, but may not consider affidavits for purposes of deciding, by an objective standard, whether the misconduct prejudiced the deliberations. "We decline the invitation to" adopt a rule presuming prejudice from introduction of extraneous material into deliberations. District court did not abuse its discretion in concluding that cartoon had not prejudiced deliberations.

Wiersgalla v. Garrett, 486 N.W.2d 290 (Iowa 1992)

New Trial

Wiersgalla and his two partners, Goodwin and Leagjeld, hired Garrett to perform crane work necessary for the partnership to erect a metal canopy over pumps at a gas station. While the partners and Garrett were working on the canopy, a portion of Garrett's crane came in contact with Iowa Electric power lines. Wiersgalla sued partner Goodwin, Garrett, and Iowa Electric for his resulting injuries. Wiersgalla settled with Goodwin and went to trial against Garrett and Iowa Electric. The jury found fault as follows:

Wiersgalla	45%
Goodwin	45%
Garrett	10%
Iowa Electric	0%
	100%

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District court instructed jury that violation of OSHA standards by Goodwin or Wiersgalla constituted negligence per se, while violation of such standards by Garrett or Iowa Electric merely constituted evidence of negligence. Koll v. Menant's Transportation Co., 253 N.W.2d 265 (Iowa 1977), holds that "violation by an employer of an OSHA or IOSHA standard is negligence per se as to his employee."

HELD: Reversal due to erroneous instruction on the significance of an OSHA violation by either Wiersgalla or Goodwin does not justify retrial as to Iowa Electric, since jury has already decided that Iowa Electric was not at fault.

Johnson v. Interstate Power Co., 481 N.W.2d 310 (Iowa 1992)

Offer of Proof

In personal-injury action, plaintiff moved in limine to prevent defendant from introducing evidence that plaintiff's treating physician had forfeited his medical privileges at the treating hospital after it had filed a complaint against the physician for his treatment of several persons (not plaintiff). District court sustained the motion over defendant's resistance. When the physician testified, defendant made no effort to cross-examine the physician about the matters covered by the motion in limine, and made no offer of proof. HELD: Defendant did not preserve error.

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Outline for the Iowa Defense Counsel Annual Meeting
Byron K. Orton, Industrial Commissioner

WORKERS' COMPENSATION UPDATE

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A. Health care fee disputes/peer review

B. §85.27, Application for Alternate Care

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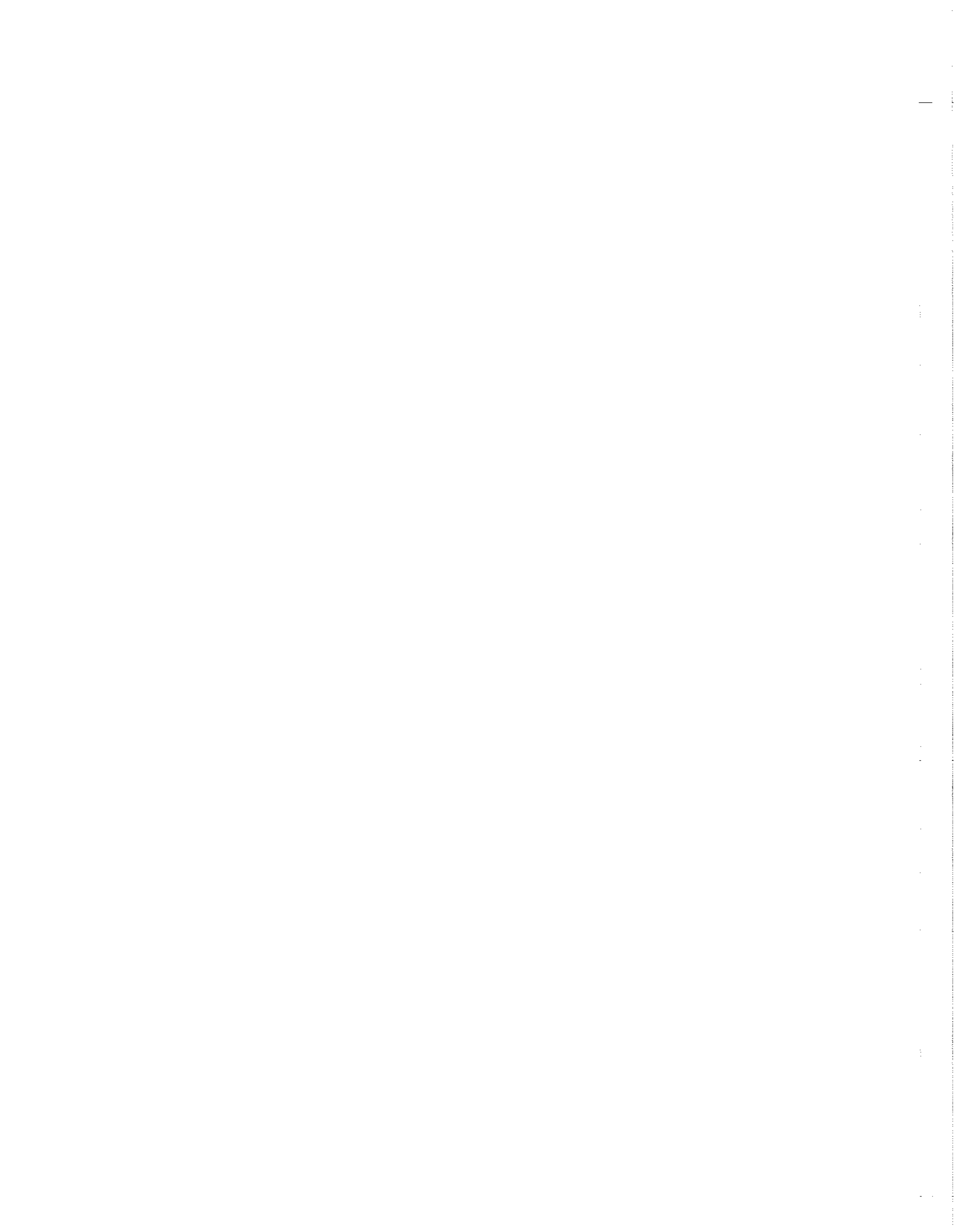
C. §85.22, Indemnification

D. User fee source of funding

1. Staffing needs of the Division of Industrial Services

2. Equal assessment proposal



I N D E X

Iowa Defense Counsel Association

1965 through 1991 Annual Meetings

This Index is supplied as a service to the members of the the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

Copies of specific presentations may be obtained by contacting:

Iowa Defense Counsel Association
c/o DeWayne Stroud
5400 University Avenue
West Des Moines, IA 50265
515/225-5608

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