defense UPDATE

The Iowa Defense Counsel Association Newsletter January, 1997 Vol. X, No. 1

DEAL KILLERS IN MEDIATION

By David J. Blair, Sioux City, Iowa

I remember giving ADR speeches to groups of lawyers ten or fifteen years ago, at the beginning of Iowa's modern experience with mediation of general civil cases, and the audience response was somewhere between hostility and indifference.

Times have changed.

Trial lawyers in current practice understand that sophisticated consumers of legal services will insist upon ADR competence as part of counsel's package of skills. Clients want to settle those cases which can be settled and identify early those other cases (and both categories are plentiful) which, because of differing expectations and inability to compromise, must be resolved by trial at the courthouse.

Accordingly, I accept without debate the proposition that effective mediation should resolve 100% of those cases which are within reach of settlement and that all counsel are motivated to achieve a fair bargain for their clients through the process of mediated negotiation.

Why does mediation sometimes fail to settle those cases which, as we often agree, "ought to be settled"?

The question is: Why does mediation sometimes fail to settle those cases which, as we often agree, "ought to be settled"? What are the tactics, conscious or unconscious, which precipitate an early adjournment of the mediation conference? What are, in my language and observation, the *"Deal Killers"*?

I offer the following:

1. Big Surprises. It is a *deal killer* to confront your mediation opponent during the conference with a new piece of significant information for which the other side is unprepared. Remember, this is a mediation and not a confrontation. There are no style points for craftiness. If you rely importantly upon a certain piece of information in your analysis of settlement value, then it kills the deal to spring it upon your opponent too late for intelligent consideration by the other side.

2. Holding Back. Related to the foregoing, it is a *deal killer* to withhold information from the other side which is important to your evaluation of the case. There may be times when information must be withheld for strategic reasons, but the moral of the story is: Do not base your settlement decisions upon information which is withheld for *strategic* (i.e. non-settlement) reasons. If this is impossible, then the deal is dead regardless of fancy footwork by the mediator or counsel.

3. Absent Authority. It is a *deal killer* to negotiate if the real decision makers are not at the table. Please note that I am not talking about the related but easier issue of *authority.* Negotiators may never have all the authority they want or need, but a telephone call completed without delay is an acceptable method to obtain authority or simply for consultation. However, the negotiators at the table must be comfortable with the ability of each other to close the deal if agreement is achieved. This is an issue of *credibility* and not authority. The deal makers must be physically present, which means that persons at the mediation must include representatives from each side who can get the deal done if they elect to do so. The absence of such persons is a *deal killer.*

4. Misunderstanding the Process. Mediation is not a trial. Mediation is not a substitute for discovery. It is a *deal killer* to use mediation for either purpose. Effective advocacy in mediation does require a direct and candid presentation of litigation risks both to the mediator and the mediation opponent. Remember, however, that the jury has not been selected, that no one with jurisdiction for any ruling is in attendance, and that nothing good will be accomplished without the participation and consent of the other side. It is a *deal killer* to behave at the mediation conference as a mad dog or a wall flower. The key is forthright and collegial advocacy adapted to a setting where cooperation and consensus are critical to success.

5. **Settlement History.** As a mediator, I always ask both parties to recount the details of settlement history, if any.

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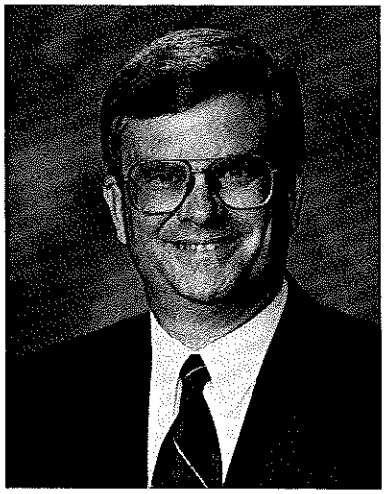
MESSAGE FROM THE PRESIDENT



Robert A. Engberg
President

I am very honored to have been elected your President and look forward to working with each of you in our common efforts toward building an even stronger program of service to our members and the clients we serve.

We have already begun a very successful year with our Annual Meeting and Seminar this past September in which 200 of you attended. I am profoundly grateful to those of you who served as speakers and who made my job so much easier in organizing that program.

In October, President-Elect Jaki Samuelson, Past Treasurer DeWayne Stroud, DRI State Representative David Phipps, and I attended the First Annual Meeting of the Defense Research Institute in Chicago. Past President Chuck Miller and IDCA were recognized during that meeting as recipients of a 1996 Exceptional Performance Award. We congratulate Chuck for that well deserved honor. Each of us came away from that four day experience with not only additional ideas for the benefit of our Association but also an even better appreciation and understanding of the tremendous strengths of our own organization.

In December, Past President and Legislative Committee Member Dick Sapp and I met in Des Moines with representatives of the Iowa State Bar Association, the Iowa Academy of Trial Lawyers, and the Iowa Trial Lawyers Association to discuss legislation and issues of common interest to our respective organizations. Further such meetings are planned over the coming Legislative Session and those ongoing discussions are expected to be the subject of a later report.

Many additional opportunities await us over the coming year. We will carry on our traditional programs which include:

- The beginning of our 1997 Legislative Program under the leadership of Legislative Chair Mark Tripp and Lobbyist Bob Kreamer.
- Our participation in the Joint Trial Advocacy Program in association with the Iowa Academy of Trial Lawyers and the Iowa Trial Lawyers Association in June, 1997 through the efforts of board member Bob Houghton.
- Continued monitoring by our Amicus Curiae Committee of appellate issues with which we may wish to align ourselves.
- Quarterly publication by the Board of Editors, its authors, and contributors of the excellent and always anticipated *Defense Update*.

Additionally, new activities and programs are underway which include:

- Our hosting of the DRI Mid Region Meeting in May 1997 in Des Moines. That meeting will be attended by leaders of the state defense organizations of Colorado, Iowa, Kansas, Missouri, Nebraska, and Utah.
- Publication of a brochure by board member and Client Relations Committee Chairperson Marion Beatty setting forth the history, function, and services of the IDCA.

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MESSAGE FROM THE PRESIDENT

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- Study by board member Wendy Munyon of a possible website and other possible utilization of the internet to take advantage of the resources available through electronic research and communication.

- New efforts by board member and Membership Committee Chairperson Manny Bikakis to develop and implement a program to attract and retain the quality members who are the strength of our orginization.

- Drafting of Civil Jury Instructions by Chairperson Mike Weston and the Jury Instruction Committee in areas of Civil Practice where few "uniform" instructions now exist and review of existing instructions to determine if changes in statutory or common law necessitate revisions.

Preparation is also well underway by President-Elect Jaki Samuelson for our next Annual Meeting and Seminar to be held September 24-26, 1997 at the Embassy Suites Hotel in Des Moines. Please mark your calendars so that you will not miss what will be another excellent program.Our Association has had the benefit of thirty-three years of dedicated service of those who came before us. We are particularly grateful to Chuck Miller for his excellent leadership as President last year. I look forward to the challenge of the coming year and to our mutual efforts in allowing our Association to continue to grow and to prosper. Every member is encouraged to contact me or any officer or director with comments or suggestions as to how the needs of our members can be even better served.

ADVANCE NOTICE

ANNUAL MEETING AND SEMINAR

September 24th - 26th, 1997

Embassy Suites Hotel

Des Moines, Iowa

RESPONDING TO DISCOVERY REQUESTS REGARDING SURVEILLANCE

By Angela A. Swanson, Des Moines, Iowa

More and more frequently standard interrogatories and requests for production of documents include requests for disclosure of whether defendant has had the plaintiff/claimant under surveillance and a request for production of the videotape(s), pictures, reports, etc. Frequently these discovery requests precede your opportunity to depose the plaintiff/claimant. This article offers a strategy for responding to these predeposition discovery requests, regardless of whether any surveillance has actually been conducted. The strategy is simply to object to the request. These objections have basis in the rules of civil procedure and case law. These objections should be made every time, regardless of whether you have actually conducted surveillance, so that the plaintiff/claimant can never truly be sure. This uncertainty may cause them to at least hesitate before exaggerating or even lying about the extent of their injuries and their level of activity when deposed.

The suggested standard objections to the surveillance interrogatory and request for production of documents is as follows:

The divulgence of such material, if it exists, is objected to on the following grounds:

1. This material is irrelevant until such time as the claimant's deposition is taken. Subsequent to such deposition, this interrogatory will be supplemented in a timely manner;
2. This material is work product and has been prepared in anticipation of litigation or for trial;
3. Disclosure of such material prior to the completion of discovery would be against public policy in that disclosure would render such material useless;
4. This material would be used solely as rebuttal evidence and as such is not appropriate for discovery.

In the event you follow the above strategy and draw a motion to compel discovery, a discussion of the law on the issue is provided here.

Neither the Iowa Supreme Court nor the Court of Appeals has addressed the issues related to surveillance and discovery. An Industrial Commissioner appeal decision and an Iowa federal district court decision discuss some of the issues, however. *Hoover v. Iowa Dept. of Agriculture,* File No. 529205 (App. 4/30/91); *Wegner v. Viessman, Inc.*, 153 F.R.D. 154 (N.D. Iowa, 1994).

In *Hoover*, the commissioner reversed a deputy's decision which had excluded claimant's damaging deposition from evidence for defendant's failure to timely supplement its answer to a surveillance interrogatory. The surveillance, which proved claimant's deposition testimony to be untruthful, occurred less than three weeks after defendant had responded "no" to discovery requests relating to surveillance and just over two weeks before claimant's deposition. *Hoover* at 2. Defendants supplemented their earlier interrogatory answer within a week after claimant's deposition. *Id.* At hearing over a year later claimant objected to defendants offer of the deposition based upon the failure to timely supplement the interrogatory relating to surveillance. *Id.* The deputy excluded the deposition. *Id.* The surveillance video was admitted. *Id.* In reversing the deputy, the commissioner relied upon a line of federal cases. *Id.* at 5. The commissioner ruled that by postponing the supplementation, defendants did not improperly fail to supplement their interrogatory response. *Id.* The commissioner further held:

> Postponing the supplementation to protect the impeachment value of the evidence until after claimant's deposition, where sufficient time remained before hearing for claimant to avoid prejudice by examining the evidence and cross-examining the surveillance witnesses, was not improper discovery. To hold otherwise would be to hold that claimant is entitled to protection from evidence that might tend to impeach her credibility. Impeachment evidence is a valid and recognized tool of advocacy, and claimant is not entitled to any such protection. *Id.* at 6.

In the *Wegner* case, the federal district court was faced with the issue of whether the surveillance information is discoverable. *Wegner*, 153 F.R.D. at 159. The court held that while surveillance materials are work product, the plaintiff has a "substantial need" for the material because of their right to discover the evidence that exists within the defendant's possession that will be available for use at trial. *Id.* The court noted, but did not directly address, the issue of the timing of disclosure. *Id.* The court stated ". . . requiring discovery of surveillance by defendants in personal injury cases will not jeopardize the ability of defendants to impeach plaintiffs. Defendants are in control of when they choose to depose the plaintiff to 'freeze' the plaintiff's testimony concerning his or her physical condition." *Id.* at 159-60.

The *Wegner* decision is in line with the clear majority view that surveillance films are discoverable before trial but only after the plaintiff's deposition. The leading case is considered to be *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D.

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TWELVE YEARS UNDER COMPARATIVE FAULT ACT

By Kenneth L. Allers, Jr., Cedar Rapids, Iowa

The following is an excerpt of a larger review of the history of comparative fault in Iowa. It was authored by Barry A. Lindahl, Dubuque, Les V. Reddick, Dubuque and Chris Novak, University of Iowa College of Law. A second excerpt will be presented in the April issue of the *Defense Update*. The entire booklet is 116 pages and has 106 sections, a table of cases and an appendix. If the reader is interested in obtaining a copy of the entire booklet, please contact attorney Les Reddick, Kane Norby & Reddick, 2477 J.F. Kennedy Road, Suite 102, Dubuque, Iowa 52002, for the cost of reproduction, 319-582-7890.

Sec. 61. -- Effect of Release.

Iowa Code sec. 668.7 provides:

668.7 Effect of release.

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, as determined in section 668.3, subsection 4.

Sec. 62. -- Discharge As to Specified Parties Only.

In *AID Ins. Co. v. Davis County*, 426 N.W.2d 631 (Iowa 1988), the Supreme Court considered the effect of a release. The release preprinted boilerplate language purported to discharge "all other persons, firms, or corporations, known or unknown, who are, or might be claimed to be liable...." The plaintiff claimed the release discharged the defendant as an "other...corporation" but the defendant relied on the "unless it so provides" language of the statute to require the release to name or otherwise specifically identify the parties released. The Court concluded that the legislature, in enacting sec. 668.7, "intended to eliminate the ambiguity factor and require the identification of any tortfeasor that is to be released."

The release must include "some specific identification of the tortfeasors" which does not necessarily mean naming them "if they are otherwise sufficiently identified in a manner that the parties to the release would know who was to be benefited. Such designations might include such classes as 'employees,' 'partners' or 'officers.'" An evidentiary hearing may be needed to determine the members of the class. However, general descriptions such as "any other person, firm or corporation" is not sufficient.

A release that "does hereby demise, release and forever discharge Britt-Tech Corporation, its successors and assigns, and all other persons, firms or corporations, known or unknown..." was also held insufficient under sec. 668.7 in *Britt-Tech Corp. v. American Magnetics Corp.*, 463 N.W.2d 26 (Iowa 1990).

Sec. 63. -- Discovery of Release.

Where it is alleged there was a settlement agreement constituting a release under sec. 668.7, discovery of the release and settlement documents is appropriate. *See Burns v. Rodriguez*, 448 N.W.2d 673 (Iowa App. 1989).

Sec. 64. -- Parties to Release.

In *Fell v. Kewanee Farm Equipment Company*, 457 N.W.2d 911 (Iowa 1990), plaintiff sued an elevator manufacturer and elevator owner, the latter filed a third-party action against plaintiff's husband. Before trial plaintiff settled with the elevator owner who then dismissed the third-party claim against plaintiff's husband. Because the husband was not a party to the release the Court held sec. 668.7 did not apply and the husband should therefore not have been included on the verdict form as a party against whom the jury could apportion fault because the husband was not, under a strict interpretation of sec. 668.2, a "party."

Sec. 65. -- Dismissal Not Release.

In *Dumont v. Keota Farmers Cooperative*, 447 N.W.2d 402 (Iowa App. 1989), it was held that the dismissal of a claim against the defendant without prejudice was not sufficient to constitute a release or covenant not to sue under sec. 668.7.

In *Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7 (Iowa 1992), the defendant claimed it was error for the trial court to sustain the plaintiffs' motion in limine prohibiting the defendant from introducing evidence that another party, Turf Services, Inc., had been dismissed. Under Iowa Code sec. 668.3(2)(b), the fault of "each claimant, defendant, third-party defendant, and person who has been released from liability under section 668.7" is to be allocated. The Court held the dismissal of Turf Services, Inc. was not made pursuant to a release or covenant not to sue. The dismissal was made without prejudice. Under sec. 668.2 and 668.7, it was not error for the court to refuse to allow evidence that Turf Services, Inc. had been dismissed. Of course, the defendant was still free to show what part, if any, Turf Services, Inc. played in causing the accident, the Court emphasized.

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CASE NOTE SUMMARY

By Kevin M. Reynolds and Richard J. Kirschman, Des Moines, Iowa

McIntosh v. Best Western Steeplegate Inn
Rule 407 and Subsequent Remedial Measures: Eroded by the Iowa Supreme Court In *McIntosh*

In *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595 (Iowa 1996) the Iowa Supreme Court may have effectually eviscerated the minimal protection afforded defendants in civil cases by Iowa R. Evid. 407 regarding the admissibility of subsequent remedial measures.

The facts of *McIntosh* are simple. Paul McIntosh, a guest at the Steeplegate Inn, slipped and fell in a parking lot. In a subsequent action filed in Scott County, McIntosh sought recovery under a premises liability theory, alleging that the motel was negligent in permitting the icy condition of the parking lot. At trial, Plaintiffs produced a photograph, taken by a motel employee on the day after the accident, of the parking lot where McIntosh allegedly fell. Although the photograph did not show any ice where the incident purportedly occurred, plaintiffs' witnesses testified regarding the icy condition of the parking lot. A witness for the defendant motel testified that the photograph accurately depicted the condition of the parking lot at the time McIntosh allegedly fell.

To impeach the motel's evidence regarding the condition of the parking lot at the time of the incident, plaintiffs proffered testimony that the motel manager had ordered the application of a deicing agent subsequent to the accident. The trial court barred this testimony, based on defendant's argument that it constituted inadmissible evidence of a subsequent remedial measure under Iowa R. Evid. 407. On appeal, the Iowa Supreme Court reversed the district court, per curiam, finding that the evidence should have been admitted. Most troubling, however, is the exceedingly broad language in the opinion which, if literally applied, would emasculate Rule 407.

Under the new rule apparently established by the Court in *McIntosh*, evidence demonstrating that a subsequent remedial measure has been undertaken is admissible as "circumstantial evidence" of a condition which existed at the time of an accident. If this is, in fact, true, the first sentence of Rule 407, which clearly states that such evidence is inadmissible as proof of negligence or culpable conduct, is rendered a nullity.

The *McIntosh* decision is troublesome because the supreme court's holding exceeds what was necessary to decide the case. The court previously found that testimony regarding the application of a deicing agent, after a slip-and-fall incident on an allegedly icy parking lot, would constitute impeachment evidence to counter defendant's testimony that a photograph which depicted a "clean" parking lot actually proved its condition at the time of the accident. This determination cannot reasonably be disputed. Given the facts in *McIntosh* and defendant's testimony, the "subsequent remedial measure" was admissible under the "impeachment" exception for the admissibility of subsequent remedial measures in the second sentence of Rule 407. Indeed, the Court so found.

It is respectfully submitted that the Court, however, erred when it exceeded this conclusion, unnecessarily finding that such evidence would also constitute "circumstantial evidence as to what the condition of the surface was at the time these directions were given." *Id.* at 597. With all due respect, this argument may be advanced in any case. Consequently, if this language is literally followed, the existing minimal protections afforded defendants under Rule 407 no longer exist in Iowa. Unfortunately, the net result may be a reduction in postaccident precautionary or remedial actions, due to the probable admissibility of such measures in a personal injury lawsuit.

As this new application of Rule 407 by the Court was not necessary for its decision, a principled argument can be made that the analysis constitutes *obiter dicta*. Most importantly, this dicta cannot be harmonized with the express language of Rule 407, which prohibits evidence of subsequent remedial measures on the issue of negligence or culpable conduct, the underlying purpose for the rule. Further, the Court did not expressly hold that Rule 407 was no longer operative in Iowa. This is important circumstantial proof that this part of the opinion does not, in fact, control lower courts when ruling on the admissibility of subsequent remedial measures, and may suggest that the Court did not fully consider the potential implications of it's language.

Finally, the Court engaged in further *dicta* when it found that Rule 407 exclusively controls the admissibility of evidence respecting subsequent remedial measures, announcing that Rule 403 plays no role. Rule 403 excludes even relevant evidence when the danger of unfair prejudice, confusion of the issues or considerations of time exceed the probative value of the evidence. This finding is questionable for several reasons. First, the

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APPELLATE CASE UPDATE

By Kermit B. Anderson, Des Moines, Iowa

1. *Quaker Oats v. Ciha*, 552 N.W.2d 143 (Iowa 1996).

Workers' Compensation; Going and Coming Rule

Employee brought workers' compensation claim after suffering serious injuries in a motor vehicle accident. At the time of the accident, the employee was returning home after having been called to work to attend to a mechanical emergency over the Memorial Day weekend. The employer argued that the claimant's injuries did not occur in the course of his employment on the basis of the "going and coming" rule providing that injuries occurring off the employer's premises while the employee is on his way to or from work are generally not compensable. The Industrial Commissioner rejected the employer's argument and he was affirmed on judicial review.

The Supreme Court held that the Industrial Commissioner was correct in applying the "special errand" exception to the going and coming rule. This exception provides that if an employee is on a special errand or mission for his employer at the time of the injury, then the injury is deemed to have arisen in the course of employment. The employer argued that as a maintenance supervisor, the claimant's regular job responsibilities included responding to problems at the plant while on-call over the weekend. The Supreme Court found substantial evidence to support the Industrial Commissioner from facts showing that the claimant's being contacted over the weekend was unusual, sudden, and unexpected and therefore truly "special." Moreover, it was obviously the employer's business that the claimant was pursuing at the time of injury. The court also held that the fact that the claimant deviated slightly on his trip home from the most direct route did not establish that he had abandoned his employment at the time of the accident.

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2. *Employer's Mutual Casualty v. Cedar Rapids TV*, 552 N.W. 2d 639.

Duty to Defend

Insurer assumed the defense of its insured pursuant to a policy covering personal injury liability. Personal injury for purposes of the policy was expressly defined as meaning injury "arising out of" a list of specific offenses, including malicious prosecution. The insurer's defense was based on the fact that a claim for malicious prosecution had specifically been asserted against the insured. On the eve of trial, however, the claimant withdrew the malicious prosecution claim. The insurer thereby withdrew its defense arguing that the plaintiff's action in withdrawing its claim "untriggered" the insurer's duty to defend. The insured's own attorneys continued with the defense of the claim and the insured then brought an action against the insurer to recover its defense costs.

The trial court found against the insurer and held that its duty to defend continued even though the malicious prosecution claim had been withdrawn. The Supreme Court affirmed holding that the facts alleged still would have met the elements required to prove the malicious prosecution claim. The court emphasized that the duty to defend arises from conduct alleged in the factual allegations of the petition rather than specific legal theories the plaintiff may choose to assert. The insurance company's duty to defend was therefore not terminated when the malicious prosecution claim was withdrawn. Three justices dissented, arguing that the court's earlier case in *North Iowa State Bank v. Allied Mutual Insurance Co.*, 471 N.W.2d 824 (Iowa 1991) dictated a contrary result.

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3. *Hollingsworth v. Schminkey*, 553 N.W.2d 591 (Iowa 1996).

Uninsured Motorist Benefits; Superseding Causation

Plaintiff sustained injuries rescuing an individual from his burning uninsured vehicle which had collided with the corner of his garage. Claims were asserted against Plaintiff's own insurer for uninsured motorist benefits, negligence and bad faith; against the rescued individual for negligent operation of his vehicle; and against the contract vendors of the residence for premises liability. The trial court granted summary judgment motions filed on behalf of all defendants. The Supreme Court affirmed in part and reversed in part.

Plaintiff's insurance policy afforded benefits for injuries "arising out of" the use of an insured vehicle. The Supreme Court explained that this implies a concept of causation less than that required for proximate causation in the legal sense, but something more than the mere fact that an automobile is the situs of an accident. The Court felt the jury could find plaintiff's injuries arose from "use" of an uninsured vehicle from evidence showing that the uninsured continued to use his vehicle notwithstanding damage to its exhaust system, that he became asphyxiated while driving the vehicle into his garage, that the

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LEGISLATIVE COMMITTEE REPORT

By Mark L. Tripp, Des Moines, Iowa

The Board of Directors of the Iowa Defense Counsel Association recently approved a legislative agenda for the upcoming legislative session. Six different legislative items were approved. House File numbers have not yet been assigned to the various proposals. The following is a summary of each legislative item.

1. INTEREST ON JUDGMENTS

Their proposal would amend Iowa Code § 535.3 by lowering the interest rate on money judgments from 10% to a floating rate currently used to calculate interest on judgments under Iowa Code § 668.

2. JOINT AND SEVERAL LIABILITY

This proposal would amend Iowa Code § 668.4 by totally eliminating joint and several liability in comparative fault actions.

3. *SCHWENNEN v. ABELL*

This proposal provides that any percent of fault assigned to a person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium. This proposal would modify the Iowa Supreme Court's holding in *Schwennen v. Abell.*

4. ACCESS TO MEDICAL RECORDS

This proposal would allow defendants in a civil action to obtain the plaintiff's medical records and consult with the plaintiff's treating physicians in a manner similarly permitted in connection with workers' compensation claims.

5. FUTURE DAMAGES

This proposal would require a jury to reduce all future damages in a personal injury action to present value. This proposal would modify the Iowa Supreme Court holding in *Brant v. Bockholt.*

6. PSYCHOLOGICAL TEST MATERIAL

Trial counsel is currently restricted from obtaining certain psychological test material in civil cases. This proposal would allow both plaintiff and defense counsel access to psychological test material in connection with civil cases.

The IDCA has proposed many of these legislative agenda items in past legislative sessions. We are hopeful that these legislative proposals will be given serious consideration this year.

The lobbyist for the IDCA is Bob Kraemer. Mr. Kraemer will be working not only to advance the legislative agenda of the IDCA but also to keep us informed as to any other legislative proposals which might have an impact on our members.

If you have any questions regarding the IDCA's legislative agenda or if you have any suggestions regarding our legislative efforts, please feel free to contact Mark Tripp with your suggestions. ❐

DEAL KILLERS IN MEDIATION *Continued from page 1*

Then I hold my breath and wait for the sky to fall. The fact is that litigants and their representatives are poor historians of settlement overtures. Words used by one party are misunderstood by another. Consider the question, "Would you take $100,000?" This question with only modest optimism becomes the assertion, "I think the case is worth $100,000," or the conditional offer, "I'll pay $100,000 if you will take it," or the unconditional offer, "Please take my $100,000 because here it is and it's all I've got,"or the sliding offer, "Here's my $100,000 for sure but there's plenty more where that came from and I can get it, just say the word, you betcha." What was said? Which version of reality is correct? It is best to address the problem of disputed settlement history immediately, when it first appears, because a major difference of opinion about prior demands and offers is most assuredly a genuine *deal killer.*

6. Going the Wrong Way. This is my personal favorite. It is a classic *deal killer.* "Going the wrong way" means a claimant who increases his demand or a defendant who cuts her offer at the commencement of mediation. This tactic is usually rationalized by changed circumstances ("my case just got a whole lot better"), which typically are *not* perceived as significant by the other side. In any event, the deal is dead and far beyond the mediator's curative skills because of the enormous insult and shock inflicted upon the other side. If you came here to go the wrong way, what are we doing here?

That concludes my short list of deal killers in mediation. I hope you will avoid them if possible or, if you must, save them for another mediator. I like done deals and smiling faces. I like effective advocates, with happy clients. If you think of any others, please don't tell your lawyer. ❐

RESPONDING TO DISCOVERY REQUESTS . . . *Continued from page 4*

Pa. 1973). Other decisions include *Pioneer Lumber, Inc., v. Bartels,* 1996 WL 673614 (Ind. App. 1996); *Ward v. CXS Transportation, Inc.,* 161 F.R.D. 38 (E.D.N.C. 1995); *Dodson v. Persell,* 390 So.d. 704 (Fla. 1980). For further discussion of the issues see *Lex, Lies & Videotape,* 18 UALR Law Journal 613 (1996) and The Discoverability of Personal Injury Surveillance and Missouri's Work Product Doctrine, 57 Mo. L. Rev. 871 (1992).

Production of surveillance films that are not intended to be used at trial should not normally be compelled. *See Fisher v. National R.R. Passenger Corp.,* 152 F.R.D. 145, 150-55 (S.D. Ind.1993). *But see Daniels v. National R.R. Passenger Corp.,* 110 F.R.D.160, 161 (S.D.N.Y. 1986); *Corrigan v. Methodist Hosp.,* 158 F.R.D. 54, 58-59 (E.D. Pa. 1994) (requiring production of all). Should the defense conduct surveillance and discover nothing helpful at least one court has ruled that plaintiff may not comment on this decision at trial. *DiMichel v. South Buffalo Ry.,* 604 N.E.2d. 63, 69 (N.Y. 1992) cert. denied, 114 S. Ct. 68 (1993).

In conclusion, surveillance can be an effective tool in defending personal injury and workers' compensation cases. To get the most out of surveillance the defense should avail itself of the opportunity to delay disclosure of whether any surveillance has occurred until after the plaintiff/claimant has been deposed. In those cases where no surveillance has been conducted the objection can still serve the purpose of discouraging exaggeration and lies. It is important to ensure that you depose plaintiff/claimant far enough ahead of trial that you do not risk exclusion of the deposition and/or the surveillance for failure to timely supplement your discovery responses. Supplement your prior answers immediately after surveillance and produce the information if you intend to offer it at the trial or hearing. ❐

TWELVE YEARS UNDER COMPARATIVE FAULT ACT *Continued from page 5*

Sec. 66. -- Immune Parties.

An employer statutorily immune from tort liability for an employee's injuries is not a "released party." *See Sorenson v. Morbark Industries, Inc.,* 153 FRD 144 (N.D. Iowa 1993).

In *Spaur v. Owens-Corning Fiberglas Corporation,* 510 N.W.2d 854 (Iowa 1994), Robert and Marilyn Spaur, husband and wife, brought suit against Owens-Corning Fiberglas Corporation (OCF), and several other defendants to recover damages for personal injury resulting from the husband's exposure to defendants' asbestos-containing products. By the time the case went to the jury all defendants except OCF either settled with Spaurs or were dismissed. The jury awarded compensatory damages, loss of consortium damages, and punitive damages against OCF. OCF claimed Manville Trust, previously dismissed, was a "party" and should have been included on the jury's verdict form for allocation of fault. By definition a "party" as used in the comparative fault statute includes a claimant, a person named as a defendant, a person who has been released pursuant to sec. 668.7, and a third-party defendant. Iowa Code sec. 668.2 (1991). The Court said:

> The Spaurs included Manville Trust as a named defendant in their original petition for damages. OCF filed a cross-petition against Manville Trust for contribution. The Spaurs dismissed Manville Trust from the case without prejudice during trial. Later, the court denied OCF's request to include Manville Trust as a party on the verdict form. The jury was therefore precluded from allocating fault to Manville Trust under our comparative fault law. See Iowa Code Sec. 668.3. OCF argues Manville Trust was not in bankruptcy at the time of this suit, it was a "released" party, and it remained a third-party defendant. Therefore Manville Trust should have been listed as a party for the purpose of allocating fault....
>
> Here, the Spaurs dismissed Manville Trust without prejudice. No document of release or settlement was exchanged. At the time of the trial in this case the Manville Trust settlement plan was not final. No funds have been paid out or awards calculated. We believe there is a distinction between a structure for settlement and a settlement. *See In re Brooklyn Navy Yard Asbestos Litig.,* 971 F.2d 831, 842-43 (2d Cir.1992). Plaintiffs must first avail themselves of the procedure by which they could settle with Manville Trust in order to receive compensation. The Spaurs did not avail themselves of that procedure

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TWELVE YEARS UNDER COMPARATIVE FAULT ACT

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and did not provide the Manville Trust with a release. We conclude Manville Trust was not a "released" party.

Next, OCF points out that although Spaurs' claim against Manville Trust was dismissed, its third-party claim for contribution survived. Under Iowa Code section 668.2(4) a third-party defendant falls within the definition of a "party" for purposes of comparative fault calculation. OCF, however, misunderstands the breadth of the bankruptcy court's litigation bar concerning the Manville Trust. The permanent injunctions ordered by Asbestos Litigation preclude any litigation against Manville Trust as well as Manville Trust's participation in any way in any litigation. See Asbestos Litigation, 129 B.R. at 911, 970-76.

Further, the bankruptcy court approved an evidence bar concerning Manville Trust "to effectuate the Trust's complete removal from the tort system." *Id.* at 902-04. It held that other codefendants were precluded from impleading the Manville Trust as a party because such claims "would undermine present efforts to equitably restructure the Trust and create manifest unfairness. Only the total elimination of all costs associated with litigation defense will conserve the limited funds that remain...." *Id.* at 904-05. Codefendants seeking indemnification or contribution from the Manville Trust are included in the class of beneficiaries. *Id.* at 911.

Finally, even if we were to allow the apportionment of fault against Manville Trust for the sole purpose of OCF's cross-claim, no fault can be allocated to Manville Trust under the existing circumstances. Chapter 668 precludes fault sharing unless the plaintiff has a viable claim against that party. *Pepper v. Star Equipment, Ltd.*, 484 N.W.2d 156, 157-58 (Iowa 1992); *see also Schwennen v. Abell*, 430 N.W.2d 98, 102-03 (Iowa 1988) (loss of consortium claim between spouses); *Reese v. Werts Corp.*, 379 N.W.2d 1, 6 (Iowa 1985) (workers' compensation). Because the presence of a third-party defendant who has a special defense to plaintiff's claim may "siphon off" a portion of the aggregate fault, the plaintiff will recover less than if the third-party defendant is not in the case. *Pepper*, 484 N.W.2d at 158. Under section 668.4, imposing joint and several liability, "a slight difference in fault allocation may produce a substantial difference in recovery." *Id.*

Like the plaintiff in *Pepper*, the Spaurs would be unable to protect themselves from fault-siphoning. Under the bankruptcy court's order they would have no possibility of obtaining an enforceable judgment against Manville Trust. See Asbestos Litigation, 129 B.R. at 911. Although the inability to allocate fault to a codefendant as involved as Manville Trust in the manufacture of asbestos may indeed be harsh and unjust, we believe the potential insolvency of a codefendant should be borne by the solvent defendants, not by the plaintiffs.

Under chapter 668 OCF has a right of contribution against Manville Trust. Iowa Code Sec. 668.5(1). Ordinarily this right may be pursued in a separate action against a cotortfeasor. *Id.* Sec. 668.6. But see Asbestos Litigation, 129 B.R. at 911. We therefore conclude Manville Trust was properly omitted from the verdict form. *Id.* at 862-863.

Sec. 67. -- Dram Shop Claim Not Within Chapter 668.

In *Jamieson v. Harrison*, 532 N.W.2d 779 (Iowa 1995), the Court said that a premises liability claim was governed by the comparative fault statute, and thus a proportionate credit rule applied to a partial settlement of that claim. However, the Court also said that a dram shop claim settled by the parties was not subject to the comparative fault statute because a dram shop claim could not result in a finding of fault under chapter 668, and a settlement of that claim cannot be used as the basis for a proportionate credit under sec. 668.7. Instead, the traditional pro tanto credit rule applies to such cases not within the scope of the comparative fault statute, citing *Tratchel v. Essex Group; Inc.*, 452 N.W.2d 171 (Iowa 1990).

Sec. 68. -- Statute of Limitations.

Iowa Code sec. 668.8 provides:

668.8 Tolling of statute.

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.

Sec. 69. -- Constitutionality.

In *Reese v. Werts Corp.*, 379 N.W.2d 1 (Iowa 1985), the Court rejected an equal protection challenge to the sec. 668.8:

> 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

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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. Because section 668.8 applies in any case in which section 668.4 applies, the classification attacked by plaintiff does not exist. Plaintiff's equal protection contention is thus moot. *Id.* at 4.

Sec. 70. -- Statute Tolled Against Parties Only.

In *Betsworth v. Morey's & Raymond's*, 423 N.W.2d 196 (Iowa 1988), Carla Betsworth fell as she left a store in a Sioux City mall on December 1, 1983. On June 14, 1985, she sued the store, Morey's and Raymond's (Morey's), alleging negligence in failing to remove accumulations of ice and snow. Betsworth amended her petition on June 11, 1986, to include Fourth and Jackson, Inc., the owner of the store building. This amendment was found by the court to "relate back" to the date of the filing of the original petition, and thus not subject to dismissal under the statute of limitations. On December 17, 1986, Betsworth filed another amendment to her petition. This time she added the City of Sioux City, which owned the area in the mall immediately adjacent to Morey's. The City of Sioux City filed a motion for summary judgment based on the running of the statute of limitations, Iowa Code sec. 614.1(2) (1985) (two years for injury to person). The district court granted the motion for summary judgement.

Sec. 71. -- Insurance Practice

Iowa Code sec. 668.9 provides:

668.9 Insurance practice.

It shall be an unfair trade practice, as defined in chapter 507B, if an insurer assigns a percentage of fault to a claimant, for the purpose of reducing a settlement, when there exists no reasonable evidence upon which the assigned percentage of fault could be based. The prohibitions and sanctions of chapter 507B shall apply to violations of this section.

In *Bates v. Allied Mutual Insurance Co.*, 467 N.W.2d 255 (Iowa 1991), the plaintiff contended the supreme court should recognize a private cause of action based on Iowa Code chapter 507B. The defendants objected on the ground that chapter 507B does not provide for such a cause of action. The plaintiff, however, argued that a private cause of action is authorized under the case law and by Iowa Code section 668. 9 (1985). The statutory provision at issue, Iowa Code Sec. 507B.4(9)(f), provides:

> The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:
>
> . . . .
>
> 9. Unfair claim settlement practices. Committing or performing with such frequency as to indicate a general business practice any of the following:
>
> . . . .
>
> f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

The Court said that in determining whether a private cause of action is cognizable under chapter 507B, it has employed a four part test as modified from the United States Supreme Court case of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Pursuant to that test, the Court had held in *Seeman v. Liberty Mutual Insurance Company*, 322 N.W.2d 35, 40 (Iowa 1982), that four considerations should be analyzed in determining whether a statute creates a private cause of action, Those considerations are: first, whether the plaintiff is a member of a class for whose special benefit the statute was enacted: second, whether there is legislative intent, either explicit or implicit, to create or deny a remedy; third, whether a private cause of action is consistent with the underlying purpose of the chapter; and fourth, whether the implication of a private cause of action will intrude into an area over which the federal government has exclusive jurisdiction or which has been delegated exclusively to a state administrative agency. In *Seeman*, the court specifically concluded that the legislative intent indicated that no private cause of action was intended by chapter 507B:

> We based our conclusion in *Seeman* on several factors. First, we concluded that section 507B.1 provided that the purpose of the statute was regulatory and was to be used to regulate trade practices in the business of insurance. *Id.* at 42. Second, the act explicitly vested the insurance commissioner with administrative powers, further indicating that the statute was regulatory in nature. *Id.* Third, section 507B.8 provides that the chapter in no way relieves or absolves a person from liability under other laws of the state, once again indicating that the chapter is essentially regulatory and not grounds for a private cause of action. Finally, we found that "the legislature, in enacting chapter 507B, intended only to invest the insurance commissioner with administrative enforcement powers and that the chapter not be expanded in the exercise of administrative or judicial discretion." *Id.*

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Plaintiff does not contend that the present case is distinguishable from *Seeman*. Rather, he contends that through our other decisions in the area, and section 668.9, the law has changed since *Seeman* was handed down. More specifically, plaintiff contends that the rationale of *Dolan*, the growing majority of states finding first-party bad faith, and the willingness of several courts and legislatures to examine this field seem to compel a recognition of common law third-party actions for breach of the duty of fair dealing and the tort of bad faith. We disagree. A careful review of the host of cases cited by plaintiff as well as chapter 668, reveal no indication that chapter 507B creates a private cause of action as suggested by plaintiff, The fact that Iowa has adopted comparative fault and has prohibited insurance companies from improperly applying it does not create a private cause of action. In fact, our analysis in *Seeman* is very explicit in indicating that the intention of chapter 507B is not to create a private cause of action, Therefore, in refusing to adopt such a common law tort, we have specifically rejected the analysis advanced by plaintiff. To hold that chapter 507B creates a private cause of action would be in direct contradiction to existing Iowa law and would create a cause of action not intended by the legislature.

Sec. 72. -- Governmental Exemptions

Iowa Code Section 668.10 provides:

Section 668.10 Government Exemptions.

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

1. The failure to place, erect, or install a stop sign, traffic control devices or other regulatory signs as defined in the uniform manual for traffic control devices adopted pursuant to section 321.252. However, once a regulatory device has been placed, created or installed, the state or municipality may be assigned a percentage of fault for its failure to maintain the device.
2. The failure to remove natural or unnatural accumulations of snow or ice, or to place sand, salt, or other abrasive material on a highway, road, or street if the state or municipality establishes that it has complied with its policy or level of service for snow and ice removal or placing sand, salt or other abrasive materials on its highways, roads or streets.
3. For contribution unless the party claiming contribution has given the state or municipality notice of the claim pursuant to sections 25A,13 and 613A.5. ❐

"Everyone is a damn fool for at least five minutes every day; wisdom consists in not exceeding the limit."

Unknown

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admission of subsequent remedial measures can be extremely confusing to a layperson jury. Although appellate courts frequently state that this can be remedied by an appropriate "limiting instruction," far too often the courts fail to provide trial courts with any guidance on fashioning such an instruction. Second, Rule 403 clearly states that even relevant (i.e., admissible) evidence may be excluded. Evidence clearly may be relevant and admissible under Rule 407, but if it is confusing, unduly prejudicial or constitutes a waste of time, the trial court should have discretion to exclude the evidence under the rubric of Rule 403.

Although *McIntosh* was only a garden-variety negligence case based on a premises liability theory, its importance with regard to the application of Rule 407 should not be underestimated. For example, in a product liability case based on failure to warn, subsequent changes to the product's warnings would not ordinarily be admissible because they constitute proof of "negligence or culpable conduct." Subsequent to *Olson v. Prosoco, Inc.*, 522 N.W.2d 284 (Iowa 1994), however, all product cases alleging failure to warn are premised on negligence only. As a result, based on the dicta and confusing language in *McIntosh*, any changes may be admissible as "circumstantial proof" that the warning, in its condition at the time of the accident, was the byproduct of a negligent act. This result has the practical effect of turning Rule 407 on its head. ❐

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motor continued to run after the vehicle hit the corner of the garage, and that the tires continued to rotate until they caused the vehicle to catch fire. Summary judgment on the uninsured motorist claim was therefore reversed. The court repeated, however, that Iowa does not recognize a cause of action for negligent failure to pay or investigate an insurance claim. A subpar investigation cannot in and of itself sustain a tort action for bad faith. The trial court was therefore affirmed on its grant of summary judgment to the insurer on plaintiff's claims for negligence and bad faith.

Plaintiff had also asserted a negligence claim against the person he rescued. The lower court had granted summary judgment against the plaintiff on these claims finding the fire to be a superseding cause relieving the rescued individual of liability. The Supreme Court observed that under the "rescue doctrine" the person being rescued is generally not relieved of liability. The Court held that the fire was a foreseeable risk of the operation of the defective vehicle and not a superseding act or event. A jury could find it reasonable to anticipate that others might attempt to rescue the operator of the vehicle from his self-created peril and sustain harm in doing so. Summary judgment on this claim was therefore reversed.

The plaintiff had also asserted a premises liability claim against the contract sellers of the property. The Court noted the general rule that an owner who sells property loses control of the use of the property and is no longer liable for injury to others on the property. The evidence was undisputed that at the time of the accident the property had been sold on contract and the vendors were not possessors of the land and they therefore had no duty to keep or maintain the driveway in a good and safe condition. Summary judgment on this claim was therefore affirmed.

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4. *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873 (Iowa 1996).

Independent Contractor Liability;Peculiar Risk/Inherent Danger

Plaintiff worker brought an action against his employer and against an independent contractor based upon an excavation accident. Summary judgment was granted to both defendants and plaintiff appealed the lower court's ruling with respect to the defendant independent contractor. The Supreme Court affirmed the lower court.

The Plaintiff had sought to predicate liability against the independent contractor (1) as a possessor of land and/or (2) under the peculiar risk and inherent danger provisions under Restatement §§ 413 and 427. Following earlier case precedent, the court found the evidence insufficient as a matter of law to show that the independent contractor exercised substantial control over the premises or the work so as to be a "possessor" of the land. The court also found as a matter of law that excavation work does not present a peculiar risk or inherent danger within the meaning of the terms under the Restatement. The court observed that working in excavated trenches certainly involves risk of injury, but it was not the type of work that was fraught with danger or hazards that could not have been minimized through the exercise of ordinary caution.

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

Medical Malpractice; Discovery of Peer Review Records; Expert Testimony

Patient brought medical practice action against physician who performed surgery and physician who administered anesthesia. Plaintiff sought to discover peer review documents generated in connection with reviews of the hospital's anesthesia department. The lower court determined these documents to be privileged under Iowa Code § 147.135 and refused to require their production. The Supreme Court affirmed the lower court's ruling and held that the statutory privilege of Iowa Code § 147.135 is broad and extends to reviews of hospitals and not only reviews of a specific licensed professional.

The lower court had also precluded a nurse-anesthetist from testifying as an expert witness to the standard of care concerning anesthesia procedure. The Supreme Court found the lower court abused its discretion in prohibiting this testimony. The court held that under Iowa Code § 147.139, if the proposed expert has qualifications that relate directly to the medical problem at issue and the type of treatment administered, then the witness should be allowed to testify. The court saw the issue as one of qualifications and noted that the plain language of § 147.139 does not prevent non-physician medical personnel from testifying as an expert witness in a case against a physician defendant so long as adequate qualifications and experience are demonstrated.

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

Vehicle Owner Liability; Section 321.493

The issue in this case was whether recovery could be made against the owner of a vehicle based upon acts of a consent driver who was legally immune from a negligence action. The lower court concluded that since the driver could not be liable, neither could the owner under the owner liability statute, Iowa Code § 321.493. The Supreme Court reversed the lower court's ruling and held that even though the driver may be immune from liability, the owner's liability turns on the negligence on the operator and not the operator's liability. In so holding, the court followed its recent ruling in *Estate of Dean v. Air Exec, Inc.*, 534 N.W.2d 103 (Iowa 1995) which examined virtually the same issue in the context of the operation of an aircraft.

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7. *Veasley v. CRST International, Inc.*, 553 N.W.2d 896 (Iowa 1996).

Choice of Law

Plaintiffs brought an action in Iowa District Court based upon a motor vehicle accident occurring in Arizona. The defendant was an Iowa trucking company against whom recovery was sought on the basis of vicarious liability as the owner of the vehicle. Defendant argued that Arizona law, which does not recognize the vicarious liability of a vehicle owner, should control. The court applied the "most significant relationship" test articulated in the Restatement (Second) Conflict of Laws and rejected the defendant's argument. The court noted that the defendant chose to register its truck in Iowa and chose Iowa as its principal place of business and therefore reasonably could have foreseen that Iowa law would apply. The court was also not persuaded by the defendant's suggestion that accepting the plaintiff's choice of law argument would lead to nation-wide liability for Iowa trucking companies even in the majority of states that do not have an owner liability statute

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

At Will Employment; Viability of Negligent Misrepresentation Claim

At-will employee brought action against his former employer on theories including breach of employment contract and negligent misrepresentation, among others. The lower court granted summary judgment to the defendant employer concluding that plaintiff's employment was terminable at any time for any reason. The Court of Appeals reversed the District Court on the negligent misrepresentation count. Viewing the elements of negligent misrepresentation outlined in Restatement § 552, the Court of Appeals found a fact question existed concerning plaintiff's justifiable reliance on alleged representations made in preemployment discussions. The Supreme Court granted further review to consider whether application of section 552 created an unprecedented exception to at-will employment and a new legal duty for prospective employers.

The Supreme Court reversed the decision of the Court of Appeals. The Court reasoned that both parties were dealing at arms' length and the employer owed no duty to the plaintiff under the court's traditional interpretation of section 552. The effect of a contrary ruling would permit an at-will employee to potentially recover in tort on the same factual grounds on which the law would deny him recovery in contract. The employer was not in the business of supplying information and its representations were not made to guide the plaintiff with professional employment advise. Under these circumstances, the court held that the tort of negligent misrepresentation under section 552 has no application.

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9. *Krauel v. IMMC*, 95 F.3d 674 (8th Cir. 1996).

ERISA Plan Exclusion for Infertility Coverage

Female employee brings claims of discrimination against ERISA plan based on the plan's denial of coverage for fertility treatments. The district court granted summary judgment to the defendant and the plaintiff appealed. The eighth circuit affirmed.

The appeals court rejected plaintiff's arguments under the ADA that her condition of infertility substantially limits a major life activity (reproduction) and that the infertility exclusion is a disability based distinction. Nor did the court find the plan exclusion a subterfuge to evade the purposes of the ADA. The court further held that plaintiff's claims fell outside the Pregnancy Discrimination Act because infertility is not pregnancy, child birth, or a related medical condition.

With regard to plaintiff's claims under Title VII, the court held that the infertility exclusion is not a sex

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based classification because the plan's exclusion applies equally to all infertile workers, male or female. Last, the court rejected the plaintiff's disparate impact argument finding no evidence showing that female employees were more adversely affected by the plan's fertility exclusion than were male employees.

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10. *Coulter v. CIGNA Property & Casualty Co.*, 934 F.Supp. 1101 (N.D. Iowa 1996).

Homeowner's Policy; Property Damage

This case involves the definition of "property damage" in a homeowner's insurance policy and a determination of whether an underlying lawsuit against the plaintiff alleged such damage within the policy's definition of the term. The underlying suit alleged that the insured had breached his fiduciary duty by mishandling and depleting assets of estates for which he was executor. He brought a declaratory judgment action seeking coverage under his homeowner's policy which insured him against liability for property damage defined as "any physical damage or destruction to tangible property, including the loss of the use of that property." The district court granted the insurer's motion for summary judgment.

The court found the policy definition of "property damage" to be unambiguous. The court further held that the losses alleged against the insured in the underlying lawsuit were all intangible economic losses and thus not property damage within the policy definition of the term. The definition requires physical damage or destruction to tangible property. Therefore, the insurer had no duty to defend or indemnify in the underlying lawsuit. □

FROM THE EDITORS

The bar and judiciary have been wringing their hands for years over the time it takes to dispose of cases. Guidelines have been imposed to produce trial dates within a prescribed time period and various deadlines are typically agreed upon in a scheduling conference. While beneficial in many respects, those measures do nothing to address an underlying problem — substantial delays in discovery, often associated with production of medical records.

Too much time is lost in personal injury cases chasing after medical records. Because it is usually preferable to receive all or most of the medical records before deposing an injured plaintiff, cases all too often languish for months with little activity as defense counsel waits (begs) for medical records. Letters of reminder and promises of compliance are exchanged between counsel, and in extreme cases of neglect, a motion to compel is filed, which often serves as the inspiration plaintiff's counsel needed to produce the records requested months earlier. It all wastes time, and unnecessarily so.

The time has arrived for medical discovery rules in liability cases to catch up to those in workers' compensation cases. In both contexts, an injured party essentially waives the physician-patient privilege regarding medical matters even remotely related to the claim at issue. Under Iowa Admin. Code §343-4.6, a workers' compensation claimant is required to serve a patient's waiver along with the original notice and petition, which obviously enables defense counsel to obtain pertinent medical records early on. (A procedure exists for challenges to the relevancy of certain records.) Both parties are under a duty to serve the opposing party with copies of all medical records obtained within ten days of receipt. Further, as set forth in *Morrison v. Century Engineering,* 434 N.W.2d 874 (Iowa 1989), workers' compensation defense counsel has the right and authority to communicate ex parte with treating physicians. Assuming equal cooperation from the physicians — not a sure thing — those rules place defense counsel on even footing with claimant's counsel in terms of obtaining medical information. The procedure is relatively swift and serves to minimize the need for so-called discovery medical depositions.

There is no compelling reason to approach medical discovery differently in liability cases. Many of the

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same issues are involved and the same information is ultimately discoverable through our current somewhat clumsy and inefficient procedures. Our discovery rules should be revised to require injured plaintiffs to serve a patient's waiver and a list of medical providers with the original notice and petition. (The identity of pre-accident medical providers and the need for their records would presumably have to be determined through discovery. The accumulation of those records would be similarly expedited through the use of the patient's waiver.) Medical records obtained by any party should be served upon the other parties within a prescribed period of time from receipt without the necessity of a request.

Further, defense counsel should be afforded the right to communicate directly with treating physicians, as distinguished from specially retained non-treating medical experts. This right would run contrary to the position of the Iowa Supreme Court in *Roosevelt Hotel Limited Partnership v. Sweeney,* 394 N.W.2d 353 (Iowa 1986), wherein the Court declined to require patient's waivers and allow ex parte communications with treating physicians in liability cases. Interestingly, the Court commented that any such change in our discovery rules "should be accomplished by a change in the Rules of Civil Procedure, rather than by judicial fiat." In *Morrison,* for reasons we regard as somewhat superficial and unpersuasive, the Court went the other way for workers' compensation cases, citing swift processing of claims as the primary justification.

These changes would cause most cases to move more quickly toward disposition. Discovery medical depositions would be largely minimized and meaningful settlement evaluations could occur much sooner than after the evidentiary medical deposition often taken relatively late in the game. Also, decisions regarding IME's could presumably be made earlier and more thoughtfully with swifter and unencumbered access to medical information.

This proposal constitutes a significant departure from current rules and practices, but we are hard-pressed to articulate any compelling argument against it. The changes would expedite and streamline the discovery process and generally level the playing field without effecting any more disclosure of information than is contemplated by current procedures. The details could be worked out through careful study by an appropriate committee, most likely the civil procedure rules committee. The current workers' compensation rules would serve as a good model. ❐

Mark S. Brownlee
P.O. Box 957
Fort Dodge, Iowa 50501-0957