defense UPDATE

The Iowa Defense Counsel Association Newsletter Fall 2004 Vol. XVIII, No. 4

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES

By Thomas D. Waterman, Davenport, IA.

On November 5, 2004 the Iowa State Bar Association ("ISBA") Jury Instruction Committee unanimously approved revisions to the Iowa Uniform Civil Jury Instruction ("IUCJI") 210.1 to comply with *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).[1] The revised IUCJI 210.1 was unanimously approved by the ISBA Board of Governors ("BOG") at its December 7, 2004 meeting. This article discusses the constitutionally mandated changes to the Iowa punitive damages instruction and reviews *Campbell* and its progeny to rebut anticipated objections to the revised instruction.

Campbell has been widely haled for reining in punitive damage awards. See "New Assistance For Defending Punitive Damage Claims In Iowa -- The 'Marching Orders' of *State Farm Mut. Auto. Ins. Co. v. Campbell*." DEFENSE UPDATE, September, 2003. As elaborated there, *Campbell* provides three "guideposts" for determining the constitutionality of a punitive damages award: 1) the reprehensibility of the defendant's conduct that harmed the plaintiff; 2) the relationship (ratio) between plaintiff's actual damages and the punitive damages awarded; and 3) civil penalties allowed in comparable cases. *Campbell* significantly curtailed use of evidence of out-of-state conduct and dissimilar bad acts to support punitive awards. *Id.* at 1522-24. Moreover, *Campbell* dramatically limited the extent to which punitive awards can exceed actual damages. *Id.* at 1524 ("In practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.") *Campbell* also deemphasized the defendant's wealth as a factor for determining the amount of punitive damages. *Campbell* rendered IUCJI 210.1 unconstitutional.

A year-long review by the ISBA Jury Instruction Committee, guided by input from ISBA leadership and case law applying *Campbell*, culminated in this proposed revision to IUCJI 210.1, set forth in redline version here:

> **210.1 Punitive Damages.** Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.
>
> Punitive damages are not intended to compensate for injury but are allowed to punish and discourage

continued on page 5

[1] The Jury Committee Chair, Judge Paul Huscher, appointed this author to chair a subcommittee to revise IUCJI 210.1 based on *Campbell*. This author worked primarily with David Baker of Riccolo & Baker PC, Cedar Rapids. On November 18, 2004 Baker was appointed by Governor Vilsack to the District Court bench. Other subcommittee members were Guy Cook of Grefe & Sidney PLC, Des Moines; and Mike Jacobs of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, Sioux City. The proposed update to IUCJI 210.1 was vetted by the entire ISBA Jury Instruction Committee at three separate semi-annual meetings.

Inside This Issue

MESSAGE FROM THE PRESIDENT

Sharon Greer

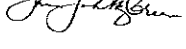
In this, my first President's Letter, let me highlight some changes we instituted at our 40th Annual Meeting. In 1964, this organization was founded on the premise of improving our civil justice system. This has encompassed efforts to support proposals in our legislative process and in the court system designed to maintain a fair balance between plaintiffs and defendants. In that vein, we began an annual legislative award recognizing an outstanding Senator and Representative from the Iowa Legislature. The IDCA recognizes the importance of maintaining and promoting good legislation in Iowa for our clients and for Iowa in general. We have a presence in our lobbyist, Bob Kreamer, but it helps to say thank you to those legislators providing outstanding help to the organization. Senator Maggie Tinsman of Davenport and Representative Kraig Paulsen of Hiawatha were the first recipients of what will become an annual award. Congratulations to them!

Additionally, for the first time, we instituted exhibitor booths at our meeting. LexisNexis, West Publishing, Minnesota Lawyers Mutual Insurance and MCS Litigation Support paid for exhibitor space. We also provided a free booth for Iowa Legal Aid to promote its program. A special thanks to those exhibitors since the booth rental supplemented our programming, such as the Young Lawyer reception for meeting attendees, held on Wednesday evening. This reception will now become a tradition at our annual meetings to give attendees an informal setting for networking.

Over the past year, IDCA has made significant strides on redesigning our Web site with the great help of Christine Conover of Cedar Rapids and Associate Director Julie Garrison. If you have not done so, jump onto www.iowadefensecounsel.org and use this site. We need everyone's help to develop the expert witness data base (DRI has an excellent resource for experts, as well), and participate in the "forum" section where you can ask questions of members or provide news updates and access the jury verdict reports to aid in settlement and evaluation of your cases. Enclosed is a Jury Verdict Reporting Form to help us with the updating of this service. If you have had a jury trial, please fill out the information and get it to the organization office.

Now, what should this year bring. On April 8, 2005, at Des Moines Golf & Country Club, IDCA will present an Employment Law Seminar, organized by Michael Thrall and Deborah Tharnish. On September 21 - 23, 2005, our Annual Meeting will be held at the Hotel Fort Des Moines. Other than programming, your Board would like to make the IDCA available to all members. The Web site has given us help in this area. Being active in a state defense organization enhances your practice in these essential ways: (1) Learning: you interact and learn from defense lawyers across the state; (2) Marketing: you get to market your knowledge and skills through a state-wide venue; (3) Networking: you can forge connections that lead to referrals and visibility in your particular practice and (4) Enjoyment: you break up the stress of the day-to-day grind - have a bit of fun, in other words.

A major goal of our IDCA Board is to fashion opportunities for quality involvement with the organization. If you sign up for a committee, we believe you want it to be meaningful and worthwhile to you, your firm and this organization. Expect our Board to solicit your membership in our standing committees. Currently, these committees are: Amicus Curiae, Young Lawyers, Membership/DRI, Product Liability, Workers Comp, Jury Instructions, Legislative, Tort & Insurance, Rules, Professional Liability, Employment Law, Commercial Litigation, Client Relations and the Board of Editors of the Defense Update. Committees will be charged with an agenda such as: providing an article for the Defense Update, speaking at one of our seminars, planning a seminar, or writing a news update on the web site. Our committees hopefully will meet at least once each year as a group and the committee chair should report the committee's progress to the Board annually. Activities, such as those described, enhance the committee role in our organization and provide more information and opportunities to IDCA members. If you have other ideas about involvement, please contact me or one of your Board members. We welcome your input and your desire to work!



Iowa Defense Counsel Association
Jury Verdict Report Form

Send completed form via email or hard copy to:

Christine L. Conover
Simmons, Perrine, Albright & Ellwood, P.L.C.
115 Third Street SE, Ste. 1200
Cedar Rapids, IA 52401-1266
(319) 366-7641
(319) 366-1917 (fax)
cconover@simmonsperrine.com

Court (State or Federal, County, District): _____

Caption/Case Number: _____

Date of Trial/Settlement: _____

Type of Case: _____

Type of Injury: _____

Sex/Age of Plaintiff: _____

Specials, past meds/wage loss: _____

_____

Last Demand: _____

Last Offer: _____

Result: _____

_____

Plaintiff(s)' Attorney(s): _____

_____

Defendant(s)' Attorney(s): _____

_____

Plaintiff(s)' Expert(s): _____

_____

Defendant(s)' Expert(s): _____

_____

Judge: _____

Additional Comments: _____

"THE RIGHT CASES FOR ARBITRATION"

By: David J. Blair, Cherokee, IA

What are the right cases for arbitration? I am tempted to say "all cases, subject to an appropriate submission agreement," but that's not how it works. The way it works is that experienced trial lawyers pick cases for arbitration (to a sole arbitrator or a panel of three) much like they pick cases for a bench trial. It depends on the case.

Generalizations are hazardous, but let me try. Consider, for example, the complex and costly construction case (the proverbial "bad house" case) as a likely candidate for arbitration. These are cases often involving multiple parties and a multitude of issues, each a potential mini-trial in itself, each with experts pro and con, each hotly contested by emotional litigants for whom the dispute is very personal, and typically without insurance coverage for anything. Tried to a jury such cases quickly become client disasters in which three or more parties spend two bucks for each buck at issue, leading to a predictably unsatisfactory result no matter what the verdict. Thus, it's little wonder that the construction industry is a leading user of arbitration for dispute resolution.

Consider, too, the case is which discovery is not critical because the essentials are already known and in your file. This is a good arbitration case because discovery in arbitration, although available, is narrow in scope (often limited to one round of document production and few if any depositions) and quite dependent on the ability of counsel to work it out. Judges in the public system are accustomed to a fare of discovery disputes; arbitrators, less so. I would not agree to arbitrate a case in which aggressive, extensive discovery is important to success.

Arbitration is a good bet if confidentiality is important. The arbitration process itself is private. There are no chairs at the table for public representatives or news media. The submission agreement may provide for enhanced privacy, limiting the ability of all participants – counsel and parties and arbitrator – from disclosing the particulars of the evidence and outcome. Sensitive trade secrets, financial and proprietary information may be shielded from disclosure. For this reason alone it's common to see highly compensated professionals and image-conscious corporations at the arbitration table.

Arbitration also provides a dispute resolution process free from the obligations and risks of precedent. The arbitrator's award may be stipulated to be without value as precedent between the parties and probably has little effect as precedent even without a stipulation. That's good if what you want is a decision on the merits without necessity for either party to fight tooth and nail through appeals and retrials in order to maintain or avoid precedent.

I would sum up this way. Arbitration should be considered by both parties in the following circumstances:

- Commercial and construction cases.
- Multi-party cases.
- Complex and technical cases.
- Cases where limited discovery is a positive value.
- Cases where speed and economy are important.
- Cases where the creation of precedent is not desired.
- Cases where there is an on-going relationship between parties.
- Cases where privacy and confidentiality are important.
- Cases where the result is predictable in a narrow dollar range.
- Cases where finality is a higher value than the right of appeal.

Arbitration is less likely to be chosen by one or both parties in the following circumstances:

- Cases with an unusually credible and sympathetic client.
- Cases of "thin" liability.
- Cases with sympathetic, powerful facts.
- Cases of aggravated liability.
- Cases with opportunity for general or punitive damages.
- Cases with strong emotional appeal.

continued on page 10

SUPREME COURT ADDRESSES MEDICAL EXPENSE ISSUE

By: Michael W. Ellwanger, Sioux City, IA

A thorny issue which has perplexed trial lawyers and judges over the years is the amount of medical expenses which can be recovered where such expenses have been adjusted downward by Medicare, Medicaid or private insurance. Such downward adjustments are no longer insignificant. The author of this article wrote a previous article on the subject in 1999, referring to a Plymouth County case in which the court held that the plaintiff could only recover the adjusted bill which had been paid by Medicare in full satisfaction of the obligation. Since that time, however, it has been observed that different trial judges have ruled differently.

The Supreme Court in *Pexa v. Auto Insurance Co.*, 686 N.W.2d 150 (2004), addressed the issue. However, the result is not altogether satisfying to defense counsel and does raise some additional questions.

In *Pexa* the plaintiff sustained injuries in an automobile accident. His medical bills totaled $41,544.34. Medicare and supplemental insurance paid $15,950.39 in full satisfaction of the medical bills. The tortfeasor had $100,000.00 in liability coverage. The limits were paid to the plaintiff. Plaintiff then filed an underinsured motorist action against Auto Owners.

The trial court in the UIM case ruled that the plaintiff could put in evidence the fact that his total bills were $41,544.34. However, the court instructed the jury that due to adjustments, the plaintiff could only recover $15,950.39. The Supreme Court held that this was error.

The court held that the collateral source rule was irrelevant. The collateral source rule involves a reduction in the amount of the recovery after the amount of damage has been determined. The issue before the court was what was the proper measure of damages in the first place.

Iowa Jury Instruction 200.6 states that the plaintiff may recover the reasonable value of necessary hospital charges, etc. In its decision, the Supreme Court states that an injured party may recover only the reasonable and necessary costs of the medical care. *Id.* at p.156. The difference between value and cost can be substantial. Presumably every physician or hospital administrator would testify that his charges are the reasonable value of the service. However, this is not necessarily the same as the reasonable and necessary cost of the service. It is submitted that the cost of the service is what is actually paid and accepted. Is the Supreme Court suggesting that perhaps our jury instruction should be changed and that the proper instruction should be that a plaintiff may recover only the reasonable and necessary cost of medical care? The Supreme Court cited the case of *Stanley v. State*, 197 N.W.2d 599, 606 (Iowa 1972). However, the Supreme Court in *Stanley* stated:

> Before there can be an award for such items the evidence must show they were made necessary by the negligent act of defendant (which is not contested here) and that the amounts charged represent the reasonable fair value of the services.

The first question that *Pexa* leaves open, therefore, is whether the proper measure of damages is the value of the medical care or the cost of the medical care. It should be noted that in the balance of its decision the Supreme Court consistently refers to the "reasonable value of the services rendered."

The *Pexa* court then went on to state that there are different ways to prove the reasonable value of medical services. One would be the testimony by an expert that the charges are in fact reasonable. A second way is to show the amount that is charged and paid. It is not enough to show that the medical care provider charged a certain amount. It must also be shown that it was paid. The court stated: "The billed amount is relevant only if that figure was paid or an expert witness has testified to the reasonableness of the charges." *Id.* at p.156. Assume the bill was $50,000.00 but $20,000.00 was paid. Is this enough to show that $20,000.00 is reasonable? The language in the

continued on page 10

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES . . . *continued from page 1*

the defendant and others from like conduct in the future. You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries.

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

1. The nature of defendant's conduct that harmed the plaintiff.

2. The amount of punitive damages which will punish and discourage like conduct by the defendant. You may consider the defendant's financial condition or ability to pay. You may not, however, award punitive damages solely because of the defendant's wealth or ability to pay.

3. The plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff.

4. The existence and frequency of prior similar conduct. *If applicable, add:* You may not, however, award punitive damages to punish the defendant for out-of-state conduct that was lawful where it occurred, or any conduct by the defendant that is not similar to the conduct which caused the harm to the plaintiff in this case.

Each of the Committee's revisions to IUCJI 210.1 is supported by specific language in *Campbell* and its progeny, as set forth below. Nevertheless, because the *Campbell*-mandated revisions to this instruction will make recovery of punitive damages more difficult, objections to the revised instruction are anticipated and dealt with here categorically.

1. The Campbell Guideposts Are For Both Judicial Review and Jury Instructions.

A threshold objection to revising IUCJI 210.1 made by plaintiff's counsel is that the *Campbell* guideposts are simply for Judges reviewing punitive awards (on appeal or post-trial motions), rather than matters for jury instruction. This objection lacks merit. The *Campbell* Court itself stated, "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish the defendant for action that was lawful in the jurisdiction where it occurred." 123 S.Ct. at 1522-23. Moreover, subsequent cases confirm that the *Campbell* guideposts are constitutionally required for both jury instructions and judicial review.[2] Indeed, the Eighth Circuit and other appellate courts reviewing punitive damage awards under *Campbell* specifically consider the adequacy of the jury instructions. *See, e.g., Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811, 824 (8th Cir. Aug. 27, 2004)("Therefore we begin by noting that the district court gave correct and distinct instructions relating the purpose and standard for punitive damages, and turn our focus to the reprehensibility of [defendant's] conduct."); *Alberts v. Franklin*, 2004 WL 1345078, * 29 (Cal. App. June 16, 2004)(affirming jury's award of punitive damages about four times

continued on page 6

[2] *See, e.g. Roth v. Farner-Bocken Co.*, 677 N.W.2d 651, 671 (S.D. 2003)("This case is remanded for a new trial on punitive damages. In order to properly calculate a punitive damage award, the jury should be instructed in accordance with this opinion regarding the three guideposts outlined by the United States Supreme Court [in Campbell]); *In re the Exxon Valdez*, 296 F. Supp.2d 1071, 1091 (D. Alaska 2004) (reducing $5 billon dollar jury verdict to $4.5 billion on remand in light of *Campbell* rather than vacating award for new trial, because the jury had been instructed on the *Campbell* factors; "The Supreme Court punitive damages jurisprudence has consistently emphasized the role of adequate jury instructions in ensuring punitive damage awards that comport with due process.")(also noting in footnote 59 that the Ninth Circuit pattern jury instructions on punitive damages were inadequate in light of *Campbell*); *Romo v. Ford Motor Co.*, 113 Cal.App.4th 738, 753, 6 Cal. Rptr.3d 793, 804-05 (Cal. App. 2003)(jury's punitive damages award of $290 million reduced to $23.7 million on post-*Campbell* remand – concluding in light of *Campbell* that jury had been "fundamentally misinstructed concerning the *amount* of punitive damages it could award" where general deterrence instruction given had failed "to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process.")(Court's emphasis; footnotes omitted)(citing *Campbell*, 123 S. Ct. at 1523-24); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 74 (Cal.

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES . . . *continued from page 5*

greater than compensatory damages; concluding that jury instructions satisfied *Campbell*).

Commentators have also recognized the need to revise pattern jury instructions in light of *Campbell*. *See* A. Frey, "No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions," 29 LITIGATION Summer 2003 at 24-28. No reported decisions applying *Campbell* have concluded that the *Campbell* guideposts were exclusively for reviewing courts and not for jury instructions. To the contrary, *Campbell* and its progeny make clear that juries must be instructed on the *Campbell* guideposts, and that punitive awards by juries that were not so instructed can be challenged on that basis.

Plaintiff's counsel have contended that the need to instruct juries on the *Campbell* guideposts is excused by the *Campbell* Court's failure to expressly overrule *Pacific Mutual v. Haslip*, 111 S.Ct. 1032 (1991), because *Haslip* rejected a challenge to a jury instruction that omitted reference to *Campbell*-type guideposts. *See Haslip*, 111 S.Ct. at 1037 n. 1, 1044. This argument fails because the guideposts were enunciated five years after *Haslip*, in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996). *Campbell* gave further shape and meaning to the *Gore* guideposts. *Haslip* should be regarded as overruled *sub silencio* to the extent that its approval of a pre-guidepost jury instruction conflicts with *Gore* or *Campbell*.

2. An Annotated Guide To The Campbell-Mandated Revisions To IUCJI 210.1.

The Committee's first addition to IUCJI 210.1 states, "You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries." This addition is based on the following conclusion of the *Campbell* Court:

> It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

123 S.Ct. at 1521. In keeping with Iowa's "plain language" approach to jury instructions, the Committee rephrased the *Campbell* Court's language to avoid use of the term "reprehensible."

Next, the Committee revised IUCJI 210.1 to comply with the requirement that punitive damages be based on the defendant's conduct that harmed the plaintiff, rather than dissimilar conduct involving non-parties. The *Campbell* Court stated:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis....

123 S. Ct. at 1523. Thus, the Committee modified the first factor for the jury to consider -- "the nature of defendant's conduct" -- by adding

continued on page 7

App. 2004)(observing that the constitutional soundness" of the California pattern instruction "has been rendered uncertain by Campbell's seemingly categorical rejection of the Utah Supreme Court's reliance on the defendant's 'massive wealth' as one justification for the award there"); *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 165-66 (Ky. Aug. 26, 2004)("In light of *State Farm* [*v. Campbell*], however, this case must be remanded for a new determination of the amount of any punitive damages awarded using an instruction... which sets forth the purpose of punitive damages and provides a safeguard from extraterritorial punishment[.]"); *Roberei v. Vonbokern*, 2003 WL 22976126 (Ky. App. Dec. 19, 2003)(vacating punitive damage award because, "We see no indication that trial court instructed the jury regarding these [*Campbell*] guideposts or considered them in reviewing the punitive damages awarded by the jury"); *Planned Parenthood of the Columbia-Williamette, Inc. v. American Coalition of Life Activists*, 300 F. Supp. 2d 1055, 1059 (D. Ore. 2004)(entering judgments on punitive damage verdicts and denying defendants' post-trial motions challenging amounts; "I specifically instructed the jury to consider the degree of reprehensibility of each defendant's conduct and the relationship of any award to actual harm inflicted.")

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES . . . *continued from page 6*

"that harmed the plaintiff." For those cases involving evidence of out-of-state conduct, the Committee added language based on the *Campbell* Court's explicit directive that:

> A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

123 S.Ct. at 1522-23. The Committee concluded that *Campbell* requires such language in the final jury instructions, not simply in a limiting instruction given at the time such evidence was introduced, as plaintiff's counsel have suggested. Indeed, other state supreme courts have taken this language in *Campbell* at face value. In *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. Aug. 26, 2004), the Kentucky Supreme Court stated:

> After reviewing *State Farm*[*v. Campbell*] and the evidence of the defendant's out-of-state conduct presented to the jury in Sand Hill, we vacate the punitive damages award and remand the case for a new determination of the amount of punitive damages because the trial court's jury instructions failed to include a limiting instruction concerning extraterritorial punishment.

Id. at 155-56.

The Committee also revised numbered paragraph 2 of IUCJI 210.1 to deemphasize wealth as a factor for determining the size of the punitive damage award. The *Campbell* Court rejected the Utah Supreme Court's reliance on State Farm's "enormous wealth" as a justification for the size of a punitive damage award, and addressed use of wealth evidence as follows:

> The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S. at 585, 116 S.Ct. 1589 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business"); see also *id.* at 591, 116 S.Ct. 1589 (BREYER, J., concurring) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy.... That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct").

123 S.Ct. at 1525. The Committee thus modified IUCJI 210.1 to permit the jury to consider a defendant's financial condition or ability to pay while instructing against awarding punitive damages "solely" based on wealth. *See Eden Electrical, Ltd. v. Amana Co., L.P.*, 258 F.Supp.2d 958, 971-75 (N.D. Iowa 2003)(applying *Campbell* to review punitive damage award; concluding that wealth remains a factor to consider), *aff'd* 370 F.3d 824 (8th Cir. 2004).[3]

The Committee further concluded that the second *Campbell* guidepost -- the ratio between punitive and actual damages awarded -- supported adding to IUCJI 210.1 the instruction that "the amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff." As the *Campbell* Court itself held, "Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 123 S.Ct. at 1524. Nevertheless, plaintiff's counsel have objected to the "reasonably related" language on grounds that *Campbell* recognized that the permissible ratio can vary with the facts of each case and declined to set a fixed formula. *See Campbell*, 123 S.Ct. at 1524. It is precisely for that reason that the Committee declined to include a multiplier or

continued on page 8

[3] The *Campbell* Court's discussion of wealth evidence further supports bifurcation of trials to exclude prejudicial evidence of a defendant's wealth unless and until the jury finds the requisite misconduct occurred to support an award of punitive damages. IUCJI 210.1 requires modification by the trial court for use in bifurcated trials.

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES . . . *continued from page 7*

ratio in revising IUCJI 210.1. No court has held that jurors should not be instructed that punitive damages must bear a reasonable relationship to actual damages. To the contrary, precedent clearly supports telling juries that the amount of punitive damages awarded should be "reasonably related" to actual damages.

A California appellate court recently held the second *Campbell* guidepost was satisfied by a jury instruction that "the punitive damages must bear a reasonable relation to the injury, harm or damages actually suffered by the plaintiff." *Alberts v. Franklin*, 2004 WL 1345078, * 29 (Cal. App. June 16, 2004). In *Sherman v. Kasotakis*, 314 F.Supp.2d 843 (N.D. Iowa 2004), Chief Judge Mark Bennett instructed the jury in a race discrimination case as follows:

> In determining the amount of punitive damages, if any, to award, you should consider how offensive the defendants' employees' conduct was; whether the amount of punitive damages bears a **reasonable relationship** to the actual damages awarded on a particular plaintiff's claim....

Id. at 865 (emphasis added). Chief Judge Bennett denied post trial motions challenging the punitive damages awarded, stating, "the Court finds no plain error in the manner in which the jury was instructed...as to punitive damages." *Id.* at 866.

As the Supreme Court in *Gore* recognized, "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree." 116 S.Ct. at 1601. Thus, even before *Campbell*, Judge Ronald Longstaff in the Iowa tobacco litigation appropriately concluded:

> Furthermore, the Court agrees with plaintiffs that any punitive damages awarded could be determined in the aggregate. The jury instructions during the damages phase of the litigation could be tailored to ensure the punitive damages bore a ***"reasonable relationship"*** to compensatory damages awarded, *see, e.g., BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). (Emphasis added).

Estate of Mahoney v. R. J. Reynolds Tobacco Co., 204 F.R.D. 150, 160 n. 17 (S.D. Iowa 2001).[4]

See also Aken v. Plains Elec. Generation & Trans. Coop, Inc., 49 P.3d 662, 667 (N.M. 2002)(holding that *Gore* satisfied by jury instruction that "punitive damages must relate to actual damages and the injury sustained").

In *Farmers Ins. Exchange v. Shirley*, 954 P.2d 1040 (Wy. 1998), the Wyoming Supreme Court read *Gore* to require a jury instruction that punitive damages "should bear a reasonable relationship" to the harm. *Id.* at 1052. The *Shirley* Court aptly observed:

> *BMW* [*v. Gore*] demands that we articulate objective standards for the imposition of punitive damages that can be communicated to the jury in the form of instructions and against which the imposition of the punitive award can be weighed in the process of judicial review. Otherwise, we hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from the application of our current process.

Id. at 1045. Similarly, the Supreme Court of Appeals of West Virginia has directed trial courts instructing juries on punitive damages to "carefully explain the factors to be considered...[including that] punitive damages should bear a reasonable relationship to compensatory damages." *Boyd v. Goffoli*, 2004 WL 2727556, court's syllabus 4(4)(W.Vir. Nov. 29, 2004).

continued on page 9

[4] Because Judge Longstaff denied Plaintiffs' motion to certify a state-wide class of lung cancer victims on other grounds, his comments regarding punitive damage instructions are *dicta*. He nevertheless correctly recognized the importance, consistent with the second guidepost, of instructing the jury that the amount of punitive damages awarded should be reasonably related to compensatory damages awarded.

STATE FARM V. CAMPBELL MANDATES REVISIONS TO THE IOWA UNIFORM CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES ... *continued from page 8*

Common sense should prevail. Due process is served by giving the jury more guidance, rather than less. It is difficult to see the harm in telling jurors that the amount of punitive damages awarded should be reasonably related to the compensatory damages awarded. Citizens of Iowa serving as jurors would be justifiably angry if they were *not* instructed that their punitive damage award should be reasonably related to actual damages awarded, only to learn later that the amount they awarded was set aside as excessive. The jury is more likely to return a punitive damage award that can withstand a constitutional excessiveness challenge if it is instructed that the punitive award is to bear a reasonable relationship to compensatory damages, as *Campbell* requires.

3. The Third Guidepost -- Civil Penalties in Comparable Cases -- Supports A Jury Instruction In Some Cases.

The Committee initially proposed a final paragraph in IUCJI 210.1 allowing the jury in "applicable cases" to consider "civil or administrative penalties authorized or imposed in comparable cases." *See Campbell*, 123 S.Ct. at 1526 ("The third guidepost in *Gore* is the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases'"). This language was deleted based on objections that the third guidepost is more appropriately applied on judicial review of punitive awards. The Committee's cautious approach, however, need not preclude practitioners from proposing such language for jury instructions in particular cases.

> In *Shirley*, an insurance bad faith case, the Wyoming Supreme Court stated:
> In arriving at an appropriate amount of punitive damages with respect to insurance carriers, it would be appropriate to give as an instruction WYO. STAT. § 26-1-107 (1997), pertaining to general criminal and civil penalties.... While the [*Gore*] Court stops short of requiring these factors to be given to the jury as instructions, we are satisfied that the only sensible approach is to tell the arbiter of punitive damages what the rules are. Consequently such instructions should be given.

958 P.2d. at 1052. Thus, in cases where a statute or administrative rule prescribes a civil penalty for comparable conduct well below the amount of punitive damages sought by the plaintiff, defense counsel should consider requesting an instruction thereon to help guide the jury.

IDCA SCHEDULE OF EVENTS
2005 Meeting Dates

FEBRUARY 18, 2005
Iowa Defense Counsel Association
Board Meeting
Des Moines Club, Des Moines, Iowa
Ruan Building, 666 Grand Avenue
11:00 a.m.

MARCH 30-APRIL 1, 2005
Defense Research Institute
Executive Directors/State
Representatives Meeting
Chicago, IL

APRIL 8, 2005
Iowa Defense Counsel Association
Employment Law Seminar
Des Moines Golf & Country Club
1600 74th Street
West Des Moines, IA

Iowa Defense Counsel Association
Board Meeting
Des Moines Golf & Country Club
1600 74th Street
West Des Moines, IA
11:45 a.m.

JUNE 24, 2005
Iowa Defense Counsel Association
Board Meeting
Marshalltown, IA
Details TBD

AUGUST 4-6, 2005
Defense Research Institute (DRI)
Mid-Regional Meeting
Steamboat Springs, CO

SEPTEMBER 21, 2005
Iowa Defense Counsel Association
Board Meeting
Hotel Fort Des Moines
Des Moines, IA

SEPTEMBER 21-23, 2005
Iowa Defense Counsel
Annual Meeting & Seminar
Hotel Fort Des Moines
Des Moines, IA

OCTOBER 19-23, 2005
Defense Research Institute (DRI)
Annual Meeting
Sheraton Chicago Hotel and Towers
Chicago, IL

"THE RIGHT CASES FOR ARBITRATION"

. . . continued from page 3

- Cases where the establishment of precedent is important.
- Cases where an appeal is likely.
- Cases dependent upon extensive discovery.

The truth is that a good submission agreement can do much to bridge the gap between the foregoing categories of cases. For instance, a high/low agreement limiting the arbitrator's award to a certain dollar range can do much to protect against unreasonable risk on both sides of the case. This can be a reasonable trade-off for plaintiff's loss of jury access vs. defendant's access to appeal. However, the considerations noted above are worthy of reflection as you undertake the due diligence of dispute resolution: Negotiation vs. Mediation vs. Arbitration vs. Litigation. Hope this helps.

See you in ADR.

David J. Blair, formerly a federal magistrate and Iowa district court judge, resides in Cherokee, Iowa. He practices statewide, regionally and nationally as an arbitrator and mediator. He has limited his practice to neutral ADR since January 1991.

SUPREME COURT ADDRESSES MEDICAL EXPENSE ISSUE

. . . continued from page 4

Pexa decision suggests that the billed amount is relevant only if that amount was paid. What if a lesser amount is paid?

A third issue is created by Chapter 668.14. That section provides that one can show that a bill has been paid by a private insurance program but cannot show that it has been paid from a federal program. If the defendant wants to show that the smaller amount is the reasonable value and wants to prove it by showing that the bill was paid, does not Chapter 668.14 prevent the defendant from doing this?

What if the only way that a defendant can show that the smaller amount is the proper measure of damages is through an expert that such amount is the "reasonable value." Where is one going to find such an expert? The hospital or physician obviously thinks that their bill is reasonable. It will be difficult if not impossible to find experts to testify that in fact the larger amounts are unreasonable. Furthermore, this will only add to the cost of the litigation and create unnecessary and confusing issues.

Finally, notwithstanding everything that has already been said in this article, it does appear that the intent of the Supreme Court is that both numbers go to the jury--the big number which is charged by the provider and the smaller number which is actually paid in full satisfaction of the obligation. It is then up to the jury to determine how much the plaintiff shall receive. What is the jury to base this on? How can a jury determine whether $50,000.00 or $20,000.00 is the proper charge for a one month stay in the hospital? Furthermore, if the jury is generous and grants the plaintiff $50,000.00, is this not a windfall? The plaintiff is recovering $50,000.00 for medical expenses that neither he nor his insurance company ever had to pay.

The author of this article has long been a proponent of trying to get some legislative clarification. The *Pexa* decision does at least offer some guidelines to the trial court. However, it is believed that this is still a matter which it would be wise to have the legislature address.

WELCOME NEW MEMBERS

Megan M. Althoff Wolfe, Des Moines, IA

Corinne Butkowski, Cedar Rapids, IA

Troy A. Howell, Davenport, IA

Michael Paul Jurgens, West Des Moines, IA

Sasha L. Kirk, Cedar Rapids, IA

William J. Miller, Des Moines, IA

Clark I. Mitchell, Des Moines, IA

Kerrie M. Murphy, West Des Moines, IA

Loree A. Nelson, Des Moines, IA

Kurt S. Peterson, Des Moines, IA

David E. Schrock, Cedar Rapids, IA

Michael A. Sciortino, Council Bluffs, IA

Jason M. Steffens, Cedar Rapids, IA

Karin A. Stramel, Des Moines, IA

Matthew E. Thurber, Omaha, NE

Barry G. Vermeer, Des Moines, IA

Joel J. Yunek, Mason City, IA

40TH ANNUAL MEETING & SEMINAR HIGHLIGHTS

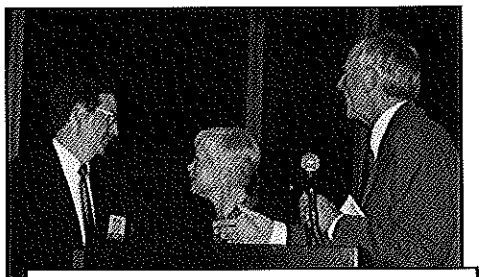
In honor and recognition of your longstanding commitment and service to the Iowa Defense Counsel Association

Your dedication to the preservation and furtherance of the civil trial system and your many professional and personal accomplishments.

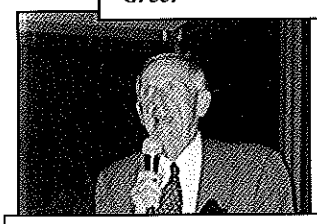
Mike Thrall, Sharon Greet and Executive Director/Lobbyist Bob Kreamer present State Representative Kraig Paulsen with the Public Service Award for "Improving the Administration of Civil Justice in Iowa" (not pictured: State Senator Maggie Tinsman)

Program Chair Sharon Greer

Sharon Greer presents long-time members Alanson Elgar, Raymond Stefani Sr., Herbert Selby and Robert Allbee with the Lifetime Membership Award. (not pictured Leroy Voigts)



President Rick Santi and Pam Nelson present Mike Thrall with the Ed Seltzinger Award

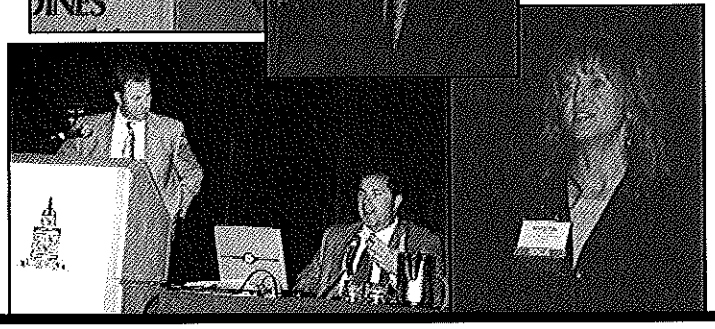


President Rick Santi kicks off the annual banquet

JUDGES & SPEAKERS

WEDNESDAY NIGHT WELCOME RECEPTION

Attendees enjoy networking at the Welcome Reception featuring the Rich Webster Band.

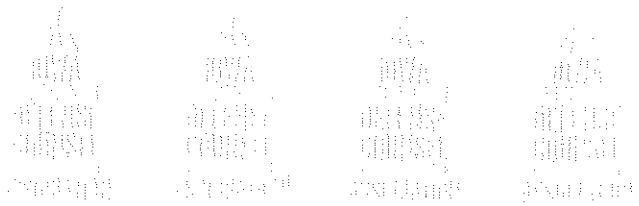


THANK YOU TO OUR EXHIBITORS AND SPONSORS OF THE WEDNESDAY NIGHT WELCOME RECEPTION:
Iowa Legal Aid, LexisNexis, MCS Litigation Support, Minnesota Lawyers Mutual Ins. Co., Thomson/West

FROM THE EDITORS . . .

I am e-mailing this editorial to Julie Garrison for printing on December 20. At this point the "fall issue" of 2004 will be complete. Thank goodness, because winter starts tomorrow. As you know, we do put out four issues a year but sometimes they are a bit tardy. The problems are (1) procrastination on our part; (2) procrastination on the writer's part; and (3) difficulty finding articles. There are hundreds of possible topics, but sometimes our small board of editors has difficulty finding people who will write about them. So I will once again make our annual plea to help us out. We all deal with interesting legal issues on a daily basis. It is a fairly simple matter to generate an insightful article based upon information and research that you already have in your office. Many members of our organization are leaders in their respective firms (although I use this term lightly). How about mandating that some bright young associate write an article for our magazine? In any event, this is like the annual "money talk" that you will hear at church. Sometimes it does some good and sometimes it doesn't, but you are going to hear it every year anyway.

Best regards for the holiday season.



Iowa Defense Counsel Association
431 East Locust Street, Suite, 300
Des Moines, IA 50309
Phone: (515) 244-2847
Fax: (515) 243-2049
E-mail: staff@iowadefensecounsel.org
Website: www.iowadefensecounsel.org

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