defense UPDATE

The Iowa Defense Counsel Association Newsletter Spring 2006 Vol. XV, No. 2

DEFENSIVE USE OF THE 'ECONOMIC LOSS DOCTRINE' IN CONSTRUCTION LITIGATION

By: Jeffrey D. Ewoldt, Whitfield & Eddy, P.L.C., Des Moines, IA

Lawyers who regularly practice construction law, or even those who've only occasionally gotten involved in construction cases, are well aware that litigating them is almost always a multi-party affair. Even if a construction case begins its life with only one plaintiff and one defendant, in most instances the caption will eventually grow to the point it overflows with multiple defendants and third-party defendants.

This phenomenon is rooted in the very nature of construction projects themselves. In all but the simplest of jobs, numerous contractors, subcontractors, and suppliers are involved, each engaged in different and specialized portions of the work. And they're all likely to be "pointing the finger" of blame at each other if a problem develops.

Unique challenges often await the attorney representing a construction company that is brought into a case as third-party defendant. He or she typically has the unenviable task of putting on a defense relatively late in the game, after the case has been on file for some time.

Recently, in several Iowa cases, an interesting trend has developed in which contribution and/or indemnity are the sole theories of recovery asserted against the third-party defendant construction contractor. This article explores how these theories are often untenable in light of the Economic Loss Doctrine as recognized by Iowa law and applied to construction cases, and why such claims against third-party defendants not in contractual privity with the third-party plaintiff should ultimately be dismissed.

Consider the following scenario: a city hires a concrete contractor to serve as general contractor on a project to build a street through a new subdivision. Because there has never been a roadway in the area before, the concrete contractor hires a subcontractor that specializes in excavation and earthmoving to construct the roadbed and build it "up to grade." This subcontractor is often cleverly referred to as "the dirt man" or "dirt subcontractor."

Because a creek runs through the area, a concrete culvert must first be installed to allow the water to pass under the street from one side to the other. The general contractor therefore enters into a second subcontract with another firm specializing in culvert construction to perform this work.

Assume that the parties get to work, the culvert is built on site, and, as required by its subcontract, the culvert builder places soil next to the finished culvert and compacts it, apparently to the project engineer's satisfaction. The dirt subcontractor then brings in additional soil for the roadbed and compacts it, again with no complaints from the project engineer. Finally, the general contractor comes in and paves the street. The project is completed and all appears well. But over the next couple of years, after a few freeze-thaw cycles, and just before the warranty period expires, something goes awry. Large sections of the street directly above the culvert have cracked and settled, far more unevenly than what is considered acceptable.

The city, of course, is not happy. The general contractor-concrete company, in an effort to maintain its reputation, pays to have the problem area excavated, the soil re-compacted, and the street re-paved. After tests confirm that soil around the culvert hadn't been properly compacted during the original construction, the general contractor files suit against the culvert subcontractor for breach of contract and negligence.

After about a year of litigation and discovery, the culvert builder then files a third-party claim against the dirt subcontractor for contribution. Because there was no contract between the two subcontractors, the culvert builder obviously has no grounds for a breach of contract claim directly against the dirt subcontractor. For good measure, the cul-

continued on page 6

Inside This Issue

MESSAGE FROM THE PRESIDENT

Michael W. Thrall

EXPRESS YOUR CONFIDENCE IN IOWA JURIES

I write today to urge all of you to express your confidence in the jury system. The jury system works, particularly in Iowa. Jurors as a whole work hard to follow the law and fairly decide the issues before them. Jurors ferret out weak claims. Jurors see through weak defenses. Justice is served.

We are slowly losing one of our more important institutions, an institution that is one of the hallmarks of our democratic society. We are losing this institution through lack of use. The decline of jury trials has been well publicized. We must ask ourselves why, and more importantly, to what extent are we to blame? Are we buying into the rhetoric of runaway jury verdicts? Are we perpetuating that myth through our case evaluations or pretrial reports? Are we blaming a bad result on a jury rather than acknowledging the strength of the opposing parties' case or defense?

Any trial, including a jury trial, entails some risk and uncertainty. However, many overreact to the aberrations of a few verdicts or a few judicial "hell holes" – and, in so doing, overestimate the real risks that exist. The system works in Iowa. Express your confidence in the jury system to your clients, colleagues, friends and family.

The confidence we should all have in this state's jury system does not mean that further improvements in the state's judicial system cannot be made. Furthermore, the substantive law juries apply evolves over time, and periodic change is often both necessary and desirable. Changes are, many times, required in substantive law. However, these changes are not, nor should they be, motivated by a fear of juries or their determinations. For as long as I have been associated with it, the Iowa Defense Counsel Association has consistently opposed caps on damage awards. Indeed, the Iowa Defense Counsel Association has supported legislation that would remove artificial caps on juries such as the five percent cap on fault assessed to one not wearing a seatbelt. However, the Association has supported legislation or submitted amicus briefs urging changes in the substantive law to be applied by juries. Such changes are fully consistent with an endorsement of the jury's ability and role in resolving disputes. Substantive law evolves both through court decisions and legislation. Most of the time, that evolution has very little to do with the role of a jury in the litigation process.

We need to try more jury cases. We are letting one of our most valuable legal resources slip away. We can no longer silently sit by and, through or reticence, tacitly endorse the misperceptions that lead to fewer jury trials. Rather, we must express our confidence in Iowa juries and their ability to fairly resolve disputes.

Michael W. Thrall

IDCA SCHEDULE OF EVENTS

2006 Meeting Dates

July 13-14, 2006
IDCA Board Meeting
The Suites of 800 Locust, Des Moines, IA

September 27, 2006
IDCA Board Meeting
Hotel Fort Des Moines, Des Moines, IA
Time TBD

September 28-29, 2006
42nd Annual Meeting & Seminar
Hotel Fort Des Moines, Des Moines, IA

EVERYTHING YOU WANTED TO KNOW ABOUT FORMER RULE 179(B) BUT WERE AFRAID TO ASK

By: Drew J. Gentsch and Gary D. Goudelock, Jr., Whitfield & Eddy, PLC, Des Moines, IA

I. Introduction.

Many Iowa practitioners are familiar with Iowa Rule of Civil Procedure 1.904 (still affectionately referred to as Rule 179 in many circles). Numerous reported Iowa Supreme Court cases demonstrate, however, that despite familiarity with the Rule, many are uncertain exactly how the Rule operates and exactly what it is. For example: does the Rule allow a court to decide issues that were not raised at trial? How is the Rule different than a Motion to Reconsider? When is the proper time to file a motion under the Rule? Let's start with the first and most obvious question –

II. What is Rule 1.904(b)?

Although the rule was amended and renumbered in 2001, to be effective beginning in

February of 2002, the amendment did not significantly alter the substance of the rule. Rather, the amendment merely added that "[r]esistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5)." Iowa R. Civ. Pro. 1.904(2). Case law determined under former rule 179(b) should remain relevant to cases and controversies which will now be governed by Rule 1.904(b).

In its current form, Iowa Rule of Civil Procedure 1.904, formerly numbered Rule 179, provides as follows:

> (1) The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law, and direct an appropriate judgment. No request for findings is necessary for purposes of review. Findings of a master shall be deemed those of the court to the extent it adopts them.
>
> (2) On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431 (5).

Subsection (1) has not been the subject of much litigation; however, the meaning and application of subsection (2) of this Rule, referable to the former 179(b), has been the subject of substantial debate over the years. This article will hopefully clear up some of the confusion that may surround this rule, and will give practical suggestions as to how to deal with it.

III. How does the rule operate?.

The time for filing a Rule 1.904(2) motion is ten days, as that is the due date for a JNOV or new trial motion under Rules 1.1003 and 1.1004, respectively. If a motion to expand the court's findings of fact and conclusions of law is not timely filed, it will not toll the 30-day time period for filing a notice of appeal. *Harrington v. State*, 659 N.W.2d 509, *rehearing denied* (Iowa 2003).

In *Meier v. Senecaut* the Iowa Supreme Court specifically defined the parameters of a Rule 1.904 (formerly 179(b)) motion. *See Meier v. Senecaut*, 641 N.W.2d 532,538-40 (Iowa 2002). In *Meier*, the Supreme Court stated that "when a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id*. (citations omitted). Further, the Court stated that "thus, it is a procedural mechanism that permits parties to request reconsideration of a ruling, and authorizes the court to change its ruling." *Id*. (citations omitted). The Court also stated that "however, a Rule 1.904(2) motion is available only to address 'a ruling made upon [the] trial of an issue of fact without a jury.'" *Id*. (citations omitted). According to the court, "this does not mean a Rule 1.904(2) motion is not available to challenge an issue of law, but the legal issue must have been addressed by the court in the context of an issue of fact tried by the court without a jury. *See Bellach*, 573 N.W.2d at 905 (a rule 179(b) motion did not toll time to appeal because the motion did not raise a challenge to an issue of fact or to a legal issue reached in the context of an issue of fact)." Id. (additional citations omitted) (emphasis added). Finally, the Court stated that "when a ruling is strictly limited to a question of law, a motion to reconsider amounts to nothing more than a rehash of the legal question . . . a second hearing solely involving a legal issue is merely repetitive." *Id*. (citations omitted).

The ostensible purpose of the rule is this: to allow the trial court a chance to pass on a specific objection of a litigant, if an issue was raised in the trial court, but was not specifically addressed in the court's ruling. It is designed to avoid an oversight or mistake by the district court. *See In Interest of N.W.E.*, 564 N.W.2d 451 (Iowa Ct. App. 1997) (stating, when ruling fails to address an issue properly submitted, the method to preserve error for review is to file a motion to enlarge or amend the trial court's findings).

continued on page 9

IOWA'S RESCUE DOCTRINE AND COMPARATIVE FAULT – AN OPEN QUESTION AND SUGGESTED ANSWER

By: Thomas D. Waterman, Lane & Waterman LLP, Davenport, Iowa

The box office success of United 93 reflects America's reverence for heroes. The value we place on heroism not surprisingly is embodied in our law, specifically in the "rescue doctrine" that has a venerable history in this state. In *Clinkscales v. Nelson Securities, Inc*., 697 N.W.2d 836 (Iowa 2005), the Iowa Supreme Court applied the rescue doctrine to reinstate tort claims brought by a plaintiff restaurant patron (an active duty U.S. Marine) badly burned when he disregarded his own safety and the owner's command to leave by rushing up to a grease fire to attempt to close gas valves to prevent an explosion. *Id*. at 839-40. The District Court had granted the defendants' motion for summary judgment, ruling as a matter of law that plaintiff's injuries were caused by an open and obvious danger and the defendants' alleged negligence was not the proximate cause of plaintiff's injuries. *Id*. at 840. The Court of Appeals affirmed. The Supreme Court reversed, concluding that summary judgment was precluded by fact questions over applicability of the rescue doctrine. *Id*. at 844-46.[1] However, the high court observed, "[w]hether the risks of rescue are counted against the rescuer under the comparative-fault doctrine in Iowa is unsettled and not at issue in this appeal." *Id*. at 842 n.4. This article proposes that the answer to that open question is "yes"— a rescuer's tort claim should no longer be an all or nothing proposition after Iowa's adoption of comparative fault.

To frame the question and suggested answer, this article will review the history of the rescue doctrine; the treatment of the analogous sudden emergency doctrine under Iowa's Comparative Fault Act; cases from other jurisdictions squarely addressing the effect on the rescue doctrine of the adoption of comparative fault; and a forthcoming provision of the Restatement (Third) of Torts. First, it is timely to note that in response to *Clinkscales*, the ISBA Jury Instruction Committee drafted, and on April 28, 2006 approved a uniform civil jury instruction on the rescue doctrine (IUCJI 700.13), to be submitted for adoption at the ISBA Board of Governor's June meeting. The instruction will guide the jury in answering recurring questions of whether the rescuer was negligent, and whether the defendant's negligence in creating the peril that prompted the rescue is a proximate cause of the rescuer's harm. Without appellate guidance, the Committee appropriately refrained from addressing the effect of the rescuer's comparative fault. Rather, the committee noted that open question, and suggested using a special interrogatory.[2]

History of the Rescue Doctrine

Iowa courts have "liberally applied the rescue doctrine … for over 100 years." *Clinkscales*, 697 N.W.2d at 842. The law favors rescuers. Indeed, the United States Court of Appeals for the Fifth Circuit approved a jury instruction on the rescue doctrine that began: "[A] rescuer is favored in the eyes of the law." *Frederick v. Mobil Oil Corp*., 765 F.2d 442, 446 (5th Cir. 1985)(applying Louisiana law).[3] In

continued on page 11

1 Clinkscales is a per curiam decision that reads as if authored by Justice Michael Streit, who wrote a special concurrence in part and dissent in part, joined by Justices Ternus and Cady. A contrasting view of the facts is presented in the per curiam decision of the Court of Appeals. See 690 N.W.2d 698 (Table) 2004 WL 189826, *1 (Iowa Ct. App. Aug. 26, 2004).

2 The proposed instruction is reprinted here in full:

700.13 – Rescue Doctrine. A person who reasonably believes [another person][property] is in imminent and serious danger may choose to risk [his/her] own safety to attempt a rescue. The rescuer is not negligent if [his/her] conduct is that of an ordinarily prudent person under existing circumstances. The rescuer is not required to reach the same conclusion that others, by the exercise of hindsight and time for deliberation, might be able to suggest as a better course of conduct. While the rescuer need not make the wisest choice, [he/she] is negligent if the rescue itself is unreasonable or if the rescuer acts unreasonably in the course of it. If the rescuer's conduct was a normal or natural response to the apparent peril, the defendant's [in]action [creating/failing to prevent] the peril is a proximate cause of the rescuer's harm.
The amount of a risk a rescuer reasonably can undertake increases with the value of the object of the rescue.
[If applicable, add: You may consider whether the rescuer was told to leave or refrain from the rescue as one factor in deciding whether (he/she) acted reasonably.]
The rescue doctrine applies even if no danger was actually imminent, so long as the rescuer reasonably believed that imminent danger existed. However, the rescue doctrine no longer applies after the apparent danger has subsided.

Authorities:
Clinkscales v. Nelson Securities, Inc., 697 N.W.2d 836, 841-44 (Iowa 2005)
Kester v. Bruns, 326 N.W.2d 279, 282-83 (Iowa 1982)
Henneman v. McCalla, 260 Iowa 60, 72, 148 N.W.2d 447, 454-55 (1967)
Johannsen v. Mid-Continent Petroleum Corp., 232 Iowa 805, 810-13, 5 N.W.2d 20, 23-25 (1942)

Notes:
This instruction should not be submitted if the claimant is an emergency responder subject to the "firefighter's rule." See Rennenger v. Pacesetter Co., 558 N.W.2d 419, 421-23 (Iowa 1997).

"Whether the risks of rescue are counted against the rescuer under the comparative-fault doctrine in Iowa is unsettled[.]" Clinkscales, 697 N.W.2d at 842 fn. 4. Consider using a special interrogatory.

THE "REVERSE CRASHWORTHINESS" DEFENSE

"THE CASE FOR THE "HELMET DEFENSE" IN IOWA IN THE WAKE OF THE BEN ROETHLISBERGER CRASH"

By: Kevin M. Reynolds, Whitfield & Eddy, PLC, Des Moines, IA

I. Introduction.

The "crashworthiness" doctrine in product liability affords plaintiffs an opportunity to recover when a motor vehicle seller markets a product that does not reasonably reduce the severity of injury in foreseeable accidents. This doctrine originated with *Larsen v. General Motors Corp*., 391 F.2d 495 (8th Cir. 1968). In Iowa, a particularly egregious result may obtain in such a case by virtue of the 5-4 decision (with a strident dissent) in *Reed v. Chrysler Corp*., 494 N.W.2d 224 (Iowa 1992). In *Reed*, the Iowa Supreme Court held that a plaintiff's fault in causing an accident is not relevant or admissible in the trial of a crashworthiness case.[1] Notably, *Reed's* onerous causation rule is contrary to Section 16 of the Restatement (Third) of Torts, Products Liability (1997) and the majority of jurisdictions which have grappled with this issue.

The reach of the crashworthiness doctrine was extended in Iowa to many other fact situations in the case of *Hillrichs v. Avco Corp*., 478 N.W.2d 70 (Iowa 1991), when the theory of "enhanced injury" was adopted. Under enhanced injury, the tactical advantages of the crashworthiness doctrine was extended to product suppliers who are not engaged in marketing motor vehicles but instead, sell virtually any type of product that has the potential of causing injury, the severity of which might conceivably be reduced by some alternative design.

How can product defendants use *Reed* and *Hillrichs* to their advantage? The answer may be this: by alleging and proving the "reverse crashworthiness" defense. Contrary to popular belief, "reverse crashworthiness" is not where an airbag deploys when an SUV backs up and hits something. "Reverse crashworthiness," a term coined by the author and not heretofore seen or used in the law, is simply a means of defending a products case (whether it is crashworthiness, enhanced injury or neither) *by arguing and proving that a particular plaintiff had a duty to reduce or negate the severity of an injury that was caused by that plaintiff's own fault*. This defense theory is actually supported by language in the Iowa Comparative Fault Act found at Section 668.1(1) Iowa Code (2005).

Some of the fact situations where this defense may apply include: failure to wear a protective helmet on a motorcycle, moped, bicycle or roller blades; failure to wear protective equipment in sports activities; failure to wear personal protective equipment (PPE), such as a hard hat, safety glasses, or steel-toed work boots; failure to wear protective garments, for example, in a foundry or biological laboratory; failure to "tie off" or wear a safety harness when working at height from a ladder, scaffold, or aerial work platform; or failure to wear a seat belt in a case where plaintiff is injured and alleges "crashworthiness" defects in the motor vehicle.[2]

II. The Legal Basis for the "Reverse Crashworthiness" Defense in Iowa.

The Iowa Comparative Fault Act, Section 668.1(1) provides as follows:

> As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, *and unreasonable failure to avoid an injury* or to mitigate damages."
>
> (Emphasis added)
>
> In addition, Section 668.1(2) provides that:
> The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault.

"Reverse crashworthiness" is simply conduct of the plaintiff which has made plaintiff's injury more severe, or caused an "enhanced injury." This conduct is "fault" under the statute and may be used to diminish or bar plaintiff's recovery in a particular case. This defense may apply in a crashworthiness case, an enhanced injury case, or virtually any, garden-variety product liability or personal injury case, *so long as it appears that plaintiff's injuries have been increased or made more severe due to plaintiff's conduct*. Under Chapter 668 of the Iowa Code this defense may be based on plaintiff's unreasonable failure to avoid an injury as set forth in the second sentence of Section 668.1(1).

Besides the potential reduction of plaintiff's recovery, another potential advantage for defendants is this: if the jury determines that plaintiff was more

continued on page 15

1 Importantly, *Reed* did hold, however, that if plaintiff's conduct is a proximate cause of the enhanced injury, then such conduct would be admissible. *Id*. at 230. For example, if a plaintiff is speeding, the crash forces inherent in the collision at the speed involved might very well be a proximate cause of the alleged "enhanced injury."

2 I would also list "failure to use a child safety seat," were it not for the statutory proscription against such evidence set forth in Iowa Code Section 321.446(6)(2005).

DEFENSIVE USE OF THE 'ECONOMIC LOSS DOCTRINE' IN CONSTRUCTION LITIGATION . . . *continued from page 1*

vert builder also sues the project engineer for contribution and indemnity.

The question present is this: Can the defendant/third-party plaintiff (the culvert subcontractor in the example above) actually prevail on its third-party claims for contribution and/or indemnity against its fellow subcontractors or the project engineer? The answer, of course, is based on the nature of substantive claims that the plaintiff originally pleaded against the defendant/third-party plaintiff.

Typically, those claims will be for breach of contract and negligence, as in the example described above. Unfortunately for the defendant/third-party plaintiff, neither of those theories may suffice to support claims of contribution and indemnity against the third-party defendants. Here's why:

a. Negligence and the Economic Loss Doctrine

Iowa's appellate courts have consistently held that "a plaintiff cannot maintain a claim for purely economic damages arising out of [a] defendant's alleged negligence." *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (citing *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984); *Nelson v. Todd's Ltd.*, 426 N.W.2d 120, 123 (Iowa 1988); *Richards v. Midland Brick Sales Co., Inc.*, 551 N.W.2d 649, 650 (Iowa Ct. App. 1996). This is what has come to be known as the "economic loss doctrine," a well-established rule stating that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable. *Cunningham v. PFL Life Ins. Co.*, 42 F. Supp. 2d 872, 887 (N.D. Iowa 1999) (citing *Nelson*, 426 N.W.2d at 123). Thus, under Iowa law, the remedy for unfulfilled expectations of a service or product rests in contract, not in tort law. *Determan*, 613 N.W.2d at 263.

The Iowa Supreme Court first examined the application of the economic loss doctrine in 1984 in *Nebraska Innkeepers*, a case in which several Nebraska businesses alleged that they lost revenue because a bridge across the Missouri River that "served as an artery of commerce" was closed due to structural problems. *Nebraska Innkeepers*, 345 N.W.2d at 125. The plaintiffs sued the bridge contractor, among others, seeking recovery for "economic loss such as reduced income, increased expenses, and diminution of the value of investments resulting from the closing of the bridge." *Id.* at 126. After analyzing the approach taken by numerous other jurisdictions, the Iowa Supreme Court adopted the economic loss doctrine, holding that a plaintiff cannot recover for purely economic loss, in the absence of physical injury, against a defendant who has acted negligently. *Id.* at 128.

Notably, The Iowa Supreme Court has applied the economic loss doctrine in at least two cases that arose from disputes over construction projects. *See Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000); *Flom v. Stahly*, 569 N.W.2d 135 (Iowa 1997). In *Determan*, a home buyer filed a negligence action against the sellers, seeking recovery of costs to repair significant structural problems she discovered after the purchase, as well as compensation for loss of use, inconvenience, emotional distress, and mental pain and suffering. *Determan*, 613 N.W.2d at 260-61. The buyer alleged specifically that the home's faulty design and poor workmanship had resulted in serious moisture problems and structural flaws that rendered the roof susceptible of collapsing. *Id.*

Affirming the district court's decision granting the seller's motion for directed verdict, the Iowa Supreme Court held that the buyer could not recover against the sellers under a negligence theory for the defective condition of the home. *Id.* at 263-64. Although the home's defects presented "a genuine safety hazard to persons and property," the roof had not actually collapsed. *Id.* at 263. The injury for which recovery was sought was limited to repair of the defective construction. *Id.* The buyer was not seeking to recover damages from any "sudden or dangerous occurrence;" rather, the damages resulted from the deterioration of the house due to its poor construction. *Id.* Accordingly, the Iowa Supreme Court held that the buyer's claim was based on her unfulfilled expectations with respect to the quality of the home she purchased, meaning her remedy was in contract law, not tort law. *Id.*

Thus, a construction litigation defendant's claim of contribution and indemnity against a third-party defendant construction subcontractor, seeking contribution or indemnity if found liable on the original plaintiff's claim of negligence, fails as a matter of law. Because the Economic Loss Doctrine prevents the plaintiff from recovering damages for purely economic losses under a negligence theory, so too, is the third-party plaintiff unable to sustain a contribution/indemnity claim on that basis.

b. Breach of Contract

Nor can the construction litigation defendant likely rely upon the original breach of contract action in seeking to impose liability upon a third-party defendant subcontractor for contribution or indemnity. The right of contribution in Iowa is available exclusively in cases where a tort has been pleaded and proven. The right of contribution in Iowa is governed by statute, specifically Iowa Code section 668.5, part of

continued on page 7

DEFENSIVE USE OF THE 'ECONOMIC LOSS DOCTRINE' IN CONSTRUCTION LITIGATION . . . *continued from page 6*

the comparative fault act, which states:

> A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them.

Iowa Code § 668.5(1). Thus, under Iowa law, there is no right of contribution from one who is not a joint tortfeasor.

While Iowa's appellate courts have not had an opportunity to directly address this issue in a construction case, courts in New York and North Carolina have declined to allow contribution between two parties whose potential liability to a third party is for economic loss only resulting from a mere breach of contract. *See, e.g., Board of Education of Hudson City School District v. Sargent, Webster, Crenshaw & Folley*, 517 N.E.2d 1360 (N.Y. 1987); *Kaleel Builders, Inc. v. Ashby*, 587 S.E.2d 470 (N.C. Ct. App. 2003). "It is well settled that a defendant may not seek contribution from other defendants where the alleged 'tort' is essentially a breach of contract claim." *Tempforce, Inc. v. Municipal Housing Authority of Schenectady*, 634 N.Y.S.2d 827, 828 (N.Y. App. Div. 1995) (citing *Board of Education*, 517 N.E.2d at 1364-65).

In *Board of Education of Hudson*, a school district hired an architectural firm to prepare plans for a building, supervise its construction, and inspect it. The district also entered into an agreement with a contractor to perform the construction work. When the building's roof began to leak, the district brought an action against the architects and the contractor for breach of contract. After the claims against the contractor were dismissed, the architectural firm filed a third-party suit against the contractor for contribution or indemnification. The contractor moved to dismiss for failure to state a claim.

The New York Court of Appeals, the highest appellate court in that state, held that purely economic loss resulting from a breach of contract did not constitute "injury to property" within the meaning of the New York statute addressing contribution. *Board of Education of Hudson*, 517 N.E.2d at 1364. The court observed that a contracting party's liability was limited to damages that were reasonably foreseeable at the time the contract was formed, and therefore held that the contribution claim against the contractor was properly dismissed. *Id.* at 1364. The court explained:

> We find nothing in the legislative history or the common-law evolution of the statute on which to base a conclusion that [the New York contribution statute] was intended to apply in respect to a pure breach of contract action such as would permit contribution between two contracting parties whose only potential liability to the plaintiff is for the contractual benefit of the bargain. To permit apportionment of liability, pursuant to [the contribution statute], arising solely from breach of contract would not only be at odds with the statute's legislative history, but also do violence to settled principles of contract law which limit a contracting party's liability to those damages that are reasonably foreseeable at the time the contract is formed.

Id. (footnotes omitted).[3]

The reasoning and holding of *Board of Education of Hudson* is directly applicable to the factual scenario set forth above. New York's contribution statute, Civil Practice Law and Rules 1401, is substantially similar to its Iowa counterpart, Iowa Code section 668.5. Section 1401 states, in relevant part:

> two or more persons who are subject to liability for damages *for the same personal injury, injury to property or wrongful death*, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

N.Y. C.P.L.R. 1401 (emphasis added); *cf.* Iowa Code § 668.5(1) (declaring a right of contribution among two or more persons who are liable "for the same injury, death, or harm").

Iowa law also shares common ground with New York in that both states have recognized longstanding principles of contract law which limit a contracting party's liability to those damages that are *reasonably foreseeable* at the time the contract is formed. *See Midland Mutual Life Insurance Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998); *Board of Education of Hudson*, 517 N.E.2d at 1364 (citing Restatement (Second) of Contracts § 351(1)). As explained by the Iowa Supreme Court, "damages based on breach of a contract must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement." *Midland*, 579 N.W.2d at 831; *accord Magnusson Agency v. Public Entity National Co.-Midwest*, 560 N.W.2d

continued on page 8

[3] It is noteworthy, as well, that the court stated it was not persuaded that it should create a common-law right of contribution in contract actions. *Board of Education of Hudson*, 517 N.E.2d at 1365.

DEFENSIVE USE OF THE 'ECONOMIC LOSS DOCTRINE' IN CONSTRUCTION LITIGATION . . . *continued from page 7*

20, 27 (Iowa 1997); *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994) ("Distinct from the general rule for damages based on commitment of a tort, damages based on breach of a contract must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement.").

On this particular point, the New York Court of Appeals in *Board of Education of Hudson* expressly found that the contractor was entitled to expect at the time it contracted with the school district that its liability would be determined by its *own contractual undertaking*. In the court's view, the contractor could not later be confronted with potential liability based on the promise made by the architectural firm in its separate contract with the district. *Id.* at 1364-65.

Similarly, in the example above, the dirt subcontractor was entitled to expect that its liability on the street construction project in question, if any, would be determined *exclusively by its contractual undertaking with the general contractor*. The dirt subcontractor cannot be required to defend contribution claims and face potential liability based on a promise made by the *culvert builder* in its separate contract with the general contractor.

The North Carolina Court of Appeals has rendered a similar opinion in a factually analogous construction case. *See Kaleel Builders, Inc. v. Ashby*, 587 S.E.2d 470 (N.C. Ct. App. 2003). The general contractor entered into an agreement with a homeowner for the construction of a residence. The general contractor also entered into agreements with various subcontractors and suppliers for labor and materials. For reasons unexplained, construction of the residence was halted, and the owner filed a demand for arbitration against the general contractor for allegedly defective construction, including the work of the subcontractors and the design/construction supervision of the architect. *Kaleel Builders*, 587 S.E.2d at 473.

The general contractor then brought suit against the subcontractors and architect, alleging breach of contract, negligence, and seeking indemnification or, in the alternative, contribution. The trial court dismissed the claims against the subcontractors and entered summary judgment in favor of the architect. The general contractor appealed, arguing that it was error for the trial court to fail to recognize its theories of indemnity or contribution. The defendant subcontractors, however, argued that the facts of the case precluded plaintiff general contractor's use of indemnification and contribution as prayers for relief. *Id.*

The North Carolina Court of Appeals agreed with the subcontractors. Specifically, the court found the general contractor's claims of negligence and contribution were barred under clear and longstanding case law holding that there can be no negligence claim "where all rights and remedies have been set forth in the contractual relationship." *Kaleel Builders*, 587 S.E.2d at 476. The court further explained:

> A tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Id. The court expressly held that because the general contractor was unable to plead a cause of action in tort, *its contribution theory of recovery failed as a matter of law*. *Id.* The court based this conclusion on the fact that the right of contribution is governed by provisions of the North Carolina comparative fault act, which, not incidentally, are similar to the contribution provisions of Iowa's and New York's statutes. The court concluded:

> Under this statute, there is no right to contribution from one who is not a joint tort-feasor. Therefore, by clear language of the statute, plaintiff is not entitled to contribution for a claim sounding only in contract. Without a tort, there can be no tort-feasor; and without a tort-feasor, there can be no right to contribution under the [comparative fault act]. Thus, as a matter of law, plaintiff states no claim that could entitle it to any future right to contribution from defendant subcontractors and the trial court's dismissal was proper.

Id. at 477 (internal citations omitted).

Thus, in the scenario discussed above, the dirt subcontractor had no contractual relationship with its fellow subcontractor, the culvert builder. The dirt subcontractor's agreement and obligations ran to the general contractor. The culvert builder was also a subcontractor which contracted with the general contractor. No contractual privity existed between the dirt subcontractor and the culvert builder.

Because contractual privity between the two subcontractors is absent, the culvert builder would have no

continued on page 19

EVERYTHING YOU WANTED TO KNOW ABOUT FORMER RULE 179(B) BUT WERE AFRAID TO ASK . . . *continued from page 3*

IV. Does the rule apply to rulings on motions for summary judgment?

Iowa law formerly held that this rule did not apply to a court's ruling on a summary judgment motion. This was because under subsection (1), in such a procedure the court was not "trying an issue of fact without a jury," but was instead making a legal ruling that no such material or genuine issues of fact existed in the case. Other cases have held that some rulings on summary judgment motions cannot be "reconsidered" under this rule. *See, e.g., Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393 (Iowa 1988) (neither rule 179(b) nor rule 252 relating to vacating a judgment apply to a party's "motion to reconsider" a trial court's grant of summary judgment).

In later cases the Court has found that the rule did, in some circumstances, apply to a trial court's ruling on a motion for summary judgment, especially where the ruling was dispositive of the case. See Bill Grunder's Sons Constr., Inc. v. Ganzer, 686 N.W.2d 193 (Iowa 2004) (finding contractor waived argument on appeal in a mechanic's lien case, where it did not file a resistance to mortgagee's motion for summary judgment, and did not file a motion to enlarge or amend findings following entry of summary judgment; argument was not made to the trial court, and the trial court had no opportunity to pass upon it). This view is codified in the current Iowa Rules of Civil Procedure. Iowa R. Civ. Pro. 1.981(3) (2005) (stating "[i]f summary judgment is rendered on the entire case, rules 1.904(2) shall apply").

V. What about "motions to reconsider" under Iowa law?

In reviewing the Iowa Rules of Civil Procedure, it appears that there is no specific rule that provides for "motions to reconsider." However, there is common-law authority under Iowa law for such motions. *See, e.g., State v. Kirschbaum*, 491 N.W.2d 199 (Iowa App. Ct. 1992) (stating that motion to reconsider may be properly granted prior to final judgment). The Iowa Supreme Court has heard arguments that "all motions predating the rules of civil procedure, including the motion to reconsider, have either been merged into the present procedural rules or abolished." *Lagle*, 430 N.W.2d at 395. The Court rejected this argument, sustaining the existence of motions to reconsider based on "[a] district court's power to correct its own perceived errors...as long as the court has jurisdiction of the case and the parties involved." *Id.* at 396.

Even if there is authority for a court to consider a "motion to reconsider," a key consideration is this: what effect will the filing of such a motion have on the "running" of your 30-day time period within which to file an appeal? Notably, Iowa Rule of Appellate Procedure 6.5 does not list a "motion to reconsider" as the type of post-trial motion that will "toll" the running of the 30-day time period within which to file an appeal to the Iowa Supreme Court. *See* Iowa R. App. 6.5(1). However, a motion under Rule 1.904(2)(to "enlarge or amend" findings) is listed. This means, that in order for a "motion to reconsider" to toll the running of the 30-day time period within which to file the appeal to the Iowa Supreme Court, it must, in substance be a motion under Rule 1.904(2).

It is important to remember that a court will look at the content of a motion rather than the label given it to determine its real nature. *Lagle*, 430 N.W.2d at 395. A "motion to reconsider" will be considered a motion under Rule 1.904(2) "only when addressed to a ruling made upon trial of an issue of fact without a jury," or when summary judgment has disposed of an entire case, or in a proceeding for judicial review of agency action under Rule 1.1603. *Beck v. Fleener*, 3786 N.W.2d 594, 296 (Iowa 1985). This means that a "motion to reconsider" that "'amount[s] to no more than a rehash of legal issues raised – and decided adversely to [a party]" will not be considered a motion under Rule 1.904(2) because such motions address only legal issues. *See, e.g., Explore Information Services v. Court Information System*, 636 N.W.2d 50 (Iowa 2001) (holding that motion to reconsider did not toll 30-day time period for appeal); *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903 (Iowa 1998) (stating that appeals from orders denying motions to reconsider previous ruling raise no legal question; an appeal ordinarily must be taken from a ruling in which error is said to lie); *Boughton v. McAllister*, 576 N.W.2d 94 (Iowa 1998) (finding that multiple motions to reconsider that address the same issues are improper and will not toll the time for taking an appeal).

To conclude, a "motion to reconsider" is not the same thing as a Rule 1.904(2)/179(b) motion, and will <u>not</u> have the effect of tolling of your appeal, unless the appellate court ultimately determines that your "motion to reconsider" is, in fact, a motion under Rule 1.904(2).

VI. What pitfalls for the unwary?

This rule, if misinterpreted or misapplied, can cause serious, fatal problems. This is clearly one of those areas of the law where a so-called "technicality" can sound the death knell for your case. This is one of the reasons why we wanted to do this article: to identify this specific "booby trap." One problem

continued on page 10

EVERYTHING YOU WANTED TO KNOW ABOUT FORMER RULE 179(B) BUT WERE AFRAID TO ASK . . . *continued from page 9*

that can occur is this: suppose a litigant files a 1.904(2) motion, but the court later determines that the motion was *improperly filed*. What if the 30-day time period for the filing of an appeal to the Iowa Supreme Court has run in the meantime? What if the district court judge did not even rule on the motion within 30 days? It is not difficult to envision a situation where the right to appeal is lost because of a mistake by counsel in applying this rule, and in fact, many of the cases cited in this article demonstrate that failure to properly file a Rule 1.904(2) motion that is, in fact, a Rule 1.904(2) motion, will deprive the Supreme Court of jurisdiction to hear an appeal.

The Supreme Court of Iowa has on many occasions examined the issue of timeliness of appeal related to a Rule 1.904(2) motion. *See Federal American International, Inc. v. Om Namaha Shiva, Inc*., 657 N.W.2d 481 (Iowa 2003). In *Federal American*, the Court affirmed that "an untimely post-trial Motion is defective and does not toll the running of the 30-day period within which to file an Appeal." *Id*. (citing *Lutz v. Iowa Swine Exports Corp*., 300 N.W.2d 109,110 (Iowa 1981)). In addition, the Court referred to Iowa Rule of Appellate Procedure 6.5, which states "though the general rule for filing a Notice of Appeal is 30 days after a final Judgment, Order, or Decree, there are certain enumerated exceptions. Rule 6.5 articulates the only types of post trial Motions which are deemed to extend the time for filing a Notice of Appeal: Motion for a New Trial, Motion for Judgment Notwithstanding the Verdict, and Motion to Enlarge the District Court's Findings of Fact and Conclusions of Law pursuant to Iowa Rule of Civil Procedure 1.904(2)."

The Iowa Court of Appeals ruled on this matter in *Hays v. Hays*, 612 N.W.2d 817,819 (Iowa App. 2000). In Hays, the appellate court examined a case where an order had been misfiled in the clerk's office. *See Id*. at 818. The misplaced order was file stamped August 12, 1998. *See Id*. While the defendant had filed a motion pursuant to Rule 1.904(2) on November 20, 1998, the appellate court upheld the lower court's overruling of the defendant's untimely post trial motion. *See Id*. The appellate court specifically stated "an untimely motion under Rule 1.904(2) will not toll the running of a thirty (30) day period within which an appeal must be taken . . . where as here the Rule 1.904(2) motion is untimely, the appeal time is computed from the date of the judgment that was the subject of the post trial motion." *Id*. at 819 (citations omitted).

Further, it is not a good enough answer to suggest that counsel "should avoid filing a 1.902(2) motion" altogether. That route may, in fact, cause your client to lose substantial legal rights in the case under the rubric of "failure to preserve error." *See, e.g., Gropengieser v. Life Safety Systems*, 666 N.W.2d 619 (Iowa Ct. App. 2002)(unreported)(worker's compensation claimant failed to preserve, for appellate review, issue of whether work comp commissioner had jurisdiction to impose the doctrine of equitable estoppel, where the district court did not rule on the issue, and claimant failed to file a motion requesting the court to enlarge its findings of fact and conclusions of law). Generally speaking, an appellate court will refuse to find error based on arguments that were not presented to the trial court; this is "hornbook" appellate practice and procedure.

VII. What Can the Savvy Practitioner Do?

The potential problem of losing your right to appeal, while awaiting a trial court's decision on your post-trial motion under this rule, is real. One suggested solution to this problem is this: file the Rule 1.904(2) motion if you truly feel that it is necessary and warranted under the circumstances, and do not hesitate to file such a motion; you may face serious consequences later if the court determines that you did not "preserve error." Then, if the 30-day deadline for an appeal to the Supreme Court approaches, go ahead and file a Notice of Appeal in the district court. Under the law, the filing of the Notice of Appeal and subsequent perfection of the appeal will divest the trial court of jurisdiction over the case, effectively preventing the district court from ruling on your post-trial motion. *See, e.g, IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621 (Iowa 2000). However, once the appeal is established, file a "Motion for Limited Remand," asking the Supreme Court to remand the case to the district court judge for purposes of ruling on the post-trial motion, *only*. If the appellate court denies your motion, it would seem that it would be hard-pressed later to find that you or your client had not properly "preserved error" by failing to file a Rule 1.904(2) motion in the district court. On the other hand, if your motion for limited remand is granted, then you can obtain a ruling on your post-trial motion, without risking your right to appeal from the final judgment.

In order to avoid unnecessary confusion, if you have a Rule 1.904(2) motion, it should be correctly captioned "Motion to Enlarge or Amend Findings" pursuant to Iowa R. Civ. P. 1.904(2), rather than calling it in sloppy fashion a "Motion to Reconsider." Although as noted, because the Court will look to the substance of the mo-

continued on page 19

IOWA'S RESCUE DOCTRINE AND COMPARATIVE FAULT – AN OPEN QUESTION AND SUGGESTED ANSWER . . . *continued from page 4*

Johannsen, the Iowa Supreme Court observed:

> [Plaintiff] was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors….

5 N.W.2d at 11. Similarly, the Wisconsin Supreme Court recognized that "rescuers are given special consideration under the law," and repeated a frequently quoted century-old description of the doctrine:

> A rescuer – one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril – ought not to hear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow creature imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence.

Cords v. Anderson, 259 N.W.2d 672, 682 (Wis. 1977)(quoting *Corbin v. City of Philadelphia*, 45 A. 1070, 1072-1073 (Pa. 1900)).

The *Clinkscales* Court noted the rescue doctrine "involves heroic people doing heroic things," and quoted Justice Cardozo's summary of the doctrine as follows:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid. The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path … The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

697 N.W.2d at 841 (quoting *Wagner v. Int'l Ry.*, 232 N.Y. 176, 133 N.E. 437, 437-38 (1921)).

The rescue doctrine was a recognized exception to the harsh "all or nothing" contributory negligence bar. *See Goetzman v. Wichern*, 327 N.W.2d 742, 753 (Iowa 1982). Since *Goetzman* and the enactment of the Iowa Comparative Fault Act (Chapter 668) in 1984, appellate decisions on the Iowa rescue doctrine have not adjudicated comparative fault issues, but rather decided questions of proximate cause, typically whether "the rescuer's actions were a superseding cause of the rescuer's injuries." *Clinkscales*, 697 N.W.2d at 842. Because *Clinkscales* reversed a summary judgment, jury instructions were not at issue in that appeal nor did the Court need to decide whether comparative fault applied.

Inevitably, there will come an Iowa case in which the jury finds both that a rescuer was negligent and that the defendant's negligence (in creating the peril) was a proximate cause of the rescuer's harm. The question whether comparative fault applies will need to be answered. The starting point of the analysis should be the Iowa Comparative Fault Act, which applies to cases involving the fault of one or more parties. *See generally Waterloo Savings Bank v . Austin*, 494 N.W.2d 715, 717 (Iowa 1993). Chapter 668 defines "fault" to include "one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others[,]… an unreasonable assumption of risk not constituting an enforceable express consent… [and] an unreasonable failure to avoid an injury[.]" Iowa Code § 668.1. The plain language of this statute applies to a rescuer the jury finds acted unreasonably (negligently) in initiating or performing the rescue. The statute bars any recovery by a party found more than fifty percent at fault and reduces proportionately the recovery of negligent party found less than fifty percent at fault. *Id*. § 668.3(1)(a).

Treatment of the Analogous Sudden Emergency Doctrine

Why wouldn't comparative fault apply to a negligent rescuer? The analysis presumably should not simply stop after a look at Chapter 668 when our own state Supreme Court in *Clinkscales* noted the applicability of comparative fault to rescuers is "unsettled." 697 N.W.2d at 842 n.[4] The Sudden Emergency Doctrine is analogous.4 Our Court of Appeals has not-

continued on page 12

3 The drafters of proposed IUCJI 700.13 did not use such phrasing because it is inappropriate for the court to instruct the jury to "favor" a party – even a heroic rescuer.

IOWA'S RESCUE DOCTRINE AND COMPARATIVE FAULT – AN OPEN QUESTION AND SUGGESTED ANSWER . . . *continued from page 11*

ed, "[t]he purpose of a sudden emergency instruction when dealing with the fault of two competing parties becomes somewhat hazy when viewed in the comparative negligence context." *Miller v. Eichhorn*, 426 N.W.2d 641, 644 (Iowa Ct. App. 1988), *overruled on other grounds in Greenwood v. Mitchell*, 621 N.W.2d 200, 207 (Iowa 2001). The *Eichhorn* court discussed cases from other jurisdictions disavowing the sudden emergency doctrine after comparative fault schemes were adopted. 426 N.W.2d at 644.

Significantly, however, the Iowa Supreme Court has approved giving the "sudden emergency" jury instruction in comparative fault cases, stating:

> The question is whether the [sudden emergency] instruction retains its validity when only common-law negligence is alleged and the court has already instructed the jury to compare the fault of both parties. Unlike the doctrine of legal excuse – which exonerates a party from liability for negligence per se – the sudden emergency doctrine is merely an expression of the reasonably prudent person standard of care. It expresses the notion the law requires no more from an actor than is reasonable to expect in the event of an emergency.
>
> We share the concern of the courts that have criticized the sudden emergency instruction for its tendency to unduly emphasize one aspect of the case. Our own instruction is particularly susceptible to that criticism. We believe, however, that a jury may be aided by a succinct and narrowly drafted instruction that tells it the actor is held only to the standard of reasonable care under the circumstances posed by the emergency. ***Thus we reject plaintiffs' argument that such an instruction has no place in a comparative fault scheme.***

Weiss v. Bal, 501 N.W.2d 478, 481 (Iowa 1993)(Emphasis added; citations and footnote omitted). *See also Mosell v. Estate of Marks*, 526 N.W.2d 179, 180-81 (Iowa Ct. App. 1994)(noting that *Weiss* "holds that the adoption of comparative fault does not destroy the sudden emergency doctrine").

It would be inconsistent to apply comparative fault to sudden emergency cases but not to rescue cases. It is classically a jury function to judge and compare the conduct of persons in stressful emergency situations – whether those attempting a rescue of another exposed to imminent danger, or a motorist confronted with a sudden emergency. *See Clinkscales*, 697 N.W.2d at 844. Given the overlap and similarities between the sudden emergency doctrine and the rescue doctrine, comparative fault principles should apply to both. Comparative fault was adopted "to ameliorate the harshness of the all or nothing approach of contributory negligence and to achieve fairness for all involved parties." *Alexander v. Medical Associates Clinic*, 646 N.W.2d 74, 86 (Iowa 2002)(citing *Goetzman*, 327 N.W.2d at 749). Under Iowa's comparative fault scheme, juries should be permitted to award a partial recovery to a negligent rescuer.

The Fate of the Rescue Doctrine Under Comparative Fault in other Jurisdictions

The *Clinkscales* Court's footnote included a "see generally" citation to an annotation entitled "Rescue Doctrine: Applicability and Application of Comparative Negligence Principles, 75 ALR 4th 875 (1990). *Clinkscales*, 697 N.W.2d at 842 n.4. A majority of the cases surveyed in that annotation held that comparative fault applies to rescuers. *See, e.g., Cords*, 259 N.W.2d at 683 ("In a comparative negligence jurisdiction such as Wisconsin, if the trier of fact finds that the rescue is unreasonable or unreasonably carried out the fact finder should then make a comparison of negligence between the rescuer and the one whose negligence created the situation to which the rescue was a response."); *Dehn v. Otter Tail Power Co*., 251 N.W.2d 404, 412 (N.D. 1977)(rescuer found twenty five percent negligent could still recover under North Dakota's comparative negligence doctrine). *See* additional cases compiled in 75 ALR 4th 875. Several cases declined to apply comparative fault because the rescuer was found not culpable.

A minority of courts declined to apply comparative negligence statutes to the rescue doctrine to allow full recovery for merely negligent rescuers. In those jurisdictions, the rescue doctrine permitted full recovery by a rescuer who did not act recklessly. *See, e.g. Furka v. Great Lakes Dredge & Dock Co*., 755 F.2d 1085, 1088-89 (4th Cir. 1985)(declining to apply Jones Act's pure comparative negligence scheme to older federal rescue doctrine permitting full recovery unless rescuer acted

continued on page 13

4 The Sudden Emergency instruction was amended by the ISBA Jury Instruction Committee April 28, 2006, subject to approval by the Board of Governors, with the addition of the italicized language:

IUCJI 600.75 – Sudden Emergency. A sudden emergency is an unforeseen combination of circumstances that calls for immediate action or a sudden or unexpected occasion for action. A driver of a vehicle who, through no fault of [his] [her] own, is placed in a sudden emergency, is not chargeable with negligence if the driver exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

IOWA'S RESCUE DOCTRINE AND COMPARATIVE FAULT – AN OPEN QUESTION AND SUGGESTED ANSWER . . . *continued from page 12*

wantonly and recklessly); *Ouellette v Carde*, 612 A.2d 687, 690 (R.I. 1992)(affirming denial of comparative negligence instruction in rescue case). The *Ouellette* court stated:

> We are of the opinion, however, that the comparative-negligence doctrine does not fully protect the rescue doctrine's underlying policy of promoting rescue. No common-law duties changed as a result of the enactment of Rhode Island's comparative-negligence statue, and there is nothing other than an individual's moral conscience to induce a person under no legal duty to undertake a rescue attempt. The law places a premium on human life, and one who voluntarily attempts to save a life of another should not be barred from complete recovery. Only if a person is rash or reckless in the rescue attempt should recovery be limited; accordingly we hold that the rescue doctrine survives the adoption of the comparative-negligence statute and that principles of comparative negligence apply only if a defendant establishes that the rescuer's actions were rash or reckless.

Id. Such cases are inapplicable in Iowa for two reasons. First, Iowa's rescue doctrine historically barred recovery by merely negligent as well as reckless rescuers. See *Clinkscales*, 697 N.W.2d at 842 ("The general rule was a rescuer would not be deemed to have broken the chain of causation or charged with contributory negligence for *reasonable* attempts to save the life or property of another.")(Emphasis added). Second, Iowa's comparative fault act includes recklessness as well as negligence within the types of "fault" to be compared. § 668.1.

In *Altamuro v. Milner Hotel, Inc*., 540 F.Supp. 870 (E.D. Pa. 1982), the federal district court predicted that the Pennsylvania Supreme Court would apply its newly enacted comparative fault statute to the rescue doctrine after abolishing the defense of contributory negligence. The *Altamuro* Court stated:

> Although no reported case has applied Pennsylvania's Comparative Negligence Statute to the rescue doctrine, the instant case clearly falls within the literal language of Act, which states that the Act is to be applied to "all actions brought to recover damages for negligence resulting in death or injury to a person or property…." 42 Pa. Cons. Stat. Ann. § 7102(a) (Purdon Supp. 1981)(emphasis added). Courts in other jurisdictions have applied their comparative negligence schemes in similar circumstances, holding that if "the trier of fact finds that the rescue is unreasonable or unreasonably carried out the factfinder should then make a comparison of negligence between the rescuer and the one whose negligence created the situation to which the rescue was a response." *Cords v. Anderson*, 80 Wis.2d 525, 548, 259 N.W.2d 672, 683 (1977). *Accord Ryder Truck Rental, Inc. v. Korte*, 357 So.2d 228, 230 (Fla. Dist. Ct. App. 1978).

540 F.Supp. at 876. *See also Pachesky v Getz*, 510 A.2d 776, 783 (Pa. Sup. 1986) (surveying authorities to conclude that Pennsylvania's comparative negligence statute applies to rescue doctrine). Similarly, as noted above, the literal language of Iowa Code Chapter 668 governs rescues in which alleged negligence of one or more parties causes personal injury or property damage. There is no good reason to refrain from applying Chapter 668 to rescues.

In *Sweetman v. State Highway Department*, 357 N.W.2d 783, 789 (Mich. Ct. App. 1984), the court noted that one purpose of the rescue doctrine historically was to "eliminate the absolute defense of contributory negligence" but that Michigan's adoption of comparative negligence rendered that rationale for the rescue doctrine "no longer compelling." The same is true in Iowa. *See Goetzman*, 327 N.W.2d at 753. Nevertheless, the *Sweetman* court held that comparative fault principles should be applied to rescues, stating:

> Where a plaintiff suffers an injury during the scope of a rescue, the trier of fact must first inquire whether a reasonably prudent person would have acted as the plaintiff did under the same or similar circumstances. In making this determination, the trier of fact must, as in all negligence cases, balance the utility of the actor's (in this instance rescuer's) conduct against the magnitude of the risk involved. In a rescue case, the extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate it.
>
> If it is found that the rescuer did not act reasonably in carrying out his mission, *i.e*., he was negligent, he should recover on-

continued on page 14

IOWA'S RESCUE DOCTRINE AND COMPARATIVE FAULT – AN OPEN QUESTION AND SUGGESTED ANSWER . . . *continued from page 13*

> ly the portion of the entire damages sustained by him as the defendant's negligence bears to the combined negligence of the plaintiff and the defendant.

357 N.W.2d at 789 (citations omitted). *See also LC Fox v. Travis Realty Co*., 635 N.E.2d 538, 541 (Ill. Ct. App. 1994)(holding Illinois comparative fault statute applied to rescuer attempting to save himself from stalled elevator). The reasoning of these cases applies equally to Iowa's statutory comparative fault scheme.

The Rescue Doctrine Under the New Restatement (Third) of Torts

Further support for applying comparative fault in rescue cases is found in the forthcoming Restatement (Third) of Torts: Liability for Physical Harm, § 32 (Proposed Final Draft No. 1, 2005), comment d. The Iowa Supreme Court has looked to the Restatement (Third) for guidance in answering questions of Iowa tort law. *See, e.g., Wright v. Brooke Group, Ltd*., 652 N.W.2d 159, 168-69 (Iowa 2002)(adopting Restatement (Third) Torts, Products Liability, §§ 1, 2). The Arizona Supreme Court recently followed this new Restatement to adopt the rescue doctrine in *Espinoza v. Schulenburg*, 129 P.3d 937, 939 (Az. 2006):

> If an actor's tortious conduct imperils another or the property of another, the scope of the actor's liability includes any physical harm to a person resulting from that person's efforts to aid or protect the imperiled person or property, so long as the harm arises from a risk that inheres in the effort to provide aid.

129 P.3d at 939 (quoting Restatement (Third) § 32 Proposed Final Draft No. 1). The *Espinoza* court also adopted the "firefighter's rule" as a limited exception to the rescue doctrine. [5] The Arizona Supreme Court relied on comment d to § 32 in stating:

> A rescued defendant might argue assumption of the risk of contributory negligence on the part of the rescuer. At the time the rescue doctrine developed, those defenses typically served as the complete bars to recovery. As a matter of policy, the rescue doctrine thus declared that a reasonable rescuer was not contributorily negligent and did not assume the risk of injury. ***Those defenses now operate only to comparatively reduce recovery***. *See* Restatement § 32 cmt. d.

129 P.3d at 939 n.1 (emphasis added).

Conclusion

In summary, comparing the fault of a rescuer is supported by: 1) the plain language of the Iowa Comparative Fault Act; 2) the Iowa Supreme Court's approval of giving the analogous "Sudden Emergency" instruction in comparative fault cases; 3) the majority of courts in other jurisdictions holding comparative fault applies to rescuers; and 4) the forthcoming Restatement (Third) of Torts § 32 cmt. d. Accordingly, this author concludes that Iowa Code Chapter 668 applies to rescues, and predicts that the Iowa Supreme Court ultimately will answer the question left open in Clinkscales by holding that the risks of rescue indeed are counted against the rescuer under the comparative-fault doctrine in Iowa. The fate of the rescuer's tort claim should not be decided by an all or nothing roll of the dice after Iowa's adoption of comparative fault. ■

5 The *Espinoza* Court limited the firefighter's rule defeating liability to "when a firefighter's presence at a rescue scene results from the firefighter's on-duty obligations as a firefighter" and declined to apply it when he or she is engaged in a rescue effort while off-duty. 129 P.3d at 940-41. Iowa courts have applied the firefighter's rule to on-duty police and firefighters, but allowed recovery for injuries from conduct or conditions at the scene apart from that which summoned their arrival. See generally, *Rennenger v. Pacesetter Co*., 558 N.W.2d 419, 421-23 (Iowa 1997). Iowa courts have not yet addressed whether the firefighter's rule applies to off-duty police officers or firefighters, nor have Iowa appellate courts adjudicated whether the firefighter's rule applies to ambulance personnel or other emergency responders, whether on or off-duty. The *Espinoza* decision includes a good discussion of the policy arguments for limiting the scope of the firefighter's exception to the rescue doctrine. 129 P.3d at 941-42 (surveying authorities). In *Chapman v. Craig*, 431 N.W.2d 770 (Iowa 1988), Justice Larson authored a dissent (joined by Justices Harris and Snell) discussing the public policy rationales as follows:

> The fireman's rule is founded largely on public policy, a concern that, if a fireman (or similar public employee), is allowed to sue for injuries arising out of a call for assistance, it might discourage citizens from calling for help. See *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984). There is, however, no empirical data presented in this case, or in *Pottebaum*, to support that conclusion. In fact, I believe there is considerable doubt that the thought of possible tort liability would even enter the mind of a citizen contemplating a call for help. That is especially true now, it seems to me, when virtually all property owners are covered by insurance against premises injuries.
>
> On the other hand, there can be no doubt that in every case where the fireman's rule is invoked, another public policy is frustrated. That is the public policy favoring a party's right to seek reimbursement for injuries caused by the negligence of another. That right should not be denied a broad class of persons on the basis of a public policy as speculative as that supposedly underlying the fireman's rule.

431 N.W.2d at 773 (Larson, J. dissenting). See also *Cornwell v. State Farm Mut. Auto. Ins. Co*., 396 F. Supp. 2d 1020, 1028-29 (S.D. Iowa 2005)(Gritzner, J.)(holding that Iowa's "Fireman's Rule" is inapplicable to tort claim of police officer struck by fleeing criminal suspect). It appears likely that Iowa courts will view the firefighter's rule narrowly, to permit recovery more often.

THE "REVERSE CRASHWORTHINESS" DEFENSE . . . *continued from page 5*

than 50% at fault in causing enhanced injuries, then plaintiff may be barred completely from any recovery at all in the case.[3]

Established proximate cause law in Iowa supports this defense as well. "Proximate cause" in Iowa is defined as follows:

The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.

"Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

See Iowa Uniform Civil Jury Instruction No. 700.3 (January, 2004).

III. Plaintiff's unreasonable failure to avoid an injury.

This type of conduct is defined as "fault" under the Iowa Comparative Fault Act. *See* Iowa Code §668.1(1)(2005). Such conduct must have happened before an injury occurs. This "timing" issue is critical, since the Iowa Supreme Court has noted with regard to the defense of mitigation of damages, that if the conduct at issue did not occur after defendant's fault or after the accident occurred, then mitigation of damages is not involved. *See Meyer v. City of Des Moines*, discussed *infra*. Second, by definition, the conduct in question must be something that arguably could have "avoided" an injury, therefore, *a fortiori*, it must have occurred *before* the injury. *Id.*[4]

Two Iowa cases bear discussion on this issue: *Meyer v. City of Des Moines*, 475 N.W.2d 181 (Iowa 1991)(failure to wear a helmet is not relevant or admissible in a truck-moped accident case) and *Olson v. Prosoco*, 522 N.W.2d 284 (Iowa 1994)(defendant could not argue that plaintiff was at fault for not wearing safety goggles, where he suffered an eye injury after being splashed with product when opening a container of caustic solution).

"On June 12, 2006, Super Bowl quarterback Ben Roethlisberger, of the Pittsburgh Steelers, sustained serious head injuries in a motorcycle crash which would not have occurred had he been wearing a helmet. This incident has generated a public discussion of whether there should be a law requiring helmet use. Absent action by the Iowa Legislature, Chapter 668 of the Iowa Code as presently written provides a legal basis for Iowa courts to impose a common-law duty to wear a helmet. Mr. Roethlisberger stated upon release from the hospital that "if he ever rides a motorcycle again, he will always wear a helmet."

A. *A case study: the "helmet defense" and Meyer v. City of Des Moines.*

In *Meyer v. City of Des Moines*, 475 N.W.2d 181 (Iowa 1991), the court held that a child's failure to wear a helmet while riding a moped would not be considered "fault" in an accident where a city truck struck the moped, as it is not conduct that constitutes "failure to mitigate damages" under the Iowa Comparative Fault Act. *Id.* at 191. A major reason for this holding, according to the Court, was that the *failure to mitigate damages* defense involves conduct that occurs after an accident has taken place, not before. *Id.* at 188. The *Meyer* Court further held that there was no common-law duty for a moped operator to wear a helmet, because there is no *statute* in Iowa mandating the use of a helmet. *Id.* at 191.

Meyer is subject to serious question on at least three grounds. First, under the Iowa Comparative Fault Act, the defense of "unreasonable failure to avoid an injury" is separate and distinct from the defense of "failure to mitigate damages." They are not the same and it is apparent from *Meyer* that the Court has confused the two defenses. Second, simply because a *statute* does not mandate helmet use, does not mean that there is no *common-law duty* to wear a helmet. The common law is judge-made law by courts, not statutory law enacted by a legislature. Third, the Court's holding is contrary to the explicit language in Section 668.1(1) which permits a defendant to argue that a plaintiff's "unreasonable failure to avoid an injury" constitutes "fault" under the Iowa Comparative Fault Act.

In *Meyer*, the defendant offered expert testimony at trial about the enhancement of plaintiff's head injuries resulting from his failure to wear a helmet. *Id.* at 186. For whatever reason,[5] *Meyer* did not discuss or address in any manner a plaintiff's failure to wear a helmet as constituting "an unreasonable failure to avoid an injury" under the express terms of the Iowa Comparative Fault Act, in particular section 668.1(1) of the Iowa Code. To the author's knowledge, this specific issue has never before been decided under Iowa law.

B. *Courts in other jurisdictions*

continued on page 16

3 Defense counsel should be advised that plaintiff's counsel would likely argue that this finding would only prevent a recovery by plaintiff on the so-called "enhanced injury" portion of the claim, and would not affect the right to recover for any underlying, initial injury proximately caused by defendant's fault. This view, however, finds no support in the language of the Iowa Comparative Fault Act. Under the Act, "fault" is "fault," irrespective of whether it causes the accident or increases plaintiff's injury.

4 Some cases also discuss how plaintiff's conduct must have occurred *after* the defendant's negligent conduct. In most products cases, this element will easily be met: if the claim is defective design, that conduct occurred many months, if not years, before the subject accident and resulting injury occurred. In a product liability case, the defendant's conduct occurs when the product is designed, manufactured or provided with a warning or instruction, and not when the accident occurs.

5 For example, it is possible that the defendant in *Meyer* did not make this argument at trial or on appeal.

THE "REVERSE CRASHWORTHINESS" DEFENSE . . . *continued from page 15*

have permitted "non-use" of helmet evidence to reduce a plaintiff's recovery in an appropriate case.

Courts in numerous jurisdictions have permitted evidence of non-use of helmets in motorcycle accident cases where a plaintiff's injuries were caused or enhanced by the failure to wear a protective helmet. *See Meyer*, at 187 (recognizing in 1991, nearly 15 years ago, that a "growing" number of jurisdictions were permitting "evidence of non-use"). This is consistent with the foundational principles underlying comparative fault. The whole purpose undergirding comparative fault is to equitably distribute financial responsibility for damages for personal injuries among negligent parties in proportion to their causal fault for any harm sustained. *See Prior v. United States Postal Serv.*, 985 F.2d 440, 442-43 (8th Cir. 1993). Under a comparative fault system, the financial responsibility of parties for a claimant's injuries should be limited to the percentage of damage particularly caused by their negligence. *See, e.g., Hutchins v. Schwartz*, 724 P.2d 1194, 1198 (Alaska 1986) (finding that evidence regarding the failure to wear a seat belt upholds the purpose of comparative fault; defendants are only responsible for damages directly resulting from their negligence, not injuries which would have been prevented by using a seat belt); *Law v. Superior Court*, 755 P.2d 1135, 1139 (Ariz. 1988) (admitting seat belt evidence promotes primary goal of comparative fault, equitable apportionment of damages in direct proportion to culpability); *Insurance Co. of N. Am. v. Pasakarnis*, 451 So.2d 447, 452 (Fla. 1984) (noting that under comparative fault principles, liability should be directly proportionate to fault); *Lowe v. Estate Motors, Ltd.*, 410 N.W.2d 706, 714 (Mich. 1987) (recognizing that comparative fault apportions damages in relation to fault); *Halvorson v. Voeller*, 336 N.W.2d 118, 123 (N.D. 1983) (concluding that jury should have opportunity to consider claimant's failure to use a readily available, effective safety device when allocating responsibility for injuries). *See also E.g.*, Michael J. Weber, Annotation, *Motorcyclist's Failure to Wear Helmet or Other Protective Equipment as Affecting Recovery for Personal Injury or Death*, 85 ALR 4th 365 (2004).

Other cases which support the admissibility of a plaintiff-motorcycle operator's failure to wear a helmet include: *Nunez v. Schneider Nat'l Carriers, Inc.*, 217 F. Supp. 2d 562, 570 (D.N.J. 2002); *Stehlik v. Rhoads*, 645 N.W.2d 889, 897 (Wis. 2002); *Rodgers v. American Honda Motor Co.*, 46 F.3d 1, 3 (1st Cir. 1995) (applying Maine law); *Landry v. Doe*, 597 So.2d 14, 16 (La. Ct. App. 1992); *Leonard v. Parrish*, 420 N.W.2d 629, 632-33 (Minn. Ct. App. 1988); *Warfel v. Cheney*, 758 P.2d 1326, 1327-28 (Ariz. App. 1988); *Oldakowski v. Heyen*, 428 N.W.2d 644, 1988 Wisc. App. LEXIS 572 at *4-5 (Wis. App. May 19, 1988); *Ottem v. United States*, 594 F. Supp. 283, 288 (D. Minn. 1984); *Halvorson v. Voeller*, 336 N.W.2d 118, 121 (N.D. 1983); and *Dean v. Holland*, 350 N.Y.S.2d 859, 862 (N.Y. Sup. Ct. 1973).

These cases are consistent with Iowa Code Section 668.1(1). That statute explicitly states that conduct by a plaintiff which can be described as an "unreasonable failure to avoid an injury" is fault that may be used to reduce or bar a plaintiff's recovery in an appropriate case. The Court's holding in *Meyer* was based to a large extent on the argument that non-use of a helmet does not constitute *failure to mitigate damages* under Iowa law. A product defendant, however, does not have to argue that a plaintiff's failure to wear a helmet constitutes a failure to mitigate damages; that issue has already been decided by the Iowa Supreme Court in *Meyer*. Instead, a product seller, such as a motorcycle manufacturer, may argue that such conduct is an "unreasonable failure to avoid an injury" and constitutes fault as defined within the express provisions of section 668.1(1) of the Iowa Code.

The other arguments in support of the holding in *Meyer* are not persuasive. For example, the Court noted that to allow a "helmet defense" would turn the case into a "battle of experts." Expert witnesses, however, have always assumed a pivotal role in enhanced-injury or crashworthiness litigation, and this has been so since *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), the first case to espouse the crashworthiness doctrine prior to 1970, over 35 years ago. *See also Law v. Superior Court,* 755 P.2d 1135, 1144-45 (Ariz. 1988) (recognizing, in case involving seat belt defense, that juries typically receive, process and apply expert testimony involving scientific or technical issues). As a result, a so-called "battle of experts" in enhanced injury litigation is nothing novel or unusual. Nothing would be different regarding the defense of "unreasonable failure to avoid an injury."

Also, the *Meyer* argument that there is "no common law duty" because there is "no statute" mandating helmet usage is a classic *non sequitur*. *See Wemyss v. Coleman*, 729 S.W.2d 174, 180 (Ky. 1987) (recognizing that many of the claims arising in motor vehicle litigation do not depend upon statute or require statutory support). Likewise, there is no provision of the motor vehicle code that requires a driver to "keep a proper lookout." The absence of an express statutory enactment does not preclude a court from finding a common-law duty to wear a helmet based

continued on page 17

THE "REVERSE CRASHWORTHINESS" DEFENSE . . . *continued from page 16*

on Plaintiff's duty of reasonable care to protect himself from injury based on Section 668.1(1). The following quote from *Wemyss*, discussing important evidentiary and common law issues in relation to the seat belt defense, is particularly instructive:

> We consider that this argument about public policy begs the issue. The issue is not whether our Court believes that the law should require automobile occupants to wear seat belts, or should not. The issue is an evidentiary one, that is, did the defendants offer evidence against Coleman to prove contributory fault which was improperly excluded . . . .
>
> We *cannot construe this silence as a legislative expression of public policy* for or against the use of a seat belt restraint. . . .
>
> In the *absence of statute it is not our function to declare that the law requires, or that it does not require*, the occupants of an automobile to wear seat belts. On the contrary, we *decide only* that, *as with any other question of contributory fault*, if the defendant introduces relevant and competent evidence from which it can be reasonably inferred: (1) that the claimant's failure to utilize an available seat belt was contributory fault in the circumstances of the case, and (2) that such contributory fault, if any, was a substantial factor contributing to cause or enhance the claimant's injuries, the *defendant is entitled to have the question of contributory fault submitted to the jury in conformity with the principles set out in the Uniform Comparative Fault Act*.

Id. at 177-79 (emphasis added). Similarly, the court in *Law* stated:

> We only acknowledge reality: the use or non-use of a seat belt is an *everyday matter* of conduct which plays a significant role in *determining the extent of injuries*. *To hold that we cannot let a jury consider such conduct on the issue of damages is to judicially transmogrify legislative non-action on a common law damage issue into legislative intent to approve non-use of seat belts*. Such a conclusion has never been expressed by the legislature and is very far from the demonstrated legislative objectives in this area. Of course, if we are wrong, and if the legislature intends that in this state one may unreasonably refuse to use a seat belt and nevertheless hold another responsible for the resulting damages, it can easily enact such a policy.

Law, 755 P.2d at 1144 (emphasis added).

The absence of a statute also means that a person cannot be found to be negligent *per se* for violating a statute that does not exist. *See, e.g., Green v. Gaydon*, 331 S.E.2d 106, 108 (Ga. Ct. App. 1985) (finding that a rider's violation of a statute mandating helmet use constitutes negligence per se). Under Iowa law, every plaintiff has a duty to exercise reasonable care for their own safety. *Rinkleff v. Knox*, 375 N.W.2d 262, 265 (Iowa 1985), *see also Geschwind v. Flanagan*, 854 P.2d 1061, 1064 (Wash. 1993) (recognizing that person voluntarily engages in conduct that "increases the risk of injury," may be held primarily responsible for the damages incurred based on the duty to exercise reasonable care for his own safety or protection); *Restatement (Second) of Torts* at §466(b) (1965) (finding that conduct which is insufficient to protect a reasonable person from harm constitutes contributory negligence or fault). The absence of a specific statutory duty mandating helmet use may well be irrelevant, where a product defendant is not arguing that a specific statutory mandate required a plaintiff to wear a protective helmet at the time of the crash.[6]

C. *The Iowa Supreme Court's definition of "unreasonable failure to avoid an injury" supports the argument that failure to wear a helmet is admissible to reduce a plaintiff's damages*.

" \l 3 In Iowa, the concept of "unreasonable failure to avoid an injury" is separate and distinct from "failure to mitigate damages." *See* Iowa Code at §668.1(1). The Iowa Legislature distinctly listed both concepts *separately* when it enacted the Comparative Fault Act. Pursuant to longstanding statutory construction principles, "it is presumed that the legislature inserted every part of a statute for a purpose." *Williams v. Thomann*, 649 N.W.2d 1, 4 (Iowa 2002). Consequently, courts must "avoid interpreting [the pertinent language from the Iowa Comparative Fault Act] so as to render a portion of it redundant or irrelevant." *Id*. Further, the Iowa State Bar Association Committee on civil jury instructions has authored specific jury instructions for each of these separate and independent defenses. *See* Iowa Civil Jury Instruction No. 400.7 (Mitigation); No. 400.8 (Unreasonable Failure to Avoid an Injury)(updated July 2005).

Two cases in Iowa discuss the concept

continued on page 18

6 Further, there is no statutory proscription against the admissibility of such evidence in an appropriate case. Compare Iowa Code Section 321.446(6)(2005)(failure to use a child restraint device is not admissible in any civil action).

THE "REVERSE CRASHWORTHINESS" DEFENSE . . . *continued from page 17*

of "unreasonable failure to avoid an injury." *Olson v. Prosoco, Inc*., 522 N.W.2d 284 (Iowa 1994); *Coker v. Abell-Howe Co*., 491 N.W.2d 143 (Iowa 1992). A detailed examination of these cases demonstrates that, for example, a motorcycle operator's failure to use a protective helmet should be admissible into evidence in an appropriate case as fault to potentially reduce the damages recovery.

In *Olson*, the court held that the concept of "mitigation of damages" did not apply to a situation where a defendant argued that the plaintiff should have worn safety goggles to protect his eyes from a splash of caustic solution. In somewhat conclusory fashion, the Court brushed aside defendant's request for a jury instruction on "unreasonable failure to avoid an injury" by analyzing the issue as *if it were a mitigation of damages argument*, which it is not. In fact, the court itself noted that this argument is "akin" to mitigation of damages. *Id*. at 291. "Akin" means "related" or similar, it does not mean identical. The Court proceeded to then erroneously require that plaintiff's conduct under this defense occur *after* an injury had occurred, contrary to the explicit statutory language! *Id*. at 291-92. Quite obviously, in order for the defense to be applicable the plaintiff must have the ability to act (*i.e*., utilize a helmet when operating a motorcycle) in some fashion prior to the occurrence of the injury, otherwise, such action could not possibly serve to "avoid an injury" within the plain-English meaning of section 668.1(1).

In *Coker*, the Court construed the phrase "unreasonable failure to avoid an injury" under Chapter 668. 491 N.W.2d at 148 (citing Iowa Code § 668.1(1)). The *Coker* opinion agreed that this language pertained to the doctrine of avoidable consequences, but found it inapplicable in that case, concluding that, under the facts at issue, an argument for plaintiff's comparative negligence was more appropriate for the trial court to have instructed upon. *Id*. at 149. The basic holding in *Coker* was that the defendant was not entitled to an instruction on *both* plaintiff's comparative negligence and "unreasonable failure to avoid an injury" for the same conduct.[7] *Id*. at 150.

The argument that "unreasonable failure to avoid an injury" is distinguishable from "mitigation of damages" is supported by courts in other jurisdictions. The Indiana Supreme Court, for example, has held that the phrase "unreasonable failure to avoid an injury or to mitigate damages," included under Indiana's definition of "fault," applies "only to a plaintiff's conduct *before* an accident or initial injury." *Kocher v. Getz*, 824 N.E.2d 671, 674 (Ind. 2005). The example given by the Indiana Court was "a claimant's conduct in failing to exercise reasonable care in using appropriate safety devices, *e.g*., wearing safety goggles while operating machinery that presents a substantial risk of eye damage." *Id*. at 674-75. One cannot miss the obvious parallel between this example and what the Iowa Court held in *Olson*, *i.e*., that the defendant could not argue that plaintiff was at fault for failing to wear safety goggles when handling the caustic substance, because this did not fit the timing requirements of "mitigation of damages." But query: did it fit "unreasonable failure to avoid an *injury*?"

The Kentucky Supreme Court has also analyzed the phrase, noting the following commentary from the Uniform Comparative Fault Act as important:

"Injury attributable to the claimant's contributory fault" refers to the requirement of a causal relation for the particular damage. Thus, negligent failure to fasten a seat belt would diminish recovery only for damages in which the lack of a seat belt restraint played a part, and not, for example, to the damage to the car.

Wemyss v. Coleman, 729 S.W.2d 174, 177 (Ky. 1987) (quoting Comments for section 1 of Uniform Comparative Fault Act); *see also Greenwood v. Mitchell*, 621 N.W.2d 200, 205(Iowa 2001) (recognizing "persuasive influence" of official comments to Uniform Comparative Fault Act ("UCFA") because the Iowa Comparative Fault Act was derived directly from the UCFA). Thus, the court reasoned, "failure to wear a seat belt is utilized as an example of conduct which may constitute contributory fault, falling within the term 'unreasonable failure to avoid an injury,' if there is proof that 'the lack of a seat belt restraint played a part'" in causing the injuries sustained. *Id*.

D. *A second case study: the "seat belt defense."*

A plaintiff's failure to wear a seat belt very often causes an "enhanced injury" as a result of a motor vehicle crash; indeed, seat belts and other features (such as airbags, knee bolsters and padded dashboards) are designed to reduce the risk of injury in foreseeable accidents. Absent a special statute covering this topic (Iowa Code §321.445(b)), this con-

continued on page 19

7 In some cases a defendant might be rightfully entitled to both jury instructions: if, for example, a motorcyclist was negligent in causing the accident initially, due to excessive speed and failure to have control, and was also at "fault" for his or her "unreasonable failure to avoid an injury" by not wearing a protective helmet that would have reduced or avoided a serious or fatal head injury.

DEFENSIVE USE OF THE 'ECONOMIC LOSS DOCTRINE' IN CONSTRUCTION LITIGATION . . . *continued from page 8*

EVERYTHING YOU WANTED TO KNOW ABOUT FORMER RULE 179(B) BUT WERE AFRAID TO ASK . . . *continued from page 10*

THE "REVERSE CRASHWORTHINESS" DEFENSE . . . *continued from page 18*

claim based on contract law against the dirt subcontractor. Most importantly, as demonstrated by the astute reasoning of the North Carolina court's opinion in Kaleel Builders, there can be no tort claim against a party to a contract who simply fails to properly perform the terms of the contract. Thus, one subcontractor would not be able to recover directly against the other subcontractor on a breach of contract theory, and would also be unable as a matter of law to establish a right of contribution for a claim of the general contractor sounding only in contract.

Conclusion

Of course, the case law and arguments set forth above will not be applicable in every instance that a construction contractor is brought into a suit as a third-party defendant. Every defense strategy must naturally be custom-tailored to fit the facts of the particular case. But when the third-party claims against a construction contractor are solely for contribution and indemnity, and the plaintiff's original claims include negligence and breach of contract, a summary judgment motion directed at the third-party claims is appropriate. The Economic Loss Doctrine will likely be applicable to preclude any recovery on a negligence theory. Similarly, Iowa's contribution statute and common-sense principles of contract law operate to exclude a third-party plaintiff's right to contribution or indemnification for any liability imposed upon it as a result of its breach of contract. The third-party defendant construction contractor can thus obtain a dismissal of the claims against it, and leave the rest of the legal wrangling to the original plaintiff and defendant. ■

tion and not merely its title, error in naming the document is likely not fatal, but proper captioning should help to eliminate any misunderstanding as to what it is. On the other hand, if you have a true "motion to reconsider" based on the common-law, then call it that, but presume that your appeal period will be running during the time that your reconsideration motion is on file and under review.

VIII. Conclusion.

Iowa Rule of Civil Procedure 1.904(2) (formerly Rule 179(b)) can be very useful in certain cases. It is designed to give the trial court "another bite of the apple" in the event that specific legal arguments raised in the district court were overlooked. However, its application can be confusing, and erroneous interpretation of the rule is fraught with the possibility of fatal error. Hopefully this article has dispelled some of the "old wive's tales" regarding its application (or lack thereof), and has brought some clarity to this procedure. ■

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duct would classically fall within the terms "unreasonable failure to avoid an injury." Under the seat belt statute, in an appropriate case this conduct will only reduce plaintiff's recovery a maximum of 5% of the damages awarded. Although this law withstood a constitutional challenge in a relatively minor, fender-bender, intersection-type collision case in *Duntz v. Zeimet*, 478 N.W.2d 635 (Iowa 1991), a more clear example of an arbitrary and capricious classification in a statute would be difficult to find. Further, it is unknown how the constitutional calculus would come out, if a challenge were made by a motor vehicle manufacturer who had been sued in product liability for alleged "crashworthiness" defects causing alleged "enhanced injuries" to plaintiff. If the proof was that plaintiff's enhanced injury was caused *by their failure to wear* an available and working seat belt, instead of the alleged crashworthiness defects attributable to the manufacturer, then it would be difficult (if not impossible) to constitutionally justify the arbitrary 5% cap on plaintiff's fault.

IV. Conclusion.

"What's good for the goose, is good for the gander." *See* The New Dictionary of Cultural Literacy, Third Ed. (2002)(the older proverb was actually "what's sauce for the goose is sauce for the gander.") Since product sellers may be held liable for defects that results in allegedly enhanced injuries, plaintiffs in product liability and personal injury cases should be held to the same minimum standard of conduct. If a plaintiff engages in conduct that proximately results in an enhanced injury, that conduct should be considered "fault" under the Iowa Comparative Fault Act as "unreasonable failure to avoid an injury" and should be admissible into evidence to reduce or bar plaintiff's recovery in the case. ■

FROM THE EDITORS . . .

By: Michael Ellwanger, Sioux City, IA

I got writer's block for this issue's editorial. Perhaps I am panicked about getting the spring issue out while it's still spring. However, I have been thinking about a few things. My son is just completing his third year of law practice in Kansas City. We talk quite a bit about cases he is working on. The most stressful part of his work is dealing with a few lawyers who are "difficult." I don't know why I thought my son would somehow be spared this phenomena. These are the kinds of lawyers that we have all dealt with. You can't simply talk reason with them. They are overly aggressive. They engage in slippery tactics. They try and personalize everything. I try and tell my son that unfortunately this goes with the territory and most lawyers are not this way. However, it saddens me that his decision to adopt my profession (and that of his grandfather) has caused him to encounter unprofessional people, when we are all supposed to be professionals by definition. I suppose he might encounter the same thing in the business world. On a somewhat different topic, none of us like to be members of a profession which is held in low regard by many members of the public. This has always been the case. It seems to me that one cause is that lawyers are paid by the clients to advocate for them and, as a consequence, one often sees lawyers on opposite sides of a legal or factual issue. Judges are used to seeing this and realize it is inherent in the system. However, the public does not. They turn on the television and see some lawyer yapping away about his case and then see the lawyer on the other side saying precisely the opposite. The reaction is that somebody has to be lying. "Lawyers will say anything." We used to have rules that prevented lawyers from arguing their cases in the media. I don't think they were ever enforced very stringently. Those rules have now been modified. Perhaps if lawyers would just keep their mouths shut (to the media) it might help us all.

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