defense UPDATE

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WORKERS' COMPENSATION POST-TRIAL PENALTY AWARDS

By: Peter M. Sand, Scheldrup, Blades, Schrock, Sand and Aranza, P.C., Des Moines, IA

There was recently a large bad faith verdict in Des Moines federal court. Penalty claims are more and more common, as are, in the perception of this writer, awards of penalty by the office of the Workers' Compensation Commissioner (the agency). This article delves into three areas: discovery in penalty claims; the lack of any "safe harbor" for carriers currently; and awards of penalty after trial.

DISCOVERY

Often defense counsel can have difficulty early on in the discovery phase of the case due to the penalty claim, as the worker attempts to perform discovery and invade carrier work product. Such problems are remnants left over after the seminal case of *Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995).

The reader will recall that the worker in that case brought an action in the agency seeking workers' compensation, and a claim for penalty. The worker sought to perform discovery on the penalty claim, and requested production of the claims adjuster's entire file–reserves and all. The insurer refused to produce the sought materials. The worker filed a motion to compel, and a deputy commissioner *granted the motion* and ordered the adjuster to hand everything over–claim notes and all–as part of discovery.

This ruling meant that the defendants in a workers' compensation action had no right to protect their own work product. The employer appealed and the Supreme Court reversed the agency, holding that no such production could be had before a trial on the merits. The integrity of work product was restored.

The *Squealer Feeds* ruling led the agency to promulgate a new rule. The rule holds that there is no discovery on a penalty claim prior to trial, unless the penalty claim is bifurcated by the claimant. *876 IAC 4.2 (third paragraph)*. If the claimant bifurcates the penalty claim, the underlying claim goes to trial, and after trial on the merits, discovery and trial on the penalty claim may proceed, which will likely mean the adjuster's file will be discoverable in that later proceeding.

The language of this rule, I believe, was an honest effort by the agency to put the *Squealer Feeds* ruling into the rules for easy reference. However, in practice, typically, penalty claims are not bifurcated. And the broad language of the rule (no discovery on penalty prior to trial) can prevent defense counsel from seeking discovery on what basis the worker intends to assert a right to penalty. In most cases, the basis is obvious, but in others, the worker is intending simply to throw up an unknown laundry list of real or perceived mistreatments at trial, and defendants cannot properly prepare for that.

Despite the wording of rule 4.2, conduct rigorous discovery prior to trial to learn every reason why the worker is going to claim at trial the employer owes a penalty. Bring your adjuster to trial to testify or else present other evidence to justify the positions taken by the carrier during the claim. If the adjuster is out of town, try to obtain a deposition by whatever means are least inconvenient for all, and submit that or an affidavit into the record to justify actions taken. If the worker resists discovery, make the Motions to Compel necessary to ensure the courts eventually apply properly the post-*Squealer* no-discovery-on-penalty rule at the agency Perhaps the rule should be changed to allow either side to bifurcate a penalty claim.

SAFE HARBOR

When this writer first entered the business in the early 90s, a generally accepted "safe harbor" protected carriers from many

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MESSAGE FROM THE PRESIDENT

Mark S. Brownlee

It seems like yesterday that I began my active involvement with IDCA. It was actually 1985, when my former partner and then IDCA President, the late Claire Carlson, enlisted me to speak at the Annual Meeting on comparative fault in the wake of the Goetzman decision and the legislature's adoption of Chapter 668. I agonized for months over what I might say which might be worthwhile to a room full of seasoned defense attorneys. Whether or not I uttered anything worthwhile that morning at Johnny & Kay's is fairly debatable (therefore no bad faith), but I survived the experience and have greatly enjoyed and benefited from my long association with IDCA ever since.

My most enduring impression from having served on the IDCA Board and having "gone through the chairs" is the amazing willingness of our members to contribute their time and talent to the association. It is the primary reason IDCA remains useful, relevant and a model for many other states' defense counsel organizations.

Having served as an editor of *Defense Update* for many years before becoming an IDCA officer, I cannot recall ever being turned down when I approached a member about writing an article. Thanks to the efforts of the current editors, *Defense Update* continues to thrive, with a proliferation of substantive and timely articles of value to all of us. The current editors are Kermit Anderson, Noel McKibben, Tom Waterman, Kevin Reynolds, Bruce Walker, Tom Read and Mike Ellwanger. Please contact one of them if you are interested in publishing an article in *Defense Update*-perhaps expanding upon a recent brief you prepared regarding a developing area of the law. Our entire membership will benefit from your willingness to share your hard work. *Defense Update* is a valuable publication which needs and deserves our continued support.

The quality of our Annual Meeting remains a source of pride for IDCA. While I'm admittedly biased, I think it is consistently the most substantive meeting of its type for Iowa trial attorneys-again due to the willingness of our members to contribute and participate. When it was my turn to organize the Annual Meeting, not a single member declined my invitation to present an article, which was very gratifying and much appreciated. The same was true with the spring mini-seminar.

The list of contributions to IDCA goes on. Under the guidance and hard work of board member Christine Conover, IDCA sponsored a Trial Academy at the Drake Law School this spring, with several IDCA members serving as faculty. By all accounts, it was a huge success.

During the spring, board member and President-Elect Martha Shaff organized a "pizza forum" at the University of Iowa Law School to meet students and discuss the type of work done by civil defense attorneys. We hope to continue this type of contact and exposure at both Iowa and Drake.

The past legislative session was the most active and contentious in years in terms of proposed bills affecting litigants and litigators. Thanks to the efforts of long-time IDCA activists such as Mike Thrall, Megan Antenucci, Dave Phipps and Kevin Reynolds, working with our Executive Director, Bob Kreamer, various ill-conceived, extreme proposals did not become law.

The next President of IDCA will be Martha Shaff. If you know her, you know what great hands the association is in. Her intellect, energy and organizatonal skills will be on full display to the benefit of all of us. She hit the road running by organizing an outstanding 2007 mini-seminar and annual meeting as President-Elect. (The bad part of serving as IDCA President between Mike Thrall and Martha is my fear that my "administration" will be compared to the Jimmy Carter administration.)

Finally, a special word of thanks to Bob Kreamer and Lynn Harkin, our Executive Director and Assistant Executive Director, whose efforts have made serving as President of our association a much easier and enjoyable task. We are luckly to have both of them on board and I know they will make life easier for Martha and the current board members as well.

For those of you that have been involved with IDCA, please stay involved. For those of you that have not yet seized the opportunity to get involved, please do so. Both you and our association will benefit.

Mark S. Brownlee
IDCA President

PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS

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

On February 20, 2007, a sharply divided United States Supreme Court in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), vacated a $79.5 million punitive damage award against a cigarette manufacturer arising from the lung cancer death of a heavy smoker. This much-anticipated decision marked the first time the high court revisited constitutional safeguards against excessive punitive damage awards since *State Farm Mut. Automobile Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003). In June, the Iowa State Bar Association (ISBA) Board of Governors approved an update to the Iowa Uniform Civil Jury Instruction 210.1 on punitive damages as proposed by the ISBA Jury Instruction Committee in light of *Williams*.[1] This article examines the impact of *Williams* not only on jury instructions, but also on evidentiary rulings and constitutional challenges to punitive damage awards.

The *Campbell* Court had elaborated on three "guideposts" for reviewing punitive damages previously set forth in *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996):

> (1) the degree of reprehensibility of the defendant's misconduct;
>
> (2) the disparity [ratio] between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
>
> (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Campbell, 123 S. Ct. at 1520 (*citing Gore*).[2] *Campbell* initially had been hailed as a long-awaited panacea for runaway punitive damages verdicts. *Campbell* unquestionably altered the legal landscape favorably for defendants and limited punitive awards in countless cases nationwide. Initial enthusiasm for the decision waned, however, after *Campbell* proved to be a less-than perfect antidote to punitive damages claims. Numerous awards for punitive damages survived *post-*

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[1] The revision was drafted by the Honorable David L. Baker of the Iowa Court of Appeals, and this author. The Jury Instruction Committee approved the update at its April meeting and the Board of Governors adopted the update at its June meeting. The instruction is posted for use on the ISBA website. A redlined version is set forth below.

210.1 Punitive Damages. Punitive damages may be awarded if the plaintiff has proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future. You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries.

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

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

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

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

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

Authority

Iowa Code section 668A.1
Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007)
State Farm Mutual Auto Ins. Co. v. Campbell, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)
Larson v. Great West Cas. Co., 482 N.W.2d 170 (Iowa App. 1992)
Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985)
Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881 (Iowa 1983)

Comment

Note: See Iowa Civil Jury Instruction 100.19 for definition of clear, convincing and satisfactory evidence.
Rev. 6/07

[2] Judge Baker and this author had crafted the revisions to IUCJI 210.1 approved by the Iowa Jury Instruction Committee in light of *Campbell* in 2003 and ultimately adopted by the Board of Governors in December, 2004. *See* this author's article published in the December, 2004 DEFENSE UPDATE, entitled "*State Farm v. Campbell* Mandates Revisions to the Iowa Uniform Civil Jury Instruction on Punitive Damages." *See also*, this author's article entitled "New Assistance for Defending Punitive Damage Claims in Iowa -- The Marching Orders of *State Farm Mut. Auto Ins. Co. v. Campbell*." DEFENSE UPDATE, September, 2003.

ISSUES CONFRONTING THE IOWA DISTRICT COURT

By: Hon. Bobbi M. Alpers, CHIEF JUDGE, Seventh Judicial District, Davenport, IA

In my mind the top five issues now confronting Iowa's state trial court judges are courthouse security for all who work and appear in court; the impact that the increase in pro se litigants has on dispute resolution; the anticipated transition to an electronic filing system for court records; the changes brought about by the Children's Justice initiative; and the perceived threat to judicial independence posed by certain interest groups and individuals in the retention elections.

The issues designated above are presently taking up most of my time so I can not offer much more in the way of other issues that would be of interest to members of the bar as a whole. I would think that any member of the bar in Iowa would be concerned about the level of security that is present at any county courthouse in this state as it affects the safety of all who are present on any given day. The state courts are housed in county courthouses where the members of the county Board of Supervisors must approve and fund any building modifications or security equipment or the hiring of personnel required to provide court protection or operate security equipment. Although most county board members agree that the need for such security measures is present, they can find no available funds to pay the cost of modifications, equipment or additional wages and benefits as needed to provide protection or operate the equipment. Of course, many of the court areas in Iowa courthouses are not used on a daily basis and this is a part of the financial analysis as well.

Last fall the *American Judicature Society* magazine did a series of short articles concerning whether judges should be able to do independent research on scientific issues. Independent research by the judges involves the ethics of ex parte communication, the need to be able to comfortably handle evidentiary questions at trial, and the question of whether the judge is harming the adversary system. As more cases involve analysis in the area of science for the judge and/or the jury, I think this would be an interesting topic for an article, and I think it would be helpful for both the bench and bar.

I believe that most judges in this district are concerned about the limitations we have on the time we can devote to the cases presented to us. We have to limit the court time so that we can continue on to the next set of litigants. When a case is submitted it often takes longer to file a written ruling than is good for the case because the judge has so many other matters competing for the time required to prepare the ruling. Time for reflection, valuable as it is, generally is in short supply for judges in this district.

I feel very fortunate to be the Chief Judge of the 7th District. Three of the five counties in this district are among Iowa's twenty most populous counties and in 2006 we had 26 civil and 107 criminal jury trails in Scott County; 6 civil and 23 criminal jury trails in Clinton; and 1 civil and 6 criminal jury trails in Muscatine County. District 7 is a hard-working district as a whole, and in accord with the initiative for Children's Justice we are now devoting more judicial resources to Child in Need of Assistance (CINA) cases concerning children who have been removed from the homes of their parents. In my role as the Scott County Drug Court judge I have witnessed the positive changes that people can make in the atmosphere created when judicial resources are allotted to a problem-solving court.

Since being appointed as the Chief, I have gained a tremendous appreciation for how much legal business is conducted every day in the courthouses within District 7, and how many people must not only show up, but also give their very best effort each day, in order to keep the courthouse doors open and to serve the interests of justice in the communities.

Editors Note:
This is the first of a series of responses by our state's chief judges addressing the IDCA's inquiry as to their view of the top five issues confronting the Iowa District Courts.

The Editors thank Chief Judge Alpers for her time and thoughful response.

CASE NOTE: RECENT EIGHTH CIRCUIT CASE HELPFUL TO DEFENDANTS ON DISCOVERY, EVIDENTIARY AND *DAUBERT* ISSUES

By: Kevin M. Reynolds, Whitfield & Eddy, P.L.C., Des Moines, Iowa

On March 28, 2007, the Eighth Circuit Court of Appeals issued a decision in a motor vehicle product liability case that could prove very helpful to defendants on recurring discovery, evidentiary and *Daubert*-type issues. *Ahlberg v. Chrysler Corporation*, 481 F.3d 630 (8th Cir. 2007).

In *Ahlberg*, Ralph Ahlberg tragically died while attempting to stop a Dodge Ram truck from rolling down a driveway. *Id*. at 632. Ahlberg's 28-month old grandson had been left alone in the truck with the key in the ignition and the engine running. *Id*. Apparently the child shifted the truck's transmission from park into neutral or reverse, causing the truck to roll down a slope. Ahlberg died in his attempt to stop the truck from rolling by placing his body in its path. *Id*. Ahlberg's wife witnessed this episode and along with the claim of the estate, had a separate claim for bystander emotional distress. *Id*. A claim for punitive damages was also made. *Id*.

The primary claim of Plaintiffs was that Chrysler did not equip the truck with a brake-shift interlock (BSI) device, which would require the operator of a vehicle to depress the brake pedal before shifting out of park. *Id*. The purpose of a BSI device is to prevent unintended acceleration when a user mistakenly depresses the gas pedal and then shifts out of park. *Id*. Following a defense verdict at trial, the Plaintiff's appealed, arguing inter alia that several of the magistrate judge's discovery and evidentiary rulings constituted reversible error. *Id*.

A. Retrofit evidence was properly excluded.

The Plaintiffs first argued that the Magistrate Judge Thomas J. Shields erred in excluding evidence of a retrofit program that Chrysler voluntarily conducted in 1996 regarding reports of unintended acceleration involving Jeep Cherokees. The Magistrate had excluded this evidence from trial based on Federal Rules of Evidence 401 and 403. Plaintiffs had a whole host of arguments that this Jeep-retrofit evidence was relevant because it tended to prove that Chrysler: 1) was negligent in not retrofitting the Dodge Ram; 2) had notice of the Ram's defect; 3) concealed this defect; 4) could have feasibly installed a BSI device on the Ram; 5) was negligent in designing the Ram; 6) sold the Ram in an unreasonably dangerous[1] condition; 7) failed to warn users of the dangerous condition before sales of the Ram; and 8) failed to warn users of the dangerous condition after sales of the Ram. *Id*. at 633.

Despite Plaintiffs' veritable "laundry list" of reasons why this evidence should have been admitted, the evidentiary ruling of the Magistrate was affirmed. The Eighth Circuit first noted, quite appropriately, that "rulings on admissibility of evidence will not be reversed absent a clear and prejudicial abuse of discretion." *Id*. at 632 (*citing Pittman v. Frazer*, 129 F.3d 983, 989 (8th Cir. 1997)). The Eighth Circuit then noted that there is no independent duty to retrofit a product under Iowa law. *Id*. at 633 (*citing Burke v. Deere & Co.*, 6 F.3d 497, 509-10 (8th Cir. 1993)). Next, the *Ahlberg* court found that feasibility was not in issue, as Chrysler had conceded that it was feasible to install a BSI device on a Dodge Ram. *Id*. (*citing Burke*, 6 F.3d at 506 (stating that where defendant stipulated to the feasibility of design changes, evidence would not be properly admitted to prove feasibility); and *Anderson v. Nissan Motor Co.*, 139 F.3d 599, 602-03 (8th Cir. 1998)(same)).

Then the *Ahlberg* court affirmed the trial court's ruling excluding evidence of the Jeep retrofit. *Id*. Although the court noted that in Iowa, both pre- and a post-sale duty to warn have been recognized as separate theories of discovery, *see Lovick v.Wil-Rich*, 588 N.W.2d 688, 693-94 (Iowa 1999), the Eighth Circuit found that "the probative value of the Jeep-retrofit evidence was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, and misleading the jury." *Ahlberg*, 481 F.3d at 633. In affirming the Magistrate on this issue, the Eighth Circuit cited *Bizzle v. McKesson Corp.*, 961 F.2d 719, at 721 (8th Cir. 1992), where evidence of the recall of a crane was excluded because the recalled product was not the same as the one in issue. *Ahlberg*, 481 F.3d at 633. In *Bizzle* the Eighth Circuit held that "[t]he recall's minimal probative value was easily outweighed by the dangers of unfair prejudice. . . and of misleading the jury." The *Ahlberg* court in turn noted:

> The same problem exists in this case–evidence of the Jeep-retrofit program raised substantial issues of confusion and prejudice with regard to the Dodge Ram. Given that the Jeep-retrofit evidence involved an entirely different vehicle, its probative value for the negligence and strict-liability claims was minimal. We further note that the plaintiff's argument that the Jeep-retrofit evidence was relevant to prove notice is merely a restatement of their negligent-failure-to-warn claim–*i.e.*, Chrysler's notice of a Jeep defect triggered a duty to warn users about an alleged Ram defect. Accordingly, we reject the plaintiffs' notice argument as well.

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[1] The *Ahlberg* court neglected to mention that "unreasonably dangerous" was discarded as an element in a product defect case in *Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159 (Iowa 2002) when the Iowa Supreme Court adopted Section 2 of the Restatement (Third) of Torts, Products Liability.

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penalty claims. If the Carrier accepted the claim as compensable, and paid the impairment rating of the treating doctor in a timely fashion, the carrier was effectively insulated against a penalty award. Limiting voluntary payments to the rating (even in whole body cases) was reasonable; carriers were allowed to contest at trial that they owed more than that.

The agency abandoned this very predictable status quo early in this decade. The agency began to rule in a string of cases that the carrier should be penalized for not voluntarily paying *more than the impairment rating* in whole body cases where the agency fact finders believed the level of disability "obviously" exceeded the rating.[1]

The fact is there were solid reasons for an impairment rating-based safe harbor. Picture a case of lumbar disc surgery resulting in an 8% rating, but restrictions that take the worker out of his job and force him to look for another job. Certainly, it is true in such cases that most of the deputies will consider the restrictions the most important evidence of the level of disability. Certainly most deputies will award industrial disability that exceeds the rating.

However, current law does not *compel* the deputy hearing such a case to award more than the rating. While the Commission considers impairment ratings second fiddle to work restrictions in whole body cases, there is no official statute or precedent ordering the Commission to give more weight to restrictions than it gives to the rating. Industrial disability is composed of many factors, with no hierarchy among those factors.

The impairment rating also deserves more respect than it gets in many cases. After all, a rating is many times a much more objective assessment of the worker's loss than are work restrictions. The rating is derived from application of the fifth edition of the AMA Guides to Impairment. The Guides represent the collective opinion of the American medical community regarding the effect on a patient's ability to engage in the activities of daily living posed by different injuries. Comparing the weight of that medical judgment against the judgment of a single physician opining that the worker can't lift more than 5 pounds due to complaints of post-surgical pain *should* often vindicate the rating.

It seems to this writer that, as long as industrial disability is made up of several factors, with none of them required to be weighted more than the others are, and as long as the impairment rating is one factor, a deputy has the discretion to limit disability to the amount of the rating. And if the deputy has that discretion, then, as a matter of law, it is not unreasonable for the carrier to limit voluntary payments to the rating. What is important here, and what the agency seems to have lost sight of, is that the central issue is the breadth of agency discretion. The central issue is not the way in which the Commission exercises that discretion in the vast majority of cases.

This new agency practice of forcing carriers to roughly guess the award the agency would make presaged the more serious problems discussed in the next section. This new practice seems especially problematic given that it is still legally possible for the award of disability to be *less than the impairment rating*. Though rare, this has been known to happen, and the agency's power to reach such a result was re-affirmed by Commissioner Trier in *Parrish v. Hawkeye Wood Shavings*, file 1302565 (11/5/02). Given that it is possible that payment of the rating would be overpayment of what the employer owes the worker, some are left wondering why payment of the rating could nevertheless lead to an award of penalty. But it will take an appeal to the Supreme Court to see if the safe harbor of the rating can be restored.

PENALTY AFTER TRIAL

Simonson v. Snap-On Tools, File 851960 raised the stakes in penalty litigation significantly. Since the last agency decision in that 15-year litigation in 2003, it has led to a series of cases holding that the Commission can penalize carriers for not paying awards while they appeal.

In *Simonson*, the worker filed a petition in 1989, alleging injuries in 1986 and 1987 and claiming penalty benefits. A doctor gave the Claimant a 4% body as a whole impairment rating. The case was tried on April 10, 1990. At the time of the Hearing, the employer had paid the 4% whole body rating. The arbitration decision of January 31, 1991 awarded industrial disability of 35%. The deputy denied the worker's claim for penalty benefits, holding that permanency in excess of 4% was fairly debatable. The carrier appealed and Commissioner Orton affirmed the award on October 31, 1991. While the intra-agency appeal was pending, the carrier made some voluntary payments of additional benefits. The carrier sought judicial review, and district court affirmed the award. The carrier appealed again. The Court of Appeals affirmed the lower decisions, and the carrier paid the judgment.

Simonson filed a new petition in February 1994, seeking a review/reopening of the 35% award, claiming she was owed additional permanency. In addition, she sought a penalty from Snap-On, claiming there was insufficient basis for not paying more than 4% immediately after the trial of April 10, 1990. This petition was heard by Deputy Rasey, who filed a decision in October 1995. He denied the claim for additional permanency benefits. Rasey ruled that the penalty claim was an attempt to re-litigate the penalty decision from the original action, and denied any penalty due to issue preclusion.

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[1] A good early example of the Commission abandoning the safe harbor is *Becker v. Amana Refrigeration*, file 1178455, 6/26/01.

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Appeals resulted in a Supreme Court decision (588 N.W.2d 430) in 1999, holding that the agency had erred in not addressing the penalty claim. Because the worker was seeking penalty for a *different period of time* in the second action as compared to the first (unreasonably low payment *before trial* as compared to unreasonableness *after trial*) the court reversed and remanded.

Deputy Walleser entered a remand decision in 1999, addressing the issue of whether the employer owed penalty benefits for unreasonably delaying paying benefits after the first hearing. She held, essentially, that the employer was privileged not to pay benefits until appeals were exhausted. The worker appealed resulting in a Court of Appeals decision in September 2002, reversing the agency yet again. The Court ruled that the carrier was not privileged to ignore its duty to act reasonably regarding the claim simply because appeals were still pending. The case was sent back yet again for a ruling as to whether the carrier had a reasonable basis for not paying more than 4% of the body after the trial that occurred on April 10, 1990 and while the appeal process was ongoing.

On remand, Commissioner Trier entered a decision in August 2003, imposing a penalty of $12,500. The Commissioner held that it was unreasonable for the carrier not to pay more than 4% PPD after the trial on April 10, 1990 while the carrier took the case through the appeals. The carrier should have known that the positions they took at trial had not been borne out by the evidence, and its legal position was no longer tenable. This was confirmed by the original arbitration award of January 31, 1991, giving the worker 35% industrial disability. After that, the failure to pay pending appeal became "even more unreasonable."[2]

It is very easy to get lost in those convoluted facts, and lose sight of what is important. What strikes me as important is the exact rightness of Deputy Rasey's ruling in the first penalty action, and how that is the key to this whole controversy. Recall that Rasey ruled that issue preclusion prevented the penalty action, because the issue was the same as was decided at the first trial in the case. As mentioned above, the Court of Appeals reversed that decision.

The doctrine of issue preclusion holds that, absent certain exceptions, once a court decides an issue, it won't have a new trial to decide the same issue over again. A claim of penalty was raised at the first trial and Rasey had ruled that no penalty was owed. That ruling was upheld all the way up the appellate chain. That means that, as of the close of the record at the end of the trial, the Defendants had acted reasonably in their payment of the claim, according to the trial deputy.

Now the Claimant was bringing a new action for penalty saying that it was unreasonable not to pay more after the trial (given the fact that the award was much higher than the voluntary payments had been). Again, Rasey ruled that issue preclusion applied. The Supreme Court ruled that, as a matter of law, issue preclusion did not apply because the claim of penalty was being raised regarding a *different time period* than the penalty claim at the first trial (which sought penalty for unreasonable failure to pay prior to the trial date).

But an argument that the issue was different was a complete red herring that the Supreme Court should not have followed. In fact, the issue *is exactly the same*. At the time Rasey reached this decision, it was a final ruling that, as of the end of trial, the defendants had been reasonable. The second petition for penalty was a claim that, beginning on the morning after trial, the defendants had mysteriously changed from reasonable to unreasonable. Yet the claimant had nothing new to offer in support–only the Decision. But the Decision takes into account everything that happened at trial, including the evidence offered by the parties in support of their respective positions. In short, it was erroneous to conclude that the initial decision of reasonableness by the deputy somehow did not take into account what happened at the trial.

Other cases have followed Simonson:

Aldridge v. Wal-Mart, file 1252855. The employer denied liability for this 1999 back injury, due to inconsistencies between the worker's story supporting compensability and certain medical records. The employer paid no benefits prior to trial. The case was tried to a deputy in 2001. The deputy found in favor of the employer, and awarded no weekly benefits. On appeal, the Chief Deputy reversed the deputy. He found that the injury was not only compensable, but beyond dispute, and awarded 50% penalty on the benefits denied. The Deputy awarded 55% disability for the injury itself. The appeal decision did not contain any specific finding by the Chief Deputy that the hearing deputy had somehow abused discretion in holding for the employer.

At this juncture, it would be the position of this writer that the agency was no longer empowered to award a penalty. Once the employer had convinced the deputy that it was correct <u>on the merits</u>, then <u>as a matter of law</u>, the compensability of the case was fairly debatable from that point on.

The employer sought judicial review. The district court did not comment upon the penalty issue, because the court agreed with the deputy, reversed the chief deputy on the merits, and ordered the agency to enter the deputy's decision as the final agency action. The worker appealed, and the Court of Appeals, in the summer of 2003, reversed the district court, and rein-

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[2] The 2003 remand decision was the subject of judicial review that affirmed in part and reversed in part in April 2004. Cross appeals were taken which were dismissed in June 2004, ostensibly as part of a settlement.

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stated the chief deputy's decision as final agency action. The Supreme Court denied further review and the employer paid the judgment in about a week.

The worker filed a new petition seeking additional penalty for weeks accruing after the date of trial. The defense brought a motion for summary judgment. A deputy granted the motion and dismissed the case, expressing a view that a new event needed to occur outside of the litigation itself in order to support an additional penalty. He could find no such event.

On appeal, Commissioner Trier reversed. The Commissioner's appeal decision is remarkable for three reasons. First, he does not contradict what the deputy says regarding the need for a finding of post-trial events in order to support an award of post-trial penalty. Second, the Commissioner found that a new event post-trial is not necessary for a penalty award, if the employer was penalized at trial.[3] In such a case, a finding of a new event would be necessary *in order to change the employer's status back to reasonable*. In other words, the finding of a post-trial event is necessary to change the employer's status from what it was at trial.

Finally, the Commissioner seemed to acknowledge openly that the situation in *Aldridge* essentially made no sense. The Commissioner stated, "One would expect that evidence sufficient to convince both the deputy commissioner who presided at the hearing and the district judge that no benefits were due would be sufficient to avoid a penalty for unreasonable denial." This quote shows that Commissioner Trier agreed with this writer that once a finder of fact sides with an employer, as a matter of law that employer cannot be penalized for being unreasonable. This also agrees with the Supreme Court's approval of the observations of one authority:

> Perhaps the most reliable method of establishing that the insurer's legal position is reasonable is to show that some judge in the relevant jurisdiction has accepted it as correct. The favorable decision need not have been available to the insurer at the time it acted on the claim. After all, if an impartial judicial officer informed by adversarial presentation has agreed with the insurer's position, it is hard to argue that the insurer could not reasonably have thought that position viable.[4]

However, it was beyond Trier's power to obtain that logical outcome in Aldridge, because the Commissioner cannot overrule the Court of Appeals. On remand, Deputy Heitland awarded a penalty in January 2006. He awarded no penalty for the two periods of appeal during which the employer was the prevailing party, and awarded penalty for periods of appeal during which the worker was the prevailing party.

Rice v. Wilian Holding, file 5005096. (Full disclosure–the case is being defended by the writer, which leads to much of the generating of this text.) This worker suffered an accepted back injury in May 2001. He treated a few times and then did not treat for a period of months. He complained to the employer of a need to return to the doctor in September 2001 and the employer made an offer of care but the worker refused in order to treat with his own doctors. A surgeon saw him in February 2002 with complaints of pain. The surgeon believed he needed immediate surgery on a herniated disc and that was performed. All of the care after September 2001 was undertaken without any employer direction. The surgery occurred without any request for TTD or medical benefits by the worker in March 2002. He filed a petition on the one-year anniversary of the injury, seeking to have the surgery and back compensated due to the May 2001 injury. However, the carrier contacted the surgeon who gave an opinion that the surgery was not related to the May 2001 injury. Thereafter, counsel for the claimant sent a letter to the surgeon and got him to check a "yes" box to a question of work-relatedness. The surgeon underwent deposition two days before trial, and made alternating causation statements supporting both sides of the case. The worker did not make a claim for penalty at trial.

The deputy ruled that the surgery and resulting disability were related to the work injury and awarded 15% disability. The carrier appealed and the Commissioner affirmed in June 2004. The carrier sought judicial review and the district court affirmed the agency in December 2004. The carrier appealed, and the Court of Appeals affirmed the award in June 2005. The panel's vote was 2 to 1, with one judge holding that the worker had failed to present necessary evidence to win any permanency. The carrier decided not to seek further review, and paid the judgment in full. The carrier had not made any payments prior to that time.

During the appeal, in March 2005, the worker sought entry of judgment on the award in district court, pursuant to §86.42. The defense moved to stay entry of judgment, or, in the alternative to stay execution on any judgment. The court entered rulings resulting in the following situation. First, the court entered judgment for the amount of the award. Second, noting that

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[3] Though the deputy did not penalize the employer in Aldridge after trial, the final agency action *did* find the employer's non-payment unreasonable. Therefore, as far as the agency was concerned, as of the last time agency scrutinized the employer's actions, the agency found them to be unreasonable.

[4] *Rodda v. Vermeer Manufacturing and EMC Risk Services, Inc.*, 734 N.W.2d 480, Iowa (2007) quoting William T. Barker & Paul E.B. Glad, *Use of Summary Judgment in Defense of Bad Faith Actions Involving First-Party Insurance*, 30 Tort & Ins. L.J. 49, 83 (1994).

WORKERS' COMPENSATION POST-TRIAL PENALTY AWARDS

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the defense had filed a notice of appeal from that entry of judgment, and had posted an appeal bond in accordance with Rule 6.7 of the rules of appellate procedure, the court stayed execution on the judgment. The worker never claimed at any point of the appeal that the appeal was frivolous or sanctionable.

While judicial review was pending, the worker filed a new petition in the agency in October 2004, seeking penalty for non-payment of the award. That case was tried in January 2006, resulting in a verdict at the end of March. The worker sought penalty for non-payment from the time the Commissioner affirmed the award in June 2004, until the judgment was paid one year later. The deputy awarded a penalty, holding that non-payment during judicial review was unreasonable. The carrier appealed. The Commissioner vacated the trial decision. He remanded the case for consideration of whether or not obtaining a stay during judicial review had any effect on the reasonableness of withholding payment of the award. The Commissioner stated: "It would be unreasonable for defendants to withhold payment of awarded benefits without permission from the district court pursuant to a valid stay."[5]

The Commissioner's quoted language might be an attempt to impose a new requirement on defendants who appeal agency decisions. The new rule is that if a defendant wants to appeal, they must obtain a stay from the district court to avoid payment of the award. Perhaps the thinking is that once everyone gets used to this new rule, this current controversy might quiet down. There are a couple of problems with such a rule acting as an acceptable or workable new regime.

First, if the worker, for whatever reason, does not immediately seek entry of judgment at the outset of judicial review (the delay in this case was 9 months) then there is simply nothing for the district court to stay. A carrier cannot file a document with the court asking the court to forbid them from paying an award; that would make no sense. Only when a court enters a judgment against the carrier is there anything for the court to stay.

Second, and more important, *Rice* only concerned non-payment during judicial review. However, other cases (notably *Simonson* itself) have sought penalty for non-payment during intra-agency appeal, and between trial and verdict. Is the Commissioner asking all carriers to march into district court on the day after every workers' compensation trial and ask for a stay of some sort to avoid penalties for non-payment?

That brings us to *Millenkamp*, which currently represents the high water mark in this area.

Millenkamp v. Millenkamp Cattle Inc., file 5011148. Mr. Millenkamp ran his own business dealing in dairy cattle. A cow kicked him in the face. He tumbled backward and hit his head on cement. He claimed a closed head injury and cognitive deficits. The defense had two doctors opining that he was not impaired due to the injury. They also had completely normal MRI and EEG tests to support their opinions. Millenkamp had told one of these doctors that he returned to work soon after the incident "without problems."

The claimant engaged doctors who opined that Millenkamp had suffered significant deficits and psychological problems from this incident. These reports were forwarded to defense counsel with requests to reverse course and pay weekly benefits on the case. The employer refused the request. Deputy Heitland heard this case and he stated in his decision that it was unreasonable for the defendants not to forward incoming new evidence to the experts upon which the defense relied, to ensure the experts continued to support the defense as new evidence was generated. However, Heitland refused to award any penalty; he concluded that the issues in the case were debatable because:

> (a) the worker's wife was a critical witness to his case at trial and she refused to speak to the defense doctors; and
> (b) the worker was poisoned by mushrooms at a key point in the treatment and admitted that his symptoms got significantly worse from that point on.

Deputy Heitland awarded 60% disability ($204,300), and no penalty. The employer appealed and the Commissioner affirmed the deputy's award. The employer did not pay any weekly benefits during the intra-agency appeal.

Millenkamp then filed a second petition seeking a penalty for appealing the arbitration decision, rather than paying the award. Deputy Heitland heard that petition at a second trial and awarded a penalty. The adjuster involved testified that she considered the result in the prior arbitration decision and believed she had a "decent" chance of obtaining reversal on appeal, and so she appealed.

Heitland stated in his decision: "In this case, the claimant won at the deputy level. Defendants did not pay benefits during the period between the arbitration decision and the appeal decision, even though the most recent decision was not in their favor. Under the approach in *Aldridge*, that conduct was unreasonable and a penalty should be imposed."

The deputy expressed a view that being required to pay the award immediately somehow doesn't detract from a defendant's right to appeal. He cited *Aldridge* and *Simonson* as precedent for the notion that awards must be paid at whatever level

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[5] On remand, the deputy commissioner re-imposed penalty benefits and a second appeal decision is currently awaited.

WORKERS' COMPENSATION POST-TRIAL PENALTY AWARDS

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the defense loses. He imposed a $20,000 penalty. The penalty award is on intra-agency appeal currently.

WHAT IS WRONG WITH THE *SIMONSON* LINE?

Simonson essentially requires defense prediction of outcome. If the agency imposed a rule requiring employers and carriers to accurately predict the decision a deputy would reach and pay accordingly, such a rule would be unworkable, and a gross violation of due process and common sense. However, the Simonson 2003 remand decision stated that the defendants should have known that the positions they took at trial had not been borne out by the evidence and their legal positions were no longer tenable.

Simonson undermines appeal rights. The agency should not impose a rule that one side of litigation can be penalized solely for exercising rights given them by statute and the rules of procedure to seek redress at a higher level. Yet the 2003 remand decision called the legal position of the employer after the 1990 trial "untenable." (Remember that the trial deputy essentially ruled that the defense position was, in fact, tenable, by refusing to label it untenable and award penalty.) The arbitration award giving the worker 35% industrial disability confirmed this "untenability." After that, the failure to pay the award pending appeal was "even more unreasonable."

This ruling ignores the rule that appeal to the Commissioner is *de novo*. The Commissioner has the power to look at the evidence and issue final agency action differing from the deputy's decision in any way the Commissioner wants (so long as the record contains substantial supporting evidence of the conclusion). How then could an intra-agency appeal *possibly* be unreasonable, when the same positions taken at trial were reasonable? Answer: it is not possible.

HOW COULD THE SYSTEM WORK FOR BOTH SIDES?

The system could work as follows:

A worker brings an action in arbitration with a penalty claim. Assuming that the case is not bifurcated, all issues are tried at once.[6] Employers understand that if they do not voluntarily pay weekly benefits after trial, they are exposed to penalty in the same way they were exposed before trial. If they are not penalized in the arbitration decision,[7] they cannot ever be penalized for their pre-trial actions by any level of appeal, because, as a matter of law, that question is fairly debatable. In order to win an award of post-trial penalty, the worker will have to show a post-trial event has occurred to change the status quo away from "fairly debatable," or make a claim in the appeal itself that the appeal is frivolous, and win on that argument. If the deputy awards a penalty for pre-trial unreasonableness,[8] and all of the weeks considered reasonably necessary accrued before trial, then the defendants have been penalized as much as they can be, and there cannot be any additional exposure to penalty. If the deputy awards a penalty for pre-trial unreasonableness, and all of the weeks have not yet accrued,[9] the only way for employers to assure themselves they have stopped exposure to further penalty would be to begin paying weekly benefits voluntarily. That post-trial event, unconnected with the litigation, changes the status quo away from unreasonable, because denial of benefits is no longer occurring. A penalized employer would be exposed to a second petition seeking to collect penalty for the weeks that accrued after trial, and before voluntary payment began.[10] Recovery would be limited to the minimum number of weeks that would have been reasonable to pay. Unless an employer could show a post-trial event making continued denial reasonable, their continued denial is merely an extension of unreasonable pre-trial conduct.

If these rules are followed, the writer asserts that the system makes sense and protects the rights of all.

For now, the rallying cry on the defense side should be aggressive discovery and defense of penalty claims; unapologetic argument to re-establish a fair safe harbor for our clients; and implacable opposition to the *Simonson* line of cases. ■

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6 The defense would be able to use discovery to know all of the reasons the worker intends to claim a right to penalty at trial so that the defense has an opportunity to present countervailing evidence.

7 Or if no penalty claim was brought in the arbitration action.

8 Assume the Commission awards the maximum 50% penalty.

9 Or the Commission awards a penalty less than the maximum 50%.

10 Actually, the writer has always argued there is a fundamental procedural flaw in these second petitions for penalty on a previously litigated action. If this is part of the same claim, it should have been brought with the original action or be barred due to claim preclusion. If it is a review/reopening petition, the only basis for an award is a change in the worker's condition, so a petition seeking only a penalty would lack a basis for an award. Attempts to gain a post-trial penalty should thus be in one of the following forms. First, it could be some sort of 1.904 motion after appeals and judicial review are complete. Second, this could be avoided if deputies simply ordered open-ended penalty in appropriate cases, just as they make a running award. For example, if the deputy finds that it was necessary to have paid 10% of the body to avoid penalty and only 30 weeks of PPD have accrued before trial, the deputy would award penalty equal to 50% of the 30 accrued weeks and order penalty to be paid on future weeks up to 20, to end at such time as benefits are brought current to that amount. If a running award is within the agency's power (perhaps an argument for another day), then so would such a running penalty award.

PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS . . . *continued from page 3*

Campbell scrutiny intact or with smaller reductions than sought by defendants.[3]

In *Williams*, the widow of a lifelong smoker sued Philip Morris for fraud. The Oregon state court jury awarded compensatory damages of $821,000 and punitive damages of $79.5 million. The trial court reduced the compensatory award to $500,000 and the punitive award to $32 million. The Oregon Court of Appeals reinstated the full jury verdict. The United States Supreme Court granted certiorari, vacated the Court of Appeals decision, and remanded for reconsideration in light of *Campbell*. On remand, the Oregon Court of Appeals reached the same outcome (reinstatement of the full jury verdict) and the Oregon Supreme Court affirmed. *See Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Ore. 2006). The U.S. Supreme Court granted certiorari a second time, this time with full briefing and argument. Numerous briefs amici curiae were submitted.

Campbell involved purely economic damages in an insurance bad faith case. Courts and commentators struggled with the application of *Campbell* guideposts in a wide variety of cases, including wrongful death and catastrophic injury actions and mass tort product liability litigation where the defendant's product harmed thousands of consumers. *Williams* provided the high court with the opportunity to clarify constitutional limitations on the use of evidence of harm to nonparties and the permissible ratio of punitive to compensatory damages. Unfortunately, the answers provided by the fragmented *Williams* Court are both unclear and incomplete.

The *Williams* decision disappointed court watchers who had been holding their breath for guidance on the ratio issue, by declining to "consider whether the [$79.5 million punitive] award is constitutionally 'grossly excessive.'" 127 S.Ct. at 1065. The majority instead vacated the punitive award because the Oregon Supreme Court "applied the wrong constitutional standard" by permitting the jury to punish Philip Morris for harm caused to nonparties. *Id*. at 1065. The majority opinion -- authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Souter and Alito -- began by framing and answering this question of federal constitutional law:

> The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

Id. at 1060 (Court's emphasis). Justice Breyer gave the following explanation for why the Due Process Clause precludes awarding punitive damages to punish the defendant for harm caused to nonparties:

> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." [quoted citation omitted] Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer - risks of arbitrariness, uncertainty and lack of notice - will be magnified. [citations omitted]

Id. at 1063.

The *Williams* majority set forth an "explicit" holding with an accompanying caveat that may prove difficult to apply:

> We did not previously hold explicitly

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[3] Several Iowa appellate decisions have applied the *Campbell* guideposts. *See, e.g., Wolf v. Wolf*, 690 N.W.2d 887, 894-96 (Iowa 2005)(affirming $25,000 punitive damage award from bench trial on claims of tortious interference with child custody rights where plaintiff-ex-husband was found to have suffered compensatory damages, but waived all amounts over $1.); *Nemecek v. Santee*, 713 N.W.2d 248 (Table), 2006 WL 334298, ** 3-4 (Iowa Ct. App. Feb. 15, 2006)(affirming Linn County jury verdict awarding punitive damages of $8,357 in trespass action, with nominal damages of $1 awarded for trespass and $1,659 for interference with prospective business advantage)(the Honorable David L. Baker was the trial judge); *Home Pride Foods of Iowa, Inc. v. Martin*, 2003 WL 23005185, ** 2-3 (Iowa Ct. App. Dec. 24, 2003)(reversing judgment on jury award of $82,228 in punitive damages and zero actual damages; remanding for new trial on punitive damages)(Hecht, J); *see also Haskell v. Tan World, Inc.*, 2003 WL 24054815 (Iowa Dist. Linn Cnty., Dillard, J.)(granting remittitur reducing jury punitive damage award from $250,000 to $40,000 in negligence action). Decisions of the United States Court of Appeals for the Eighth Circuit applying *Campbell* are surveyed in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), discussed below.

PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS . . . *continued from page 11*

> that a jury may not punish for the harm caused others. But we do so hold now…. We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

Id. at 1065. The *Williams* majority concluded that "the Due Process Clause requires States to provide assurances that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id*. at 1064.

Justice Breyer's majority opinion expressly recognized the practical difficulty of allowing evidence of harm to others in determining reprehensibility while prohibiting "punishment" for harm to others. *Id*. at 1065. The *Williams* Court recognized that lower courts will have "some flexibility" to determine procedures to ensure federal constitutional due process safeguards are met:

> How can we know whether a jury, in taking account of harm cause others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one-because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury-a court, upon request, must protect against that risk. Although the state courts have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases. [Court's emphasis]

Id. Courts and commentators will debate what "procedures" pass constitutional muster but it is clear that *Williams* will impact not only jury instructions, but also evidentiary rulings as well as post-trial and appellate review of punitive awards. Practitioners must take heed of the "upon request" language in the quoted passage in order to preserve error. Specifically, practitioners should move in limine to exclude evidence of harm to others, and object to the admission of such evidence, in addition to requesting appropriate limiting instructions.

JURY INSTRUCTIONS

The ISBA Jury Instruction Committee concluded that a revision to IUCJI 210.1 was required and approved adding the following language: "Although you may consider harm to others in determining the nature of the defendant's conduct, you may not award punitive damages to punish the defendant for harm caused others…." *See* Footnote 1 for the full text of the instruction. The Board of Governors agreed and adopted the revision. Query, however, how lay juries in practice will give effect to the foregoing language when justices of our highest court have difficulty doing so. As Justice Stevens observed:

> The majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct -- which is permitted -- from doing so in order to punish the defendant "directly" -- which is forbidden. *Ante*, at 1064. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant--directly--for third-party harm [footnote omitted].

Id. at 1066-67 (Stevens, J., dissenting).

Justice Ginsburg described the Court's case law on punitive damages as "changing, less than crystalline precedent." *Id*. at 1069. (Ginsburg, J., dissenting)(joined by Scalia and Thomas, J.J.). Whether "crystalline" or not, *Williams* is the law of the land and juries must be instructed consistent with its explicit holding.

The *Williams* majority quoted from the jury instruction Philip Morris requested and the trial court rejected:

> The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the "reasonable relationship" equation (which it would allow) and using it directly as a basis for punishment. The instruction asked the trial court to tell the jury that "you *may* consider the extent of harm suffered by others *in determining what [the] reasonable relationship* is" between Philip Morris' punishable misconduct and harm caused to Jesse Williams," *[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own* in which other juries can resolve their claims…."

127 S.Ct. at 1064 (Court's emphasis). The instruction proposed by Philip Morris would permit juries to consider harm to others in determining the ratio of punitive compensatory damages -- the second *Campbell* "guidepost." By contrast, the *Williams* majority, without criticizing the proposed instruction specifically, instead concluded that the jury could consider harm to others in evaluating the "reprehensibility" of defendant's conduct -- the first *Campbell* "guidepost." Justice Ginsburg

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PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS . . . *continued from page 12*

pointedly criticized Philip Morris' proposed jury instruction, stating:

> Under that charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

127 S.Ct. at 1069 (Ginsburg, J.; dissenting)(also noting that the majority "ventures no opinion on the propriety of the charge proposed by Philip Morris"). Lower courts, other state jury instruction committees and practitioners will have to carefully consider how best to instruct juries following *Williams*. This author respectfully suggests that Iowa's newly updated instruction, IUCJI 210.1, correctly implements *Williams*.

EVIDENTIARY RULINGS

The explicit admonition that juries "may not punish for the harm caused others" has evidentiary implications, especially in product liability cases tried in Iowa. Specifically, *Williams* may help defense counsel exclude evidence of other accidents involving the product, which by definition involve "harm caused others," not the plaintiff. In *Lovick v. Wil-Rich*, 588 N.W.2d 688 (Iowa 1999), the Iowa Supreme Court held that a punitive damage claim was properly submitted against a product manufacturer in a post-sale failure to warn case based in part on evidence of similar accidents involving its product. The *Lovick* Court stated:

> Viewing the evidence in the light most favorable to Lovick, we agree with the trial court that punitive damages were properly submitted to the jury. There was evidence Wil-Rich failed to institute a warning campaign for numerous years despite knowledge of numerous similar incidents involving its cultivator and knowledge of the efforts of Deere & Company to warn their users of the danger. There was also some inference from the evidence that Wil-Rich acted indifferently to any need to warn of the potential for danger.

Id. at 699. *See also, McClure v. Walgreen Co.*, 613 N.W.2d 225, 231 (Iowa 2000)(affirming punitive damage award against pharmacy based in part on evidence that 34 other prescriptions were misfilled at the same location; *citing Lovick*). *Compare Mercer v. Pittway Corp.*, 616 N.W.2d 602, 616-18 (Iowa 2000)(vacating punitive damage award against manufacturer of smoke detector; holding trial court abused its discretion in admitting evidence of hundreds of other consumer complaints that the same model of detector failed to respond to smoke).

The *Lovick* Court observed that:

> evidence of other incidents is admissible for a variety of purposes, including: (1) the existence and nature of the defect; (2) causation; (3) notice; and (4) impeachment or rebuttal.

588 N.W.2d at 697. Appellate courts typically are highly deferential to trial court rulings on the admissibility of evidence, under the "abuse of discretion" standard of review. Constitutional issues, however, are more likely to receive less deferential "*de novo*" review. *See Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005)(applying *de novo* review of record to determine whether punitive damage award was excessive under *Campbell* guideposts). In light of *Williams*, counsel seeking to exclude evidence of other accidents should move in limine and object on grounds that the jury might misuse such evidence to unconstitutionally punish defendant for "harm caused others." If punitive damages are awarded, defense counsel should seek *de novo* review.

In *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), the Eighth Circuit reversed a punitive damage award in a product liability action, stating:

> The evidence of other accidents was used by the plaintiff and the district court, however, in submission of the question of punitive damages to the jury. The court used a verdict form which told the jury that a portion of the punitive award would go to a trust fund. In his closing argument, Burke intimated that part of the award would compensate victims of similar farm-implement accidents. This use of evidence of other post-control accidents served to enhance the award of punitive damages. This was reversible error.

Id. at 506. *Williams* breathes new life into the *Burke* Court's conclusion that courts should not permit evidence of similar accidents involving the product to "enhance" a punitive damage award. *Williams* also bolsters the *Burke* Court's conclusion that it is improper to instruct the jury that part of a punitive damage award will go into a trust fund to benefit other victims.

In *Niver v. Travelers Indem. Co. of Illinois*, 433 F.Supp.2d 968 (N.D. Iowa 2006), a first party bad faith claim arising from a failure to pay workers' compensation benefits, Chief Judge Bennett denied the insurer's motion in limine seeking a categorical exclusion of evidence of alleged bad faith conduct toward other claimants. *Id*. at 979-80. The *Niver* Court applied *Campbell* to determine the admissibility of the evidence of other bad faith claims:

> While this court must "ensure that the conduct in question replicates the prior transgressions," *Campbell*, 538 U.S. at 423, 123 S.Ct. 1513, for the evidence to be admissible, and must exclude evidence that has "nothing to do with" the dispute presently before the court, *id*. at 423-24, 123 S.Ct.

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PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS . . . *continued from page 13*

> 1513, this court believes that it is ultimately for a jury to decide whether the evidence of prior misconduct is sufficiently like the misconduct at issue here to warrant punishing Travelers for "recidivism" in an award of punitive damages. Thus, consistent with *Campbell*, jurors must be instructed that they cannot award punitive damages to punish or deter conduct that bore no relation to Niver's harm, and that they may not consider the merits of other parties' claims, real or hypothetical, against Travelers in determining whether or not to award punitive damages against Travelers in this case but may only award punitive damages to punish Travelers for repeated "bad faith" conduct if this case repeats prior "bad faith" conduct of the same sort that injured Niver. See Id. at 422-24, 123 C. St. 1513.

Niver, 433 F.Supp.2d at 979-80. Such an analysis could be applied to evidence of similar accidents or complaints in product liability cases.

Williams arguably helps tip the scale towards exclusion of evidence of similar accidents or complaints, given the explicit holding that juries "may not punish for harm caused others." The door remains open, however, for plaintiffs to argue that similar accident/complaint evidence remains admissible as to the reprehensibility or recidivism of the defendant's conduct. The *Williams* majority acknowledged that juries can take into account the fact that defendant's conduct that "risks harm to many is likely more reprehensible than conduct that that risks harm to only a few." 127 S. Ct. 1065. The majority supported that proposition with a "*cf.*" citation to *Witte v. United States*, 115 S.Ct. 2199 (1995), including a parenthetical stating:

> Recidivism statutes taking into account a criminal defendant's other misconduct do not impose an "additional penalty for the earlier crimes," but instead … "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." (quoting Gryger v. Burke, 68 S. Ct. 1256 (1948)).

Williams, 127 S.Ct. at 1065. Justice Stevens added this observation:

> But if enhancing a penalty for a present crime because of a prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims.

127 S.Ct. at 1067 & n. 2 (Stevens, J., dissenting). It will be interesting to see how courts and commentators deal with the "mixed messages" accompanying the majority's explicit holding that juries may not punish the defendant for harm caused others.

THE CONSTITUTIONALITY OF IOWA CODE SECTION 668A.1

Query whether *Williams* casts a shadow of unconstitutionality over the statutory mechanism in Iowa Code § 668A.1(2)(b) by which 75 percent of the net punitive damage award ("after payment of all applicable costs and fees") is paid to "the civil reparations trust fund administered by the state court administrator." That diversion is to occur if the jury finds that defendant's conduct was ***not*** "directed specifically at the claimant, or at the person from which the claimant's claim is derived." Does such a finding indicate that the defendant is being unconstitutionally punished for harm caused others? Not necessarily, if the plaintiff simply happened to be the unlucky victim of misconduct directed at no one in particular.

In *Moody v. Ford Motor Co.*, 2007 WL 869693 (N.D. Okla. March 20, 2007), a Ford Explorer rollover case, no punitive damages were awarded, but the federal district court granted Ford's motion for a new trial and vacated a $15 million jury compensatory award based on plaintiffs' counsel's violation of orders in limine. *Id.* at 24. The *Moody* court noted the impact of *Williams* on the admissibility of evidence of harm to others and jury instructions in the retrial. *Id.* at 26-28. The court discussed the Oklahoma statute permitting the jury to award punitive damages based on evidence of the defendant's "reckless disregard for the rights of others" which "[o]n its face … contemplates harm to third parties as the foundation for any award of punitive damages." *Id.* at 26. The *Moody* stated, "There is the possibility that [the Oklahoma statute] may be facially unconstitutional[.]" *Id.* at n. 14. The court stated that it "would consider a limiting instruction based on [*Williams*], but there is a strong possibility that this would be contrary to the legislative intent and may void any award of punitive damages under [the Oklahoma statute]." *Id.* Nevertheless, it is probably unlikely that a *Williams*-based constitutional challenge to Iowa Code Section 668A.1 would succeed in vacating a punitive damage award where the jury found defendant's conduct was not directed specifically at the plaintiff. *Williams* allows juries to consider harm to others in determining the reprehensibility[4] of defendant's conduct. Moreover, when the plaintiff in fact was injured by the defendant, a finding that defendant's conduct was not specifically directed at the plaintiff does not of itself establish that the jury's punitive damage award was improperly based on harm to *others*. Defense counsel still should preserve error on this issue through an appropriate post-trial motion.

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[4] The Iowa Jury Instruction Committee substituted the word "nature" for "reprehensibility" in keeping with the "plain language" tradition of the Iowa Uniform Jury Instructions.

PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS . . . *continued from page 14*

EXCESSIVENESS REVIEW BASED ON RATIOS

The jury in *Williams* awarded $821,000 in compensatory damages. 127 S.Ct. at 1058 (syllabus). This resulted in a ratio of about 100 to 1 punitive to compensatory damages, given the $79.5 million punitive award. *Williams* was remanded to the Oregon state courts for further proceedings this year, with the U.S. Supreme Court expressly declining to answer whether the roughly 100 to 1 ratio was unconstitutional on the facts of this case. *Id*. at 1065.

An open question is whether the ratio should be based on total compensatory damages found by the jury, or the net compensatory award after reduction for the plaintiff's comparative fault. The Sixth Circuit addressed that issue in a product liability enhanced injury (crashworthiness) action arising from a fatal pickup truck accident where plaintiff was ejected allegedly due to a defectively designed door latch; the federal court jury in Kentucky found the driver and Chrysler each 50 percent at fault. *Clark v. Chrysler Corp.*, 436 F.3d 594, 596-97 (6th Cir. 2006). The jury found plaintiff's compensatory damages to be $471,258, reduced by the court to $235,629, based on the 50 percent fault finding. The jury also awarded $3 million in punitive damages. *Id*. at 597. The Sixth Circuit held that the ratio for constitutional review of the punitive award for excessiveness was to be measured from the net compensatory award after reduction for comparative fault, stating:

> We used this reduced amount to determine the appropriate ratio because a ratio based on the full compensatory award would improperly punish Chrysler for conduct that the jury determined to be the fault of the plaintiff.
>
> ****
>
> [T]he punitive damage award is not to be inflated to compensate a plaintiff for damages not permitted by the relevant jurisdiction.

Id. at 607 n. 16. The Sixth Circuit reduced the punitive damage award from $3 million to $471,258, concluding that a 2 to 1 ratio of punitive damages to the net award was appropriate. *Id*. at 607, 612. An Iowa District Court Judge reached a contrary conclusion in *Haskell v. Tan World, Inc.*, 2003 WL 24054815, * 1 (Iowa Dist. Dec. 9, 2003). In that case, Judge Denver Dillard reduced a punitive damage award from $250,000 to $40,000 but based the ratio on the compensatory award before the reduction, stating:

> To conclude otherwise would be to legitimize willful and wanton conduct merely because the Plaintiff was negligent to some degree. If Plaintiff's negligence were relevant in the awarding of punitive damages, comparative fault would apply to punitive damages.

Id. at * 1. Under Iowa statutory and common law, a punitive damage award is not reduced by plaintiff's comparative fault. *Godbursen v. Miller*, 439 N.W.2d 206, 209 (Iowa 1989). There nevertheless remains room to argue that as a matter of federal constitutional law, the ratio for an "excessiveness" review should be based on the net compensatory damages after reduction for comparative fault, for the reasons stated by the Sixth Circuit in *Clark v. Chrysler*.

An Eighth Circuit decision applying the *Campbell* guideposts in a tobacco liability case provides guidance on the constitutionally permissible ratio in mass tort product liability actions involving death or catastrophic injuries to numerous consumers. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005). In *Boerner*, a federal court jury in Arkansas awarded the widower of a smoker who died of lung cancer $4,025,000 in compensatory damages under a design defect theory and $15 million in punitive damages. *Id*. at 598. The Eighth Circuit affirmed the compensatory award, but reduced the punitive damages to $5 million. *Id*. at 604. The *Boerner* Court noted that "the degree of reprehensibility is the 'most important indicium of the reasonableness of a punitive damages award.'" *Id*. at 602 (quoting *Campbell*, 538 U.S. at 419)). The Eighth Circuit applied the *Campbell* guideposts as follows:

> The evidence at trial indicated that American Tobacco's conduct was highly reprehensible: Pall Mall cigarettes were extremely carcinogenic and extremely addictive -- substantially more so than other types of cigarettes; the sale of this defective product occurred repeatedly over the course of many years despite American Tobacco's knowledge that the product was dangerous to the user's health; and American Tobacco actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct was shown to relate directly to the harm suffered by Mrs. Boerner: a most painful, lingering death following extensive surgery.
>
> In light of the second *Gore* guidepost, however, we conclude that the punitive damages award is excessive when measured against the substantial compensatory damages award. Though the Supreme Court has been "reluctant to identify concrete constitutional limits on the ratio between harm… to the plaintiff and the punitive damages award," *id*. at 424, 123 S.Ct. 1513, it has identified a circumstance in which caution is required: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id*. at 425, 123 S.Ct. 1513. As the Supreme Court noted in *Gore*

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PUNITIVE DAMAGES IN IOWA AFTER *PHILIP MORRIS USA V. WILLIAMS* AND THE *CAMPBELL* GUIDEPOSTS . . . *continued from page 15*

there is no "simple mathematical formula" that marks the constitutional line. 517 U.S. at 582, 116 S.Ct. 1589. *See also State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 ("[W]e decline again to impose a bright-line ratio which a punitive damages award cannot exceed."). Notwithstanding the absence of a simple formula or bright-line ratio, the general contours of our past decisions lead to the conclusion that a low ratio is called for here. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004)(remitting the punitive damages award to an amount equal to the compensatory damages award of $600,000); *Stogsdill*, 377 F.3d at 834 (approving a ratio of 1:4 compensatory damages to punitive damages to as an upper limit where the compensatory award was ($500,000); *Morse v. Souther Union Co.*, 174 F.3d 917, 925-26 (8th Cir. 1999)(upholding close to a 1:6 ratio where the compensatory award was only $70,000).

Factors that justify a higher ratio, such as the presence of an "injury that is hard to detect" or a "particularly egregious act [that] has resulted in only a small amount of economic damages," are absent here. *See Gore*, 517 U.S. at 582, 116 S.Ct. 1589. We also note that, despite evidence that American Tobacco exhibited a callous disregard for the adverse health consequences of smoking, there is no evidence that anyone at American Tobacco intended to victimize its customers. *Cf. Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004)(affirming an award of punitive damages approximately 4.5 times greater than the compensatory damages award where the defendant had devised a scheme of fraud and evinced an intent to "f***" and "kill" the plaintiff's business).

> Accordingly, given the $4,025,000 compensatory damages award in this case, we conclude that a ratio of approximately 1:1 would comport with the requirements of due process. Thus, we conclude that the punitive damages award must be remitted from $15 million to $5 million.

Boerner, 394 F.3d at 602-03.

Boerner is significant in that the Eight Circuit limited punitive damages in that product liability death case to a ratio of roughly 1.25 to 1 despite concluding that defendant's conduct was "highly reprehensible." Iowa state courts should find *Boerner* persuasive on this issue of federal constitutional law.

Boerner reflects the paradox that the constitution keeps punitive damages on a shorter leash (perhaps tolerating no more than a one to one ratio) in a death or catastrophic injury case where large compensatory damages are awarded. At first blush, it seems counterintuitive, because conduct is considered ***more*** reprehensible under the first *Campbell* guidepost when "the harm caused was physical as opposed to economic; the tortious conduct evinced indifference to or reckless disregard of the health or safety of others… [or] involved repeated actions…." 123 S.Ct. at 1521. Ironically, the greater the harm inflicted by a product (as measured in compensatory damages), the smaller the ratio constitutionally permitted for punitive damages. Nevertheless, the Oregon Supreme Court in *Williams* had previously left intact the $79.5 million punitive award applying the *Campbell* guideposts, concluding the award was justified by the reprehensibility of defendant's conduct. *Williams v. Philip Morris USA, Inc.*, 127 P.3d 1165, 1177-82 (Ore. 2006). Because the U.S. Supreme Court this year in *Williams* evaded the "ratio" question, plaintiff's counsel doubtlessly will continue to argue that a large ratio of punitive to compensatory damages should be permitted given the "reprehensibility" of marketing a dangerous product that kills or maims numerous users. *Boerner* provides a powerful counterweight to such arguments. The need for the U.S. Supreme Court to revisit the "ratio" issue is highlighted by the fact that these appellate courts applying the same *Campbell* guideposts to cigarette product liability death cases reached such divergent conclusions as to the constitutionally permissible ratio (100 to one vs. 1.25 to one). ■

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Des Moines, Iowa

CASE NOTE: RECENT EIGHTH CIRCUIT CASE HELPFUL TO DEFENDANTS ON DISCOVERY, EVIDENTIARY AND *DAUBERT* ISSUES . . . *continued from page 5*

481 F.3d at 633-34. The *Ahlberg* court went on to note that in *Lovick*, although evidence of a competitor's retrofit program had been admitted over objection, the Iowa Supreme Court narrowly stated its holding:

> On retrial, however, we caution the trial court regarding undue emphasis of [the competitor's] retrofit program in light of its limited probative value and its potential for unfair prejudice.

481 F.3d at 634 (quoting *Lovick*, 588 N.W.2d at 697).

B. One of Plaintiffs' experts, a former Chrysler employee, was properly excluded from testifying under Rule 702 and *Daubert*.

In *Ahlberg*, the Plaintiffs also argued on appeal that the Magistrate erred in excluding the expert testimony of a former employee of Chrysler. In recent years, some product defendants have seen an increase in the number of "former disgruntled employees" appearing as witnesses for the other side. The former employee in *Ahlberg* had chaired a safety leadership team (SLT) of Chrysler which dealt with weaknesses in minivan safety. 481 F.3d at 634. The SLT did not consider whether the Dodge Ram should be equipped with a BSI device. *Id.* This proffered witness did not have a degree in engineering, and described his "expertise" as "the management of safety issues at Chrysler." *Id*. This witness was tendered as an "expert" on the narrow issue of whether the Ram was unreasonably dangerous because it lacked a BSI device. *Id*. at 634-35. After a Daubert hearing prior to trial, the Magistrate excluded the witness' testimony and also ruled that such testimony would be cumulative of another expert's testimony. *Id*. at 635.

In affirming this ruling on appeal, the Eighth Circuit court stated:

> We hold that the magistrate judge did not abuse his discretion in refusing to allow Sheridan to testify as an expert. The proffer of Sheridan's testimony was properly rejected because Sheridan employed no methodology whatsoever, reliable or otherwise. The plaintiffs attempted to satisfy the Rule 702 and *Daubert* criteria by arguing that Sheridan's techniques were subject to peer review by his Chrysler peers; that a BSI device was more than 99% reliable; and that Chrysler, as a whole, employed manufacturing and safety standards recognized in the auto industry. These arguments lack any substance. First, the plaintiffs have not actually described Sheridan's alleged techniques, nor have we identified any from the record. Second, even if we were to assume that Sheridan was a member of a specialized field, the relevant peer-review group would not be Sheridan's coworkers. If that proposition were true, any employee could arguably be considered an expert on account of the fact that he or she worked with others. Third, the plaintiff's argument regarding error rate fails to address any methodology actually used by Sheridan. The plaintiffs' argument regarding general acceptance in the relevant community suffers from the same flaw. Sheridan's proffered opinion evidence therefore falls short of the requirements of Rule 702 and *Daubert. Cf. Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997)("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.")

481 F.3d at 635-36.

C. Plaintiffs' expert was properly excluded from testifying as a fact witness as to hearsay conversations.

In *Ahlberg*, the Eighth Circuit also affirmed the Magistrate's exclusion of hearsay testimony by Sheridan as a fact witness. 481 F.3d at 636. The testimony that plaintiffs proffered was that during a 1994 meeting, members of the SLT stated that vehicles manufactured without BSI devices were unreasonably dangerous and Chrysler vehicles should have been equipped with BSI devices. *Id*. The court once again noted that "[W]e review the exclusion of hearsay statements for a clear abuse of discretion." *Id*. (*citing Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 572 (8th Cir. 1989)). The *Ahlberg* court further noted that under Federal Rule of Evidence 801(d)(2)(D), regarding certain statements which are defined as "not hearsay," the "proffering party must show that the statement was within the declarant's scope of employment." 481 F.3d at 636, (*citing Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1566 (11th Cir. 1991)(quoting *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1064 (W.D. Mo. 1985)). The trial court's ruling was affirmed absent such a showing, because SLT members evaluated minivan safety, not Ram safety. 481 F.3d at 631.

D. The trial court did not err by excluding evidence of previous lawsuits or customer complaints.

Finally, the *Ahlberg* court affirmed the Magistrate's rulings regarding the admissibility of other customer complaints or lawsuits. At trial, the Magistrate had limited this proof to any prior accident: 1) involving a Jeep or Dodge truck with an automatic transmission manufactured between 1990 and 1999; 2) with a key left in the ignition; and 3) with a child under the age of four. 481 F.3d at 637. With

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CASE NOTE: RECENT EIGHTH CIRCUIT CASE HELPFUL TO DEFENDANTS ON DISCOVERY, EVIDENTIARY AND *DAUBERT* ISSUES . . . *continued from page 17*

regard to the customer complaints, they were also excluded as hearsay. *Id*. at n. 2. On appeal, Plaintiffs contended that this standard was too restrictive and served to exclude other accidents which were relevant to show Chrysler's knowledge of a defect and concealment thereof.

The *Ahlberg* court noted that any review of decisions concerning the admissibility of prior accident evidence is subject to the "clear and prejudicial abuse of discretion standard" of review. *Id*. (*citing Drabik v. Stanley-Bostitch, Inc*., 997 F.2d 496, 508 (8th Cir. 1993)). "A party may offer evidence of prior accidents to show notice, causation, feasibility of correction, or magnitude of danger *if* a showing of substantial similarity is made." *Ahlberg*, 481 F.3d at 637 (court's emphasis). In ruling on this issue, the court cited to *Lovett v. Union Pacific Railroad*, 201 F.3d 1074 (8th Cir. 2000) and *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988) and stated that in both *Lovett* and *Lewy*, a stricter showing for the admissibility of other accident evidence had been utilized by the trial court and affirmed on appeal. *Ahlberg*, 481 F.3d at 637. With regard to the ruling involving customer complaints, the court noted that although they might be offered for a non-hearsay purpose, *e.g*., "notice," they must nevertheless satisfy the substantial similarity showing for admissibility. *Id*. at n. 3.

E. Conclusion.

Here are some "bullet points" that defense counsel may take from *Ahlberg v. Chrysler Corporation*:

1. Because the standard of review for evidentiary questions on appeal is a clear abuse of discretion, it is critical that important evidentiary issues at trial be briefed and argued by the defense. If this job is done in a sloppy or inadequate fashion, you will be "stuck" with this ruling on appeal.
2. Substantial effort should be made to appropriately limit the scope of discovery prior to trial. Despite its relatively broad parameters, the scope of discovery is not limitless. If the trial court's scope limitations are reasonable, they stand an excellent chance of withstanding a later appeal.
3. Scope limitations regarding other accidents or customer complaints should focus on the lack of substantial similarity between the subject accident and/or product and the evidence sought to be excluded. Other accidents or complaints involving dissimilar products are not relevant and are excludable under Rule of Evidence 403.
4. Defense counsel should not forget to utilize Rule of Evidence 403 in arguing for the exclusion of evidence, and in making the case that to admit impertinent evidence would confuse the jury and constitute a waste of judicial resources.
5. Any "expert" without a formal educational background or training and a recognizable methodology for arriving at the opinions sought to be expressed should be subjected to an aggressive Daubert attack, or a pretrial motion in limine based on Iowa Rules of Evidence 702 and 104(a).
6. Even products cases which appear to have significant emotional and sympathetic appeal to a lay-person jury are defensible on the facts and on the engineering merits, so long as care is taken to make sure that evidence relating to the liability merits meets the strict evidentiary standards for admissibility. ■

DIVERSITY IN IOWA DEFENSE COUNSEL ASSOCIATION

A Statement of Principle

ICDA is the state organization of lawyers involved in the defense of civil litigation. As such, IDCA expresses its strong commitment to the goal of diversity in its membership. Our member attorneys conduct business throughout Iowa, the United States and around the world, and IDCA values the perspectives and varied experiences that are found only in a diverse membership. The promotion and retention of a diverse membership is essential to the success of our organization as a whole as well as our respective professional pursuits. Diversity brings to our organization a broader and richer environment that produces creative thinking and solutions. Thus, IDCA embraces and encourages diversity in all aspects of its activities. IDCA is committed to creating and maintaining a culture that supports and promotes diversity in its organization.

[Adopted by the IDCA Board 7/20/07]

RECENT IDCA EVENTS

Justice Brent R. Appel speaks to IDCA board members including Hannah Rogers, Christine Conover and Henry Bevel.

Justice Mark S. Cady addresses the IDCA board at the July meeting. Others present include L to R: Joel Yunek, Randy Willman, and Bob Kreamer

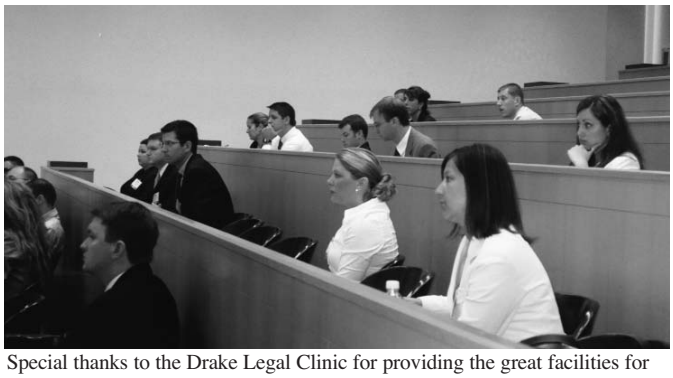
Retired Judge Albert Habhab joins Martha Shaff, Michael Thrall, James Pugh and Michael Jacobs at the July IDCA board meeting.

Justice David S. Wiggins comments on issues while IDCA President Mark Brownlee and Noel McKibben look on.

IDCA Board members and several of the Justices joined the golf pros at the Fort Dodge Country Club for a mini golf instruction and outing.

Christine Conover, chair of the IDCA Trial Academy opens the two day seminar while other instructors look on.

Students listen intently to opening remarks for the IDCA Trial Academy



Special thanks to the Drake Legal Clinic for providing the great facilities for the IDCA Trial Academy.

THE DRI ANNUAL MEETING

The DRI Annual Meeting will be held from **October 11 – 14**, at the Marriott Wardman Park Hotel in Washington, D.C. Highlights include remarks from author and journalist, Bob Woodward, Fox News Managing Editor, Brit Hume, and U.S. Supreme Court Clerk William Suter, along with an outstanding CLE program and all of the sights and sounds of our nation's capital.

Register online at www.dri.org.

At the meeting, former IDCA President Mike Weston is seeking the position of DRI National Director. 4 are elected each year to a 3 year term. It is important to the Iowa defense bar that Mike be successful. You are encouraged to write a letter of support for Mike and send it to John Kouris, DRI Executive Director, 150 North Michigan Avenue, Suite 300, Chicago, Illinois, 60601. You can email your letter to jkouris@dri.org. Please send your letter no later than October 5. If you attend the meeting, make sure to take 5 minutes to speak to the nominating committee on Mike's behalf.

Ask how to sign up when you arrive at registration.

SCHEDULE OF EVENTS

December 14, 2007
IDCA Board Meeting
The Suites of 800 Locust, 800 Locust Street • Des Moines, IA
(Please dial 515/288-5800 for room reservations for the evening of 12/13 and state 'IDCA' room block for $155 rate.)
10:45 a.m. Executive Committee
11:00 a.m. Board Meeting/Luncheon

February 1, 2008
IDCA Board Meeting
The Iowa Hospital Association Education Center
100 East Grand Avenue, Suite 100 • Des Moines, IA
(Please dial 800/362-2779 for The Embassy Suites, 101 East Locust St., DSM, for the evening of 1/31 and state 'Lynn Harkin' room block for $149 room rate.)
10:45 a.m. Executive Committee
11:00 a.m. Board Meeting/Luncheon

April 4, 2008
IDCA Spring CLE Seminar
Des Moines Golf & Country Club
1600 Jordan Creek Parkway • West Des Moines, IA
8:30 a.m. – 4:30 p.m.
Topic TBD

IDCA Board Meeting
Des Moines Golf & Country Club
1600 Jordan Creek Parkway • West Des Moines, IA
11:30 a.m. Full Board Meeting/Luncheon

May, 2008
DRI Mid-Region Meeting-TBD
Hosted by Utah

June, 2008
IDCA Board Meeting - TBD
Davenport, IA
9:00 a.m. Full Board Meeting/Luncheon
Golf Outing

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