

How To Handle Workers' Compensation Benefits In Third Party Actions

By Bruce L. Walker, Phelan Tucker Mullen Walker Tucker & Gelman LLP, Iowa City, IA



Bruce Walker

In the event you are retained to defend a third party tort claim where there is a workers' compensation lien in place, there are a number of considerations that must be processed. Do you want to let a jury know whether or not the Plaintiff has already been compensated? Do you think that by directly informing the jury, they will use this in their deliberations as a basis to start awarding damages, or will they believe the Plaintiff has already received enough for the injury? Would it be a better alternative to allow a jury to speculate whether or not the plaintiff has already received

benefits? There are also practical considerations that require thought. One example of this is how to handle exhibits, depositions, and live testimony that could touch on the subject. Another example is to determine the foundation that is required for admission of bills for related treatment expenses.

In the past, this issue has been addressed by the same District Court Judge in the 6th Judicial District with two divergent rulings that may be of interest to you and helpful in understanding the issues. In a case tried in Cedar Rapids, the issue of the admission of workers compensation benefits was raised by defense counsel to establish an absolute defense to the third party action. Before filing the third party action against his employer and its principals, the Plaintiff had collected approximately \$300,000.00 in medical, temporary total disability, and other benefits as a result of severe burns that occurred at a work site. When presented with a

permanent partial and industrial disability offer, the Plaintiff believed it to be too low. After consulting with counsel, he then claimed he was not an employee so the third party action could proceed. The issue was raised pretrial by a Motion in Limine and addressed during the five days of trial before the case was settled. The rulings received consistently denied the jury access to evidence that workers' compensation benefits had been received at all, let alone the amounts paid. The case was resolved and no appeal was necessary.

More recently in a motion filed in Iowa City, the same defense counsel requested the same judge to deny the jury access to the Plaintiff's receipt of approximately \$140,000.00 in medical, temporary total disability and permanent partial disability benefits. Defense counsel submitted this issue, which was resisted by Plaintiff's counsel and argued that the amount of payments made is admissible on the issue of the reasonable value of medical expenses since *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150 (Iowa 2004), and when admitted, the jury is to be informed that the amount of payments for medical expenses awarded are to be reimbursed to the insurer who paid them. Upon consideration of the rulings raised by defense counsel in *Kuta v. Newberg*, 600 N.W.2d 280 (Iowa 1999); *Loftsgard v. Dorrian*, 476 N.W.2d 730 (Iowa Ct. App. 1991); and *Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990) and Iowa Code § 668.14(2) (2013), the District Court ruled the evidence to be admissible.

The basis on which the Court ruled the payments made were admissible was the reasonable value of medical services could be proven based on *Pexa and Wildner v. Wendorff*, No. 05-1998, 2006 WL 2265453 (Iowa Ct. App. Aug. 9, 2006) (dealing with medical benefits) and 16 Couch on Ins. 3d § 225:175 (2012). The Court further noted that in *Kuta*, the Plaintiff objected to the admission of the evidence of workers' compensation benefits. The Court also ruled that in order to provide confrontation and cross examination

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IDCA SCHEDULE OF EVENTS

**50th Annual Meeting
& Seminar**

Sept. 18–19, 2014
8:00 a.m. – 5:00 p.m.

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the Plaintiff would need to call a representative from the workers' compensation insurer to lay the foundation for the reasonableness (and presumable necessity) of the payments.

The Court concluded its holding that there could be a limiting instruction on this point to avoid reduction of Plaintiff's recovery because of these payments, without adding that there should not necessarily be an argument by Plaintiff's counsel to award Plaintiff any damages in an amount greater than the lien at the time of trial. There is no doubt that special interrogatories on this subject will be utilized as well. The Court finally found this approach to be the most practical way to proceed because of the substantial references in the

medical records and depositions related to payment of work related benefits.

This case will come to trial in July of 2014. At that point, this issue will be decided by the judge who ruled on the pretrial motion filed by defendant, since he is specially assigned. For further insight into these issues, I suggest you refer to Johnson County LACV 073729; www.atra.org/issues: Collateral Source Rule Reform; and David Schap & Andrew Feeley, *The Collateral Source Rule: Statutory Reform & Special Interests*, Cato J., Vol. 28 No. 1 (Winter, 2008) available at 2008 WLNR 8639359.

IDCA's New Member Listserv

Don't forget about the new IDCA Member Listserv

The purpose of the IDCA listserv is to provide IDCA members an additional opportunity for networking outside of IDCA meetings and other functions. The listserv is available to members to quickly ask for help, tips and advice from other members and to provide ongoing communication opportunities.

The IDCA listserv is open to IDCA members only.

If you are receiving this email, you have already been subscribed to the listserv. Read further to learn how to use the listserv. If you have questions, please contact IDCA Headquarters at staff@iowadefensecounsel.org.

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One of the many benefits of IDCA membership is access to the Jury Verdicts on iowadefensecounsel.org. We encourage all members to use and contribute to this valuable database.

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Don't forget to check us out the next time you are online!



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A message from the president ...

On September 20, 2013, I became President of the Iowa Defense Counsel Association. I am humbled and thrilled by the opportunity. I am humbled because our organization represents experienced, accomplished and well-respected defense lawyers. I am thrilled because I know our current Board of Directors and executive leadership is committed to continue our work to enhance your experience as an IDCA member.

As I begin my term, I want to publically thank Bruce Walker for his service as IDCA's President last year and to congratulate him on his election to Vice President of the Iowa State Bar Association. The IDCA looks forward to working with the ISBA and Bruce for many years to come. In addition, I want to congratulate and acknowledge IDCA member and Past President, Mike Weston, on becoming President of the Defense Research Institute on October 19, 2013. The IDCA hosted a reception honoring Mike at the recent DRI Annual Meeting in Chicago and approximately 20 IDCA members joined the celebration. At the IDCA Annual Meeting in September one of our members asked, "Why did you become a member of the IDCA?" The question had me thinking back 30 years! I was admitted to the Iowa bar in 1983 and became a member of IDCA shortly after. My partners told me IDCA was the preeminent defense lawyer organization in the state. I was told I would meet and have the opportunity to network with many great defense lawyers in Iowa. I remember meetings at the Renaissance Des Moines Savery Hotel, Embassy Suites, and Hotel Fort Des Moines where I listened to experienced defense lawyers discuss their practices, teach CLE, share stories about cases and discuss trial practice techniques wishing someday I could be as comfortable and as confident in front of a jury as they appeared. I am a better lawyer today because of my participation in IDCA.



James Craig

But the question also made me think why young lawyers should join IDCA today? There are more reasons now than ever before.

Two years ago, the Board met to refocus our mission and vision. Our mission is to continue to be a trusted voice for the defense of litigants in Iowa. Our vision is to protect and promote a balanced civil justice system. Just as in civil litigation where two competing parties present their best evidence to obtain a just result, having an active, vocal defense bar is critical to maintaining balance in our justice system. We on the Board take this responsibility seriously.

Advocating the interest of the defense bar to the State Legislature and public will continue to be a high priority this year. Scott Sundstrom and Brad Epperly, our lobbyists, continue to do a great job. They work with our Legislative Committee to establish an affirmative agenda for the legislative session and identify and counter the legislative initiatives of others we feel tilt the judicial playing field unfairly. Last year, IDCA was involved in filing amicus briefs in two separate matters affecting the defense practice in Iowa. With your help, we will continue to search for opportunities to file amicus briefs in matters of interest to the defense bar. We also continue our collaboration with other like-minded defense organizations and bar groups to maintain the merit selection system for judges in Iowa, to support full funding of our Courts, and to protect the retirement benefits of judges in the state to maintain the high quality of our judiciary.

Member education remains a priority. We continue to provide over 12 hours of high-quality continuing legal education at our Annual Meeting & Seminar. We plan to provide three webinars

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in 2014 on topics of interest to our members. Additionally, we are organizing a Skills Academy designed for graduating law students and new members of the Bar. While law schools focus on teaching substantive law, we need to help teach new associates the more practical aspects of the practice. Further, we plan to increase our use of Facebook, Twitter and LinkedIn to update our members on new case law, verdicts of note and member news. Finally, we are in the process of updating our website and have started a member listserv to assist our members in finding experts, collecting information on opposing experts, and to help solve obscure or complicated questions of law faced by our members.

The Board is committed to increasing our membership in the year ahead, believing our strength improves with numbers. We have made changes in our Bylaws to allow in-house insurance counsel and insurance claims professionals involved in supervising defense attorneys to become members of our organization. This change provides our members better opportunities to network.

The Iowa Defense Counsel Association is focused on helping our members become better lawyers, on advocating for fairness and balance in our judicial system, and providing you opportunities to network with other defense trial lawyers and insurance companies in the state. If you have not already done so, please encourage your new associates to join IDCA. I still benefit from my membership after 30 years. I know they will too!

A handwritten signature in black ink, appearing to read "James P. Cury". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

IDCA Submits Amicus Brief in Employment Discrimination Case

Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678 (Iowa 2013)

By James P. Craig, Brenda K. Wallrichs, and Megan R. Dimitt, Lederer Weston Craig, P.L.C., Cedar Rapids, IA

The Iowa Supreme Court has affirmed a district court holding that the Iowa Civil Rights Act does not permit an award of punitive damages except where expressly authorized. The Iowa Defense Counsel Association (IDCA) filed an amicus brief in support of the Appellees, arguing that the principles of stare decisis and legislative acquiescence precluded punitive damages.

The case began when Plaintiffs-Appellants Tammie Ackelson, Robin Drake, and Heather Miller, sued their employer Defendants-Appellees, Manley Toy Direct L.L.C. and Toy Network L.L.C., and asserted claims for sexual harassment, sex discrimination, and retaliation under the Iowa Civil Rights Act ("ICRA"). The employees alleged that a supervisor and a coworker repeatedly engaged in harassing and offensive conduct and sought punitive damages. The employer filed a motion to strike the punitive damages claim, arguing that punitive damages were not permitted by the ICRA. The district court granted the motion, and the employees requested and were granted the right to file an interlocutory appeal. The sole issue on appeal was whether the ICRA permits an award of punitive damages for allegations of employment discrimination.

Plaintiffs-Appellants argued that Iowa law permits punitive damages based on the presence or absence of willful and wanton conduct and not based on the theory of law under which the claims are made. Relying on *McElroy v. State*, 703 N.W.2d 385 (Iowa 2005), Plaintiffs-Appellants argued that not only jury trials were permitted in ICRA claims, but also that all other components of the civil justice system were available and, thus, so should punitive damages be if the requisite willful and wanton conduct was established.

Defendants-Appellees argued that the ICRA was a comprehensive, exclusive and preemptive statutory scheme that provided only a statutory remedy. Because punitive damages were not damages "for an injury caused by a discriminatory or unfair practice", the ICRA did not authorize the district court to award punitive damages as a remedy. Finally, Defendant-Appellees noted that the Iowa Supreme Court had determined that punitive damages were unavailable in *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375 (Iowa 1986), the Iowa legislature had never acted to change that interpretation.

The Iowa Defense Counsel Association submitted an amicus brief expanding on Defendant-Appellees *Chauffeurs* argument, arguing that for twenty-six years the Iowa legislature had



James Craig



Brenda Wallrichs



Megan Dimitt

acquiesced in that decision. The IDCA further argued that the Iowa Supreme Court should observe stare decisis and continue to adhere to its precedent. The Iowa Supreme Court agreed.

On June 21, 2013, the Iowa Supreme Court held that punitive damages were not available under the ICRA except when expressly authorized by the Iowa Legislature. The Court reviewed other states' statutes regarding the availability of punitive damage awards in employment cases and discussed its own precedent regarding the availability of punitive damages under the ICRA. While the Court acknowledged the public policy arguments in favor of permitting punitive damage awards, it ultimately chose to rest its opinion on "the venerable principles of stare decisis and legislative acquiescence."

We have clearly and repeatedly stated our conclusion that the ICRA does not implicitly permit an award of punitive damages. This message has been a reoccurring pronouncement over the last twenty-seven years. No significant legislative changes have been made since our first pronouncement in 1986 that would even hint at a shift in legislative intent since that time.

. . . .

. . . We did our job twenty-seven years ago and will leave it for the legislature to take any different approach.

. . . [W]e are confident that our legislature has acquiesced in our position after twenty-seven years.

Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678, 688–89 (Iowa 2013).

Amicus briefs are one of the many way in which IDCA serves its membership. Counsel for Defendant-Appellees, Frank Harty, had this to say about IDCA's involvement: "An amicus brief by the IDCA is a very useful way to highlight the importance of an issue that transcends the case before the court."

IDCA 49th Annual Meeting & Seminar Recap

2013 – 2014 IDCA Board of Directors

Please welcome and congratulate the 2013 – 2014 IDCA Board of Directors. This Board started office on September 20, 2013, during the IDCA Annual Business Meeting.

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IDCA 49th Annual Meeting & Seminar Recap

The 49th Iowa Defense Counsel Association's Annual Meeting & Seminar was held September 19 – 20, 2013, at the West Des Moines Marriott in West Des Moines, IA. Nearly 220 attorneys, exhibitors, and speakers gathered for two days of education and networking. Here are some highlights!

Seitzinger Award Presented to Gregory Barntsen



Greg receives a standing ovation from family and IDCA members after receiving the 2013 EDDIE Award.

In 1988, IDCA president Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and its first president and for his continuous and complete dedication to the IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, which was dubbed "The Eddie Award."

Edward Seitzinger was an attorney with Farm Bureau and besides his family and work, IDCA was his life. This award is presented annually to the board member who contributed most to the IDCA during the year. It is considered IDCA's most prestigious award.

The very deserving recipient of the Eddie Award for 2013 is Gregory G. Barntsen, Smith Peterson Law Firm in Council Bluffs. Barntsen has served in many ways for IDCA, but his most recognizable contributions happened during his tenure as President of IDCA. Under Barntsen's leadership, the IDCA participated in a day-long strategic planning meeting, revised Board meetings to focus on strategic plan goals, and revitalized the IDCA committee structure. During this time, Barntsen also stepped forward to serve as DRI Representative, a position with DRI that he recently completed. Celebrating with Greg at the IDCA Awards Dinner were his wife, children and spouses, and relatives.

Congratulations, Greg!

Meritorious Services Award Presented to Alan Fredregill

The Lifetime Award is bestowed upon IDCA members whose longstanding commitment and service to the Iowa Defense Counsel Association has helped to preserve and further the civil trial system in the State of Iowa.

This year, IDCA is pleased to bestow this award upon Alan E. Fredregill, Heidman Law Firm in

Sioux City. Phil's career accomplishments include President of the Iowa Defense Counsel Association (1990 – 1991), President of the Iowa State Bar Association (2002 – 2003), American Mock Trial

Association Judges Hall of Fame, Fellow of the Iowa Academy of Trial Lawyers, and Fellow of the American College of Trial Lawyers.

Robert M. Kreamer Award

Occasionally, there is an Iowa State Senator or Representative who goes above and behind their roles in working with IDCA toward our goal of improving the administration of civil justice in Iowa. Past recipients of this award include: State Representative Craig Paulson, State Senator Maggie Tinsman, the Honorable Louis Al Lavorato, State Senator Robert Hogg, and former IDCA Executive Director and Lobbyist, Robert M. Kreamer.

This year, IDCA presented this award to State Representative Chip Baltimore. Representative Chip Baltimore, a Boone Republican practicing attorney, is the chairman of the House Judiciary Committee. In that role, Rep. Baltimore has worked tirelessly to enact legislation to improve the administrative of civil justice in Iowa. He has played a significant role in crafting legislation addressing farmers' liability for recreational uses of their property, medical malpractice, insurance agent liability, mitigation of damages for failure to wear seatbelts, and liability of municipalities for sledding injuries on city-owned property.



Outgoing Board Members Honored

IDCA honored the following Board Members for their time and service to the association.

Gale Juhl, Farm Bureau Property and Casualty Company in West Des Moines, served on the IDCA Board of Directors for three years as District V Representative.

Amanda Richards, Betty, Neuman & McMahon, P.L.C., Davenport, served on the IDCA Board of Directors for four years as District VII Representative. Amanda was first appointed to fulfill a vacant position on the Board and was then voted by the IDCA membership to complete a full Board term. Amanda continues to serve as co-chair of the IDCA Young Lawyers Committee.

Gregory Witke, Patterson Law Firm, L.L.P. in Des Moines, served on the IDCA Board of Directors for six years as an At-Large Representative and as chair of the IDCA Legislative Committee. Greg continues to serve as co-chair of the IDCA Legislative Committee.

Thank you, Gale, Amanda, and Greg, for your long-standing commitment to the Iowa Defense Counsel Association.

IDCA 49th Annual Meeting & Seminar Recap

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IDCA 49th Annual Meeting & Seminar Recap

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