IOWA DEFENSE COUNSEL ASSOCIATION

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Full Circle: The "Innocent Co-Insured" Doctrine

By Ted J. Wallace, American Family Mutual Insurance Company, Davenport, IA

The Supreme Court of Iowa recently decided Postell v. American Family, an action which involved an intentional fire loss and the claims of an insured who had no participation in that loss. 823 N.W.2d 35 (Iowa 2012). In order to decide this case, the Court had to make certain determinations on the application of the "innocent co-insured" doctrine as it has evolved in Iowa. See id. This article will highlight the history of the innocent co-insured doctrine, from its earliest beginnings through Postell, as well as discuss whether or not there are any questions which remain to be adjudicated since the Postell decision was issued.

Iowa Courts that have reviewed or decided issues relevant to the doctrine in the past. The first case to utilize this precise term was AMCO Insurance v. Stammer. 411 N.W.2d 709 (Iowa App. 1987). The Stammer case was decided by the Court of Appeals in 1987. The Stammers residence was damaged by arson in 1983. The insurer initiated an action contending that one or both of the Stammers were responsible for the arson and that they had both falsified statements and acted fraudulently in connection with the claim presented to AMCO. Id at 711.

In response to the declaratory action, the Stammers filed an answer which also contained a claim for breach of contract on behalf of both Stammers and three tort claims on behalf of Mrs. Stammer alone. AMCO filed motions for summary judgment as to the tort claims which were granted and the remaining claims were tried to a jury which found in favor of AMCO. The Stammers appealed. Id.

A position taken by Mrs. Stammer was that the trial court erred by dismissing her first party bad-faith claims. The Court of Appeals noted that, even though Iowa had not yet accepted a first-party bad-faith tort, claims the facts would be "fairly debatable" and would "lie unequivocally outside the theory's ambit." Id at 712. The Court then further commented that whether or not an innocent co-insured could recover "under a policy in situations such as this has not yet been decided in this state." Id at 713. Thus, although not decided, the possibility of recovery by an innocent co-insured was raised.

The first decision to squarely address the issue of an innocent co-insured was Vance v. Pekin Ins. Co. in 1990, when the United States District Court for the Southern District certified two questions to the Iowa Supreme Court.457 N.W.2d 589 (Iowa 1990). The first question was whether or not an innocent co-insured spouse could recover under a fire policy when the other spouse was convicted of arson. The second question was, if the innocent co-insured could recover, what proportion of the loss would be available for recovery. Because the first question was answered in the negative, the second required no answer.

Factually, Donald and Susan Vance owned a residence and personal property that was damaged by fire in December of 1986. In April of 1987, the Vance's filed suit against Pekin. In June of 1987, Donald was convicted of second-degree arson for setting the fire. Shortly thereafter, Donald withdrew from the suit leaving only Susan Vance to make a claim under the policy. There was no evidence that Susan was implicated in the arson.

The Supreme Court's analysis in Vance included conducting a review of theories regarding recovery of an innocent co-insured in legal treatises and other court decisions. They noted that some theories would allow an innocent co-insured to recover depending on whether the co-insureds' interests under a policy were joint or severable. This analysis could, and did, lead to different conclusions in different jurisdictions. The Court also criticized the use of a "rebuttable presumption" analysis. Id at 592.

A third approach to the issue, which was referred to as the "best reasoned rule," was ultimately adopted for use in the innocent co-insured situation. Id. This approach requires the Court to make decisions not on property rationales or marital relationships but on a contract analysis of the applicable insurance policy. Accordingly, the language of the Pekin insurance policy became paramount.

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The language of the Pekin policy in Vance included an intentional loss exclusion that provided there would be no coverage for any loss arising out of any act committed "by or at the direction of an insured." Id (emphasis in original). The Court noted the words "an insured" relative to this lawsuit meant "an unspecified insured" who committed arson. "In short, if any insured commits arson, all insureds are barred from recovering." Id at 593. It was noted that there was no ambiguity in the phrase "an insured" which was characterized as "clear as spring water." Id at 593 (quoting Bryant v. Allstate Ins. Co., 592 F.Supp. 39, 81 (E.D.Ky. 1984)).

In 1992, the Supreme Court further addressed the question of recovery by an innocent co-insured in Webb v. American Family. 493 N.W.2d 808 (Iowa 1992). In Webb, insureds Dale and Rickey Webb brought a claim against their insurer to recover proceeds of an insurance policy after their house was destroyed by fire.

On November 16, 1989, while only Dale Webb lived in the residence, the fire destroyed the residence and contents which Dale claimed to value more than $88,000.00. Prior to that time, the Webb marriage was dissolved and Rickey and Dale entered into a division of property which included the residence. The insurer investigated the fire loss and, following the investigation, denied coverage claiming that Dale had caused the fire. The insurer also claimed that Dale had materially misrepresented the extent of the personal property lost in the fire with the intent to defraud the insurer.

During trial, the jury found that Dale did not intentionally cause the fire that destroyed the residence. However, the jury did find that Dale Webb had materially misrepresented the extent of the loss and the trial court, therefore, denied any recovery. Further, because the jury found that the claim of Rickey Webb, who did not provide information as to the loss, was also denied. The trial court held that her recovery, as an innocent co-insured, would be dependent upon the finding against Dale.

As part of the decision, the Court reiterated the adoption of the "best reasoned rule" set forth in Vance. The decision in this instance would turn, as in Vance, upon a contract analysis of the insurance provisions at issue. In this case, the policy language denied coverage if prohibited acts were committed by any insured person. The Court further repeated that the use of the terms "a," "an," or "any" insured not only precluded an innocent co-insured from recovering under a policy due to the acts of another insured but that such a holding "advances the public good by discouraging fraud." 493 N.W.2d at 812 (quoting Vance, 457 N.W.2d at 593).

In 1994, the Supreme Court had an opportunity to apply its "best reasoned" rule to policy language that was different than that used in Vance or Webb. Predictably, the outcome was also different.

In Jensen v. Jefferson County Mut. Ins. Assoc., the Court was faced with the question of whether or not policy language which barred recovery for the acts of "the" insured would have the same result as Vance and Webb. The insurance policy in question was issued by Jefferson County Mutual to Jane Jensen. Jensen was married to Michael Ehrmann but he was not named on the face of the policy. The relationship between Jensen and Ehrmann became strained and Ehrmann was asked by Jensen to move out. One day later Ehrmann set fire to the marital residence. Jensen, then, filed a claim with Jefferson County Mutual for the loss.

The exact language at issue in this case was that the insurer would not pay for a loss if "you" create or know of a condition which increases the chance of a loss. The policy defined "you" to mean the named insured and spouse if living in the same household.

The Court began its analysis by reiterating the use of the best reasoned rule enunciated in Vance. It then analyzed the policy provisions at issue. The first problem found with the language was the term "you." The exclusion arises if "you create" the increased chance of loss. The term "you", when fit into the exclusion, would cause it to read as follows:

[W]e will not pay for loss if [the Insured named in the Declarations and spouse if living in the same household] create or know of a condition that increases the chance of a loss arising from a covered peril. 510 N.W.2d at 872.

The Court noted that the use of the word "and" in the definition would suggest that the chance of loss would have to be created by the named insured and her spouse in order to create applicability of the exclusion.

Finally, the court found that the word "you" as contained in this policy could be interpreted in more than one fashion. The insurer here argued that the meaning of "you" would be the equivalent of "any insured." However, the decision noted that the word "you" could equally be found to mean "the" insured. Under that circumstance, if "the" insured did not cause the loss, then they would be entitled to recovery even if a different insured did. At the very least, the Court found ambiguity which would then cause the Court to interpret the policy more favorably to the insured and coverage was found.

This decision appeared to settle the question of the innocent co-insured doctrine application until the decision of Sager v. Farm Bureau. 680 N.W.2d 8 (Iowa 2004). At first blush, the Sager lawsuit appeared to simply be another fire loss caused by one spouse with the other attempting to recover under an insurance policy.

The Sager case was tried under stipulated facts. Robert Sager intentionally set a fire in the basement of his residence that he shared with his wife, Ramona. Ramona did not have anything to do with the fire. The policy of insurance that applied to the loss had a fairly typical intentional loss exclusion which precluded recovery for any loss committed by or at the direction of "an" insured. Following prior precedent, the trial court found that there was no coverage for Ramona under this language.

Ordinarily, that would have been the end of the matter. However, Ramona made the argument that the Farm Bureau policy, which excluded coverage for "an" insured was in violation of Iowa's standard fire policy which was set forth in Iowa Code § 515.138 (1999). The Court recognized that when a policy provision in an insurance policy was in conflict with a statute that the language of the statute would take precedence and control. Sager, 680 N.W.2d at 12 (citing Lee v. Grinnell Mut. Reins. Co., 646 N.W.2d 403, 406 (Iowa 2002)). Here, the relevant language of the Iowa Fire policy provided that an insurer could write exclusions for losses due to the neglect of "the insured to use all reasonable means to save and preserve property at and after a loss." Further, it allowed exclusions for losses caused "while the hazard is increased by any means within the control of the insured." Id at 12-13. The argument made was that because the policy language excluded coverage due to the act of "an" insured, and the statute only permitted exclusions due to the act of

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"the" insured, there was a conflict, and the language of the statute prevails. In this case, since Ramona did not cause the loss, she was entitled to recover.

The Supreme Court agreed with the argument presented by Ramona. Farm Bureau, however, contended that the statute, by its language, allowed an insurer to include language which was the "substantial equivalent" of it contained. The Court noted that there was that provision in the statute but found that the use of "an" insured and "the" insured were not substantially equivalent. In fact, it noted that there was a substantial difference between an exclusion based on the conduct of "an" or "any" insured as opposed to "the" insured. Accordingly, there was coverage for Ramona. Further, the impact was that all fire insurance policies which had the "an" or "any" insured language were no longer enforceable. Thus, the innocent co-insured appeared likely to recover in cases of this nature henceforth.

Following Sager, however, on March 14, 2005, Senate File 360 was introduced. This file included amendments to Iowa Code § 515.138 which changed the language "the insured" to "an insured" in key portions of the standard fire policy. On April 13, 2005, House File 854 was introduced which contained the same amendments. Although there was no legislative history to the Senate File, the House File noted the Bill revised "language about intentional acts in standard fire policy language which are non-compensable." The House substituted the Senate File on April 19, 2005, which was passed on the same day. This provision was sent to the Governor and signed into law on April 28, 2005. The judicial system then needed to interpret the meaning of this legislative change .

On November 16, 2012, the Court decided Postell v. American Family, 823 N.W.2d 35 (Iowa 2012). Postell was the first opportunity that the Court had to review the innocent co-insured doctrine in light of the Sager decision and the subsequent amendments to the Iowa statute.

In Postell, the facts were largely undisputed. Michelle and David Postell were married and resided in Dixon, Iowa. Their residence was insured by American Family with a standard homeowner's policy. In January of 2009, Michelle was separated from David and left the marital residence. However, she still considered the house to be her residence and testified to an intent to return there when David moved out.

On February 14, 2009, David left his wife a telephone message in which he indicated that he had poured gasoline throughout the residence. It was evident that David was committing suicide and was destroying the residence as part of that act. David was in the residence when two people asked him to come out. David told them to leave because the house was "going to blow" or "it's fixing to go." Subsequent to those events, the house did catch fire and was destroyed. The investigation revealed that David had poured 25 gallons of gasoline throughout the residence and the case was closed as "arson resolved." It was uncontested that Michelle had nothing to do with the fire.

The insurance policy issued by American Family had an exclusion for intentional acts by "any insured." The exact language was as follows:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss ...
>
> 2. Intentional Loss, meaning any loss or damage arising out of or any act committed:
>
> a. by or at the direction of any insured; and
>
> b. with the intent to cause a loss.

Sager, 823 N.W.2d at 39.

In this case Postell advanced two arguments for coverage. One was that the language of the Iowa Fire policy was not affected by the statutory amendments and that Sager was still controlling and required the innocent co-insured to recover. The claim was that recovery by an innocent co-insured was a minimum protection of the statute that the insurer could not avoid. However, the Court disposed of this issue. It noted that the legislature moved in the first session after Sager to amend the language of the statute in five places from "the" insured to "an" insured. It was stated that the timing of the amendment and the explanation in the bill meant that the legislature intended to overrule the holding in Sager. Id at 49.

The other issue was whether or not there was clear evidence of "intent" on the part of David Postell in causing the loss. The Court noted that there were three parts or requirements to American Family's intentional loss exclusion. They were that: there was an intentional loss, the act was committed by or at the direction of any insured, and finally there was intent on the part of the actor.

The first two prongs of the exclusion were dealt with summarily. The decision noted that the evidence easily satisfied the plain language of the destructive or intentional loss with the pouring of gasoline in the house and lighting same. Id at 42. Second, as David was a named insured under the policy it was clear that his actions were those of an insured. Id.

The third prong of the exclusion was the "intent" element. The Court noted that the policy did not define "intent" and that other sources would be needed to ascertain the common meaning of the term. Michelle argued that David could not form an intent because he suffered from an uncontrollable impulse to commit suicide by fire. The court, based upon the evidence, disagreed. The court found that intent is defined as "the state of mind accompanying an act." Id. Importantly, the Court also noted prior Iowa cases have held that intent can be inferred from the nature of the act performed. Accordingly, the Court stated that it considered "the individual's objective, not subjective intent." Id at 43.

In this case, the Court found that there was substantial evidence to support the conclusion that David Postell was not under any uncontrollable impulse and that he did have the requisite intent to destroy the residence. It noted that his actions were done with premeditation in obtaining and spreading the gasoline. David's actions were taken with an awareness of the consequences given that he warned others away from what he was doing and that his acts would result in blowing up the house. Even after the fire David was responsive to paramedics and there was no evidence in the record that he was hallucinating, deranged or delusional.

One final position advanced by Michelle for recovery was based upon a reasonable expectations argument. The Court found little trouble dealing with this issue having dealt with it previously in American Family v. Corrigan. 697 N.W.2d 108 (Iowa 2005). That decision held that "a reasonable person understands the phrase, 'an

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insured,' in an exclusion bars coverage to all insureds." Id at 47-48, (citing Vance, 457 N.W.2d at 593).

At the time of the Postell decision, then, the ability of an innocent co-insured to recover after a loss caused by another insured has come full circle. Beginning in 1990 with Webb, the Court determined that the use of the language "an" insured meant that an act by one insured could preclude recovery by another insured. This denial of recovery was completely reversed with the 2004 decision in Sager which read the language "the" insured into insurance policy exclusions pursuant to the Iowa Fire Insurance Statute. However, amendments to that statute by the legislature and the decision in Postell have returned Iowa to the same status for an innocent co-insured that existed following Webb.

Despite the fairly succinct holding in Postell, there may still be an issue which remains for determination with regard to an innocent co-insured. As noted in Postell, the facts were such that the Court could easily find that the David Postell was not delusional and able to form intention for his actions. The question that still remains is what the Court would do in the situation of an individual who, in fact, was arguably incapable of forming intent, whether through mental defect or delusion, and committed an act which would arguably fall within an intentional act exclusion.

A good example of this potential situation might arise in the liability context. Suppose, for example, that an individual is running a daycare operation in her home. Further suppose that one of her own children, who for arguments sake is mentally challenged, also resides in the home and would qualify as an insured. If, while the daycare operator is briefly away, the mentally challenged insured attempted to quiet a crying infant by covering it with a pillow, and that child is injured as a result, would the intentional acts exclusion apply to prevent liability coverage for the daycare operator due to the acts of her mentally challenged child? (Should you use a fire example to fit a little better into control?)

There appear to be two avenues for the Court to take in this type of situation where an insured, arguably without intention, commits this type of act. First, the Court could simply follow its previous precedents in other cases that hold the very nature of the conduct is sufficient to determine intent of the actor. For example, in Altena v. United Fire,the Court had little trouble finding that a sexual assault would allow both an inference of intent to do the act and to cause injury. 422 N.W.2d 485 (Iowa 1988).However, the Altena situation involved the conduct of an adult who was not alleged to be mentally challenged or otherwise impaired.

Second, the Court could engage in a fact-intensive review of the mental status and conduct of the individual actor. This would lead them to determinations of whether or not the requisite intent might exist in particular cases in order to apply an exclusion for the acts of "an" insured. The type of scenario posited earlier might be closer to the situation in AMCO v. Haht, which involved a finding by the Supreme Court that the death of a child was not intended when another child threw a baseball at the first child in a playground spat. 490 N.W.2d 843, 846 (Iowa 1992). Such scenarios could well lead to a "battle of the experts" in determining whether or not an individual actor has "intent" which would cause invocation of an exclusion.

Absent the scenario of the potential inability to form intent by an insured, it appears that the doctrine of not allowing a recovery by an innocent coinsured due to the act of another insured is for now firmly established.

FOOTNOTES

[1] 510 N.W.2d 870 (Iowa 1994).

[2] Iowa Code § 515.138 has since been renumbered as Iowa Code § 515.109.

[3] H.F. 854, 81st G.A., 1st Sess., explanation (Iowa 2005).

[4] 2005 Iowa Acts ch. 70, §§ 19-21 (codified at Iowa Code § 515.109).

[5] Notably, there were three dissenting votes to this opinion.

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IOWA DEFENSE COUNSEL ASSOCIATION

A message from the president ...

To all members of the IDCA,

Bruce Walker

After the December 2012 Board of Governor's meeting, Cindy Moser appointed a committee to study various methods of providing access to civil justice for disadvantaged Iowans. The committee consists of the following individuals: Vivian Betts, Nick Cooper, Ruth Cooperrider, Steve Eckley, John Gray, Dennis Groenenboom, Linda Neuman, Jan Rutledge, Bret Toresdahl, and me. This committee has met three times and divided up responsibilities to communicate with other states, national, and local providers of these services to try to determine how best to recommend moving forward.

Initially, the impetus for the formation of this committee was a significant budget shortfall for the Legal Services Corporation of Iowa and other delivery services located in the counties of Muscatine, Scott, Story and Polk who received proportionate but smaller cuts in their budgets. The budget shortfall has created difficulty in servicing individuals that need this help, and layoffs of staff. When the Iowa Supreme Court was approached on a method of raising additional funds to supplement the budget, it was returned to the Iowa Bar Association for their recommendation.

The committee will meet again on April 11 to discuss a report that should be presented to the Board of Governor's Meeting at the annual meeting in June of 2013.

Among other topics will be discussion concerning networking with other institutions to develop access for small businesses formation and patent for disadvantaged or underprivileged citizens, veterans both serving and returning from service, volunteer lawyer program supplementation, educational endeavors, but most importantly, budget issues. There is currently some consensus in recommending to the Iowa Supreme Court that a fee be designated for this purpose from pro hac vice applications. In addition, other thoughts might be to increase court costs if the legislature would be willing to allow any increase to be designated for this purpose and additional amounts assessed for licensure or re-licensure to be designated for this purpose as has been done in many other states.

The Iowa Defense Counsel Association has had a long history of providing legal services to Iowans, both corporate and individual. I urge you to consider giving some of your time to those individuals who have need of good defense counsel but do not have the financial ability to pay the normal and customary rate for that purpose.

Should you have a willingness to participate in this endeavor, I suggest you communicate with one of your local Legal Aid Offices or the offices in Des Moines, Ames, Muscatine, or Davenport. You can certainly communicate with any members of this committee who can direct you to a method of providing some pro bono representation. As you know, the goal for all Iowa Attorneys is 50 hours of pro bono service every year. Unfortunately, a number of individuals do not meet this goal. I would like to encourage all you Iowa Defense Counsel members to reach that goal during the calendar year 2013.

Legislative Report
Iowa Defense Counsel Association

By IDCA Lobbyists Scott Sundstrom and Brad Epperly of Nyemaster Goode PC

The first session of the 85th Iowa General Assembly ended on May 23, 2013 – 20 days after legislators' per diem expired. The Iowa Defense Counsel Association (IDCA) had a busy session following a number of issues of interest to defense lawyers. The following is a brief discussion of bills of interest to IDCA members. The full text of all bills can be found the General Assembly's website: www.legis.iowa.gov.

I. ENACTED LEGISLATION

A. Judicial Branch Funding

1. General Operations

The IDCA again worked in conjunction with other lawyer groups (the Iowa State Bar Association, the Iowa Association for Justice, and local bar associations), judges, court reporters, and others to seek full funding for Iowa's judicial branch. The judicial branch requested a budget increase of approximately $5.1 million for FY 2014 (which begins on July 1, 2013), comprised of the following components:

- Full time Clerk of Court offices in every county – $2.4 million (53 FTEs).
- Juvenile court staff to allow all juvenile offenders to have an in person meeting with a juvenile court officer – $1.7 million (40 FTEs)
- Restore 20 court reporters – $700,000 (20 FTEs)
- Restore law clerks, case schedulers, and court attendants in district court – $280,000 (5 FTEs)

The efforts of the supporters of full funding for the judicial branch were successful this year. The final judicial branch appropriations bill, Senate File 442, appropriates the full requested increase and a total of $167,699,367 for salaries of judicial branch employees. The bill appropriates an additional $3.1 million for witness and jury fees. (The bill appropriates exactly half those amounts for FY 2015, which was the pattern followed in all the various appropriations bills.) The bill also allows, with the consent of all parties, civil trials to take place in a county contiguous to the county where proper jurisdiction lies, even if the contiguous county is in a different judicial district. Senate File 442 has not yet been acted upon by the Governor.

2. Judges' Salaries

In the waning days of the session, Chief Justice Cady called a meeting at the Capitol of IDCA's lobbyists and the lobbyists for the various other lawyer and judges' groups. He stated that the judicial branch was working on a salary bill to increase the salaries of judges and that House and Senate leadership were supportive. He asked that the lobbyists talk to every House Republican to gauge support for such a bill so that he could report the results to House leadership. Within the next 24 hours, every House member had been contacted, and the requisite level of support was demonstrated to House leadership. As a result, Division III of the final version of the standing appropriations bill, Senate File 452, increases judges salaries starting January 3, 2014. The salaries of all justices, judges, and magistrates are increased by 4.5%. The salaries of all non-judge employees of the judicial branch are not increased. The bill appropriates an additional $850,000 to the judicial branch to pay for the judges' salary increases. The judicial branch was very appreciative of the efforts of the IDCA and other groups in lobbying for the judges' salary increase. The Governor has not yet acted on Senate File 452.

3. EDMS

In 2012, the legislature appropriated $4 million from the Rebuild Iowa Infrastructure Fund for continued development of the EDMS electronic filing system, with $1 million in FY 2012 and $3 million in FY 2013. This year, the legislature maintained the $3 million FY 2013 appropriation, but changed the source of funding. House File 638 removed the $3 million from the Rebuild Iowa Infrastructure Fund. House File 648 added the $3 million appropriation back, but funded it from the Iowa's General Fund. The Governor has not yet acted on either House File 638 or House File 648.

B. Farmland Liability

The Iowa Supreme Court's February 2013 decision in Sallee v. Stewart resulted in legislative action. In Sallee, the Court narrowly construed Iowa's recreational use statute, Iowa Code chapter 461C, and caused significant concern among farmers about their liability when they let people onto their land for recreational purposes. House File 649 amends Iowa Code chapter 631C in several respects. Throughout the chapter, the word "owner" (in relation to land) is changed to "holder." The chapter's general statement of purpose is amended to state that the chapter is to be "construed liberally and broadly in favor of private holders of land to accomplish the purposes of this chapter." The definition of "recreational purpose" is broadened to include: engaging in "educational activities" (to specifically address Sallee); accompanying another person engaged in recreational activities; and entry onto, use, and passage over land while engaged in recreational activities. Another provision of the bill states that a landholder does not assume a duty of care merely by guiding, directing, supervising, or participating in a recreational purpose. House File 649 passed both chambers unanimously, but has not yet been acted upon by Governor Branstad.

C. Transmission of Court Records

Senate File 187 concerns the procedures for transmitting court records from the district court to the Supreme Court in an appeal. The bill enacts new Iowa Code section 602.8103A, which specifies that the clerk of the district court shall be solely responsible for transmitting the record on appeal to the clerk of the Supreme Court and requires the clerk of the district court to transmit the record only upon the request of the appellate court or the appellee or appellant

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(or their attorneys). The bill specifies the record on appeal shall consist of the original documents and exhibits filed in district court, transcripts of the proceedings, and a certified copy of the docket and court calendar entries prepared by the clerk of the district court in the case under appeal. Exhibits of unusual size or bulk are not required to be transmitted by the clerk of the district court unless requested by the appellee, appellant, the attorney for the appellee or appellant, or the appellate court. The bill also requires that the clerk of the district court transmit any of the remaining record to the clerk of the Supreme Court within seven days after the final briefs have been filed in the appeal. Senate File 187 was ENACTED.

D. Judicial Fees

Senate File 318 states that the fees collected by the judicial branch for shorthand reporter certification examinations and for the bar examination are to be retained by the judicial branch (rather than deposited in the general fund) and used to offset the costs of the Office of Professional Regulation for administering those examinations. As a result of the bill, the judicial branch will retain a total of approximately $253,000 per year. Senate File 318 was ENACTED.

II. LEGISLATION CONSIDERED, BUT NOT ENACTED

Split control of the House (Republican) and Senate (Democratic), combined with strong opposition from the Iowa State Bar Association and Iowa Association for Justice on a number of bills, resulted in the failure of the vast majority of substantive policy legislation affecting the judicial system. Discussed below are a few bills of note this session that received attention, but were not enacted:

A. Reducing Plaintiffs' Damages for Failing to Wear Seat Belts

The IDCA again had one affirmative legislative proposal this year. House Study Bill 60 would have amended Iowa Code section 321.445 by repealing the arbitrary 5% limit on the amount a plaintiff's damages may be reduced when the plaintiff fails to wear a seatbelt. The bill was approved by the subcommittee to which it was assigned, but did not receive approval by the full House Judiciary Committee and died in the first funnel. Key to the bill's defeat was strong opposition from both the Iowa Association for Justice and the Iowa State Bar Association.

B. Insurance Agent Liability

In response to the Iowa Supreme Court's July 2012 decision in Pitts v. Farm Bureau, House File 398 would have clarified the duties and responsibilities of Iowa insurance agents under Iowa Code chapter 522B. The bill rewrites current Iowa Code section 522B.11(7) and abrogates Pitts. The bill has passed the House and was approved by the Senate Judiciary Committee with a proposed committee amendment that narrowed the scope of the bill significantly. As a result of the Senate Judiciary Committee amendment, insurance agents and some (but not all) insurance companies opposed the bill. Senate Judiciary Chairman Rob Hogg (D-Cedar Rapids) indicated a willingness to compromise, but his efforts at doing so were rebuffed by the Independent Insurance Agents of Iowa. An attempt by the House to put the provisions of House File 398 into the standing appropriations bill, Senate File 452, did not survive the final conference committee negotiations on the bill. As a result, no legislation addressing the Pitts case was enacted this session.

C. Medical Malpractice Reform

In his Condition of the State Address Governor Branstad outlined three major priorities: (1) property tax relief; (2) education reform; and (3) "quality of life" issues. Among the "quality of life" measurers the Governor championed were medical malpractice reforms, including requiring plaintiffs to file a certificate of merit and a cap on non-economic damages. The Governor's proposals, with some substantial modifications, ultimately became House File 618.

House File 618 would have made significant changes to the adjudication of medical malpractice claims. Most significantly, the bill created medical malpractice review panels to evaluate medical malpractice claims. Such panels would have five or six members depending on the type of case: (1) a plaintiffs' personal attorney; (2) a defense personal injury attorney; (3) a health care practitioner who practices in the same specialty or profession as the defendant; (4) a lay person with no connection to any health care provider or insurance company; (5) an attorney appointed by the chief judge of the judicial district; and (6) a person familiar with hospitals or health facilities if a hospital or health facility is a defendant. Parties would have been required to produce all medical records to the review panel, and the chair of the panel could have authorized additional limited discovery. The plaintiff would be required to submit a certificate of merit affidavit to the review panel for each expert witness with information explaining the expert's opinions. The review panel would then conduct a hearing on the claims and defenses in the action with each party presenting evidence and would issue findings about whether the defendant breached the applicable standard of care, whether the breach proximately caused the plaintiff's injuries, and whether any negligence of the plaintiff was equal or greater to the negligence of the defendant. The review panel's findings would be admissible as evidence in any subsequent action between the parties. If the review panel's findings were unanimous in favor of the defendant, then the plaintiff's noneconomic damages would be capped at $250,000 and the defendant would recover all expert witness fees if the defendant prevailed at trial. If the review panel's findings were unanimous in favor of the plaintiff, then the defendant would have to admit liability or enter into settlement negotiations. If the settlement negotiations were not successful and the plaintiff prevailed at trial and recovers more than his or her last formal demand, then the defendant would have to pay all expert witness fees. Finally, the bill allowed for use of evidence-based medical practice guidelines as an affirmative defense.

The Iowa State Bar Association and the Iowa Association for Justice opposed the bill. Health care provider organizations registered in favor of the bill. House File 618 was on the House calendar for many weeks, but was never debated.

The issue did not go away, however. During the debate over Senate File 296, the Medicaid expansion/Governor's Healthy Iowa Plan alternative, the House adopted an amendment that essentially put all of what had been House File 618 into Senate File 296. Senate File 296 then went to a conference committee for several weeks. The bill never emerged from conference committee and was never debated again.

Ultimately, the issue of Medicaid expansion was wrapped into the

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human services appropriations bill, Senate File 446. The final version of Senate File 446 that was passed by the legislature does not contain any substantive medical malpractice reform provisions. Instead, Senate File 446 directs the Legislative Council to appoint an interim study committee composed of members of the Iowa Senate and House to examine "the submission of certificate-of-merit affidavits by plaintiffs and defendants in malpractice actions and limitations on the number of expert witnesses that may be called by both plaintiffs and defendants involving health care providers. The study committee shall present its conclusions and recommendations in a report to the 2014 session of the general assembly." Governor Branstad has not yet acted upon Senate File 446.

D. Statute of Limitations for Building Defect Claims

Iowa currently has a fifteen-year statute of repose for claims alleging building defects, which is among the longest in the nation, but no statute of limitations. House File 572 proposed to create a new three-year statute of limitations for building defect claims, but would have left unchanged the current 15-year statute of repose. The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association. The bill passed the House but died in the Senate.

E. Insurance Company Subrogation in Criminal Cases

House File 608 would have allowed an insurer to be included in a criminal restitution plan. The theory was to streamline the subrogation process by resolving subrogation issues in criminal restitution proceedings rather than requiring insurers to bring subrogation claims in a separate proceeding. The bill died due to opposition from the Iowa State Bar Association, the Iowa Association for Justice, and the Attorney General's office.

F. "Good Samaritan" Law for Architects

House File 539 would have provided liability protection for architects and professional engineers who provide disaster assistance for no compensation. The bill passed the House, but was not debated on the Senate floor. The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association.

G. Sledding Liability

House File 158 would have shielded municipalities from liability for claims arising from sledding if the city operates a sledding park that conforms with applicable national design standards. The bill would have done this by adding sledding to current Iowa Code section 670.4, which currently applies to "a public facility designed for purposes of skateboarding, in-line skating, bicycling, unicycling, scootering, river rafting, canoeing, or kayaking." The bill passed the House but died in the Senate. The bill was opposed by the Iowa Association for Justice and the Iowa State Bar Association.

H. District Judge Qualifications

House File 357 would have required that a district judge appointee be a resident of the judicial district (or judicial election district, if applicable) where the nomination occurred before assuming office. Current law requires that a nominee for a judgeship be a resident of the district where appointed. The bill passed the House and was amended in the Senate to reinsert the requirement that a nominee be a resident of the judicial district. The House refused to accept the Senate amendment, and the bill was not enacted.

I. Pregnancy Discrimination

Senate File 308 would have amended the Iowa Civil Rights Act by requiring employers to make reasonable accommodations for pregnant employees with pregnancy-related medical conditions. The bill arose out of concerns about two situations concerning the treatment of a pregnant firefighter and a pregnant sheriff's deputy who were taken off duty. The bill was approved by the Senate Local Government Committee, but was never debated in the Senate.

continued from previous page | *LEGISLATIVE REPORT: IOWA DEFENSE COUNSEL ASSOCIATION*

Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494 (Iowa 2013)

By Carol J. Kirkley, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, IA

The Iowa Supreme Court recently vacated a Court of Appeals decision which held that an insurance policy was ambiguous and construed the ambiguity against the insurer to find the loss covered under the terms of the policy by virtue of the reasonable expectations doctrine. Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494, 497 (Iowa 2013). The insured operated a custom farming operation. Id. Pursuant to the "Sew Nursery Agreement", the insured was required to obtain coverage to cover any losses. Id. at 498. The insured purchased a Farm-Guard policy from First Maxfield Mutual Insurance which was subsequently reissued by the defendant. Id. There were a number of exclusions under Coverage A and A-1 of the policy pertaining to damage to property under the "care, custody, and control" of the insured and damages attendant to "custom farming." Id. at 499. In addition, the custom farming exclusion under A-1 provided that there would be no coverage for losses if the insured's "total gross receipts" for the prior twelve months exceeded $2,000.00. Id. Prior to the loss, the insured purchased an endorsement which increased the income cap under the custom farming exclusion provision contained in A-1 to $150,000.00. Id. at 499-500. Subsequent to the purchase of the endorsement, the insured suffered a loss of 535 nursery hogs. Id. at 498.

The insured filed suit against the insurer for breach of contract. Id. at 500. The insurer answered and counterclaimed on the basis that the Farm-Guard policy did not cover the insured's loss. Id. Both plaintiff and defendant filed motions for summary judgment. Id. The district court granted the insured's motion for summary judgment. Id. The court of appeals affirmed the district court holding that the insurance policy was ambiguous and construed the ambiguity in favor of the insured to find the loss covered under the terms of the policy. Id.

The Iowa Supreme Court, focusing on the impact the endorsement had on the question of how the policy was to be construed, held that the policy was not ambiguous. Id. at 504. The policy in question was intended to provide coverage for losses incurred by the public while on the insured's premises. Id. at 503. Moreover, the purpose of the care, custody, and control exclusion is to keep the insurer from being a guarantor of the insured's performance under the terms of the contract. Id. at 504. Further, in rejecting the insured's argument, the court cited the aphorism that " '[e]ndorsements do not limit or change the basic policy except as specifically set out in the endorsement.' " Id. at 505 (quoting Swift & Co. v. Zurich Ins. Co., 511 S.W.2d 826, 832 (Mo. 1974)).

Carol J. Kirkley

The court also examined the issue under the reasonable expectations doctrine. Id. In rejecting the plaintiff's argument, the court relied on the plain language of the exclusions contained in the policy and on the narrowness of the doctrine. Id. at 505-06. Additionally, the court noted the plaintiff's failure to meet the prerequisite of proving "circumstances attributable to the insurer that fostered coverage expectations or show that the policy is such that an ordinary layperson would misunderstand the coverage." Id. at 506.

The Iowa Supreme Court held that the policy is not ambiguous and does not provide coverage for this loss as a matter of law. Id. at 507. In addition, the court held that there is no genuine issue of material fact as to the application of the reasonable expectations doctrine and concluded, that as a matter of law, it did not apply. Id.

Sanctions for Frivolous Litigation

By Michael W. Ellwanger, Rawlings, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P., Sioux City, IA

Introduction

Iowa Code §619.19 and Rule 1.413, IRCP, are virtually identical. They allow trial courts to award sanctions for frivolous litigation. The "American Rule" precludes recovery of attorney fees by the winning party in a lawsuit, unless the fees are specifically authorized by statute. Rowedder v. Anderson, 814 N.W.2d 585, 589 (Iowa 2012). Recovery of fees as a sanction is an exception to this rule. Id. The statute/rule has been adopted for a variety of reasons, including the prevention of frivolous litigation and, at least partly, reimbursing the victim of such litigation for his or her legal costs. Id. at 594. However, some recent cases have undermined this important component of jurisprudence in Iowa.

It should be noted at the outset that the trial court has two separate functions in ruling on a sanctions motion. First, is the conduct sanctionable? Second, what sanction is to be imposed? If conduct is sanctionable, some sort of sanction is mandated. Perhaps a third issue is whether the sanction should be imposed against the lawyer, the client or both.

Recent Case Law

In Barnhill v. Iowa District Court for Polk County, 765 N.W.2d 267 (Iowa 2009), the plaintiff commenced a class action against a manufacturer of roofing shingles and its president. The problem was that there was no legal basis for suing the president of the company personally. Id. at 275. Summary judgment was granted in favor of said defendant. Id. at 270. The trial court awarded $25,000 in sanctions. In affirming the award of sanctions the court stated:

We will not allow an attorney to act incompetently or stubbornly persistent, contrary to the law or facts, and then later attempt to avoid sanctions by arguing that he or she was merely trying to expand or reverse existing case law.

Id. at 279.

The Barnhill case also held that a district court's findings of fact in deciding whether to impose sanctions are binding on the appellate court if supported by substantial evidence ("our standard of review is appropriately deferential to the district court because it is in the best position to evaluate counsel's actions and motivations"). Id.

The Barnhill court stated that in ruling upon a motion for sanctions, the court uses an objective standard and that the test is "reasonable under the circumstances, and the standard to be used is that of a reasonably competent attorney admitted to practice before the district court." Id. at 272 (quoting Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536 (9th Cir. 1986)). A party or his attorney cannot use ignorance of the law as an excuse. Id. at 273 (citing Perkins v. Gen. Motors Corp., 129 F.R.D. 655, 658 (W.D. Mo. 1990). The rule is designed to prevent abuse caused not only by bad faith, but by negligence and to some extent professional incompetence. Id.

Chapter 619.19 of the Iowa Code states that the signature of party or that party's legal counsel to a motion, pleading or other paper is a certificate that:

1. The person has read the motion, pleading or other paper.

2. To the best of the person's knowledge, information and belief, formed after reasonable inquiry, it is grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

3. It is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.

If a motion, pleading or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person signing, represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleadings, or other paper, including a reasonable attorney fee.

Iowa Code § 619.9 (emphasis supplied).

This statutory provision appears to be adopted verbatim in Rule 1.413, IRCP.

The above stated statute/rule creates three duties known as the reading, inquiry and purpose elements. Barnill, 765 N.W.2d at 272 (quoting Weigel v. Weigel, 467 N.W.2d 277, 280 (Iowa 1991). Each duty is independent of the others and a breach of one is a violation of the Rule. Id. (citing Harris v. Iowa Dist. Ct., 570 N.W.2d 772, 776 (Iowa Ct. App. 1997)). One of the primary purposes of the Rule is to maintain "a high degree of professionalism in the practice of law." Id. at 273 (citing Weigel, 440 N.W.2d at 282).

The Rule is intended to discourage parties and counsel from filing frivolous lawsuits and otherwise deter the misuse of pleadings, motions, or other papers. Id. (citing Hearity v. Iowa Dist. Ct., 440 N.W.2d 860, 864 (Iowa 1989)).

In the Barnhill decision the court referred to certain criteria or factors which can be considered in determining whether the signor made sufficient inquiry into the facts and law prior to filing the litigation. Id. (citing Mathias v. Glandon, 448 N.W.2d 443, 446-47 (Iowa 1989) citing ABA Section on Litigation, Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure (1988), reprinted in 121 F.R.D. 101, 114 (1988)).

After determining whether a sanction should be imposed, the court needs to address the amount of sanction. Id. at 276. The court identified sixteen factors which the court "may consider" in assessing the amount of monetary sanction. Id. at 276-77. The court then went

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on to cite In Re: Kunstler, 914 F.2d 505, 523 (4th Cir. 1990). The court stated that the Fourth Circuit's considerations were "instructive" in determining an appropriate monetary sanction for a Rule 1.413 violation. Id. "However, we also encourage district courts to consider the ABA factors as they relate to the issues identified in the four factor test when determining an appropriate sanction." Id. The four factors were:

1. The reasonableness of the opposing party's attorney fees.

2. The minimum to deter.

3. The ability to pay.

4. Factors related to the severity of the . . . violation.

Id. (quoting Kunstler, 914 F.2d at 523.

The Barnhill court upheld the $25,000 sanction. Id. "Not only did the district court consider all four factors listed above as well as several of the ABA considerations, **but it balanced the twin purposes of compensation and deterrence set forth in our case law.**" Id. (emphasis supplied).

Justices Wiggins and Hecht dissented. Id. at 280. They agreed that the conduct was sanctionable but disagreed with the way the amount of the sanction was determined. Id.

The next case to come down was Rowedder v. Anderson, 814 N.W.2d 585 (Iowa 2012) (majority opinion by Justice Wiggins). In this case the trial court had awarded $1,000 in sanctions against plaintiff's counsel (payable to the Crawford County Jury and Witness Fund). Rowedder, 814 N.W.2d at 586. The plaintiff's conservator sued four purchasers of land on the grounds that they had taken advantage of the ward and caused him to sell at unfairly low prices. Id. at 587. There were considerable problems getting the plaintiff to respond to discovery. Id. One of the defendants offered to sell his property back. Id. Motions for summary judgment were filed. Id. at 588. The motions were sustained. Id. Motions for sanctions were then filed. Id. The plaintiff filed a notice of appeal. Id. Some appeals were dismissed. Id.

Ultimately sanctions were imposed in the sum of $1,000. Id. at 588. The parties who were awarded sanctions appealed. Id. They had spent considerable sums in defending the actions which they contended were frivolous. The Supreme Court reviewed only the amount of the sanctions and whether the court could require the sanctions to be paid to the Jury and Witness Fund. Id. at 589.

The court held that the primary purpose of sanctions under Rule 1.413(1) "is deterrence, not compensation." Id.(citing Barnill, 765 N.W.2d at 276). This seems to be a bit inconsistent with an earlier statement in the opinion that stated that the sanctions should be paid to the applicants rather than the Fund, "given the preference in our Rule toward compensating victims." Id. at 586. In addition, Barnhill had referred to the twin goals of "deterrence and compensation." Barnill, 765 N.W.2d 267, 277.

In upholding the minimal sanctions, the Supreme Court emphasized certain factors:

- The trial court failed to make a specific finding as to the reasonableness of the applicant's attorney fees.
- The trial court had made a finding that the $1,000 sanction " 'along with the stigma attached to the mere imposition of sanctions is [a] sufficient sanction [to deter future conduct].' "
- The record was devoid of any evidence that would allow the court to make a finding as to the attorney's ability to pay (although this was later found to be the obligation of the offending attorney to show his inability to pay).
- The trial court found that the plaintiff's attorney did not take his actions in bad faith, was not vindictive or willful or done with evil intent.

Rowedder, 814 N.W.2d at 590.

The bottom line is that the trial court did not abuse its discretion in awarding $1,000 in sanctions, which was a tiny fraction of the total attorney fees that the applicants had incurred in defending themselves. Id. at 591.

On the issue of who should receive the sanctions, the court held that "because the primary goal of Rule 1.413(1) is deterrence, the primary goal is best achieved in most circumstances if sanctions are first allocated to the victims who made the investment to pursue them. Id. at 592. The court went on to state that a secondary purpose is "maintaining professionalism in the practice of law." Id. (citing Barnhill, 765 N.W.2d at 273). Furthermore, "the most important secondary purpose is partial compensation of the victims." Id. However, "victim compensation must clearly defer to deterrence when it comes to setting the amount of the sanction." Id.

Justice Waterman wrote an extensive dissent. Id. at 593. He felt that the $1,000 sanction was an abuse of discretion. Id. Victim compensation was a subsidiary goal of the rule. Id. The "victims" incurred fees totaling $63,926 defending the frivolous claims through appeal. Id. "The victims were forced to spend several years defending the fraud and conspiracy claims found so meritless as to be sanctionable." Id. at 594. The court pointed out that in the Barnhill decision, the Iowa Supreme Court approvingly quoted federal appellate precedent concluding "de minimis sanctions are 'simply inadequate to deter Rule 11 violations.'" Id. at 595. Justice Waterman also cited MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 621, 627-628 (8th Cir. 2003), in which case Judge Pratt awarded approximately three-fourths of the victims fees and expenses. Id.

Perhaps the Rowedder decision can be justified on the basis that it was affirming a decision of the trial court. Id. at 591. After all, an "abuse of discretion" is required to reverse the trial court's award. Such was not the case, however, in Sticks, Inc. v. Michael Hefner, 2-1122/12-0633(Application for Further Review denied). In that case the plaintiff filed an action against its financial consultant. A jury verdict was obtained in favor of both plaintiffs (Stick, Inc., and Sarah Grant). The amount to be paid to satisfy the judgment was subsequently negotiated. A check was written to both plaintiffs and the full amount paid. Both plaintiffs filed satisfactions of judgment. Subsequently the defendants sent each plaintiff a form 1099 reflecting

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the payment in the full amount of the judgment. Four days after receiving these dual 1099s, the plaintiff, her counsel and a CPA for the plaintiff jointly signed a letter to the Department of Revenue, Office of Professional Responsibility, demanding that the defendant be investigated and prosecuted for sending out fraudulent 1099s. It was their position that the defendant had wrongfully sent them each a 1099 in the full amount of the judgment that had been paid. Approximately 30 days later the two plaintiffs filed an action alleging that sending the dual 1099s was professional negligence and a breach of fiduciary duty, even though defendant had not had a professional relationship with the plaintiffs for many years.

Defendants filed a motion for summary judgment which was overruled.

The matter proceeded to a jury trial in Polk County. The court awarded the defendants a directed verdict. There was no appeal.

Defendants then filed a motion for sanctions. The court granted a sanction in the sum of $10,341, which represented approximately 60% of the total expenses that had been incurred by the defendants, which included expert fees. Three times in its decision the trial court found that the lawsuit had been driven by the "animosity of the plaintiffs and counsel towards defendants from the facts and circumstances surrounding the original lawsuit." The trial court further found that the lawsuit had been filed by the plaintiffs "without a clear regard for the facts or law underlying the second lawsuit." The plaintiffs had presented the trial court with no legal precedent for a recovery in a case of this nature.

The plaintiffs appealed the sanctions and the case was assigned to the court of appeals. No. 12-0633, 2013 WL 530957 (Iowa Ct. App. Feb. 13, 2013). In a 2-1 decision the trial court was reversed. The decision of the Court of Appeals boiled down to basically two factors. First, plaintiffs' counsel argued that he relied upon an expert's opinion in filing the lawsuit. Id. at *5. (The plaintiff did not include the trial testimony of the expert in the Appendix so it may have been speculation on the part of the Court as to what exactly the expert did say in support of the plaintiffs' case.) More importantly, the court emphasized that the plaintiffs had earlier survived a motion for summary judgment. Id. The court stated that "the ruling denying summary judgment was the watershed moment in this litigation." Id. The court thus appeared to establish a "clear line" rule--if the plaintiff can survive a motion for summary judgment then sanctions cannot be awarded.

Judge Vogel wrote an extensive dissenting opinion. Among his points:

- The district court made a specific finding that "entrenched animosity" drove the litigation. "It is improper for us now to reassess Cook's demeanor and motive for filing suit so quickly."
- The fact that the plaintiffs had survived a motion for summary judgment is not a defense. First, one looks to the pleading at the time it is filed, not when the party has had months to attempt to support a case. Second, the majority failed to analyze the issues that were before the trial court at summary judgment. "This can hardly be seen as significant commentary on the merits outweighing the court's unequivocal finding through the directed verdict and the order on sanctions that the suit was not based in fact and law."
- The trial court had analyzed a number of factors that the Supreme Court had required be evaluated before awarding sanctions. These factors tilted in favor of the defendants. The majority, however, did not evaluate those factors.
- The plaintiff's argument that the "expert made me do it," was not tenable. "While an expert may possess information in a particular field, the attorney must still determine if what the expert maintains supports the legal position of the lawsuit he is filing." The lawyer must conduct a reasonable inquiry as to the facts and the law before the petition is filed.
- The plaintiff had "filed this lawsuit with no basis in law to support the extension of the fiduciary duty, nor has he provided cases that would support a breach even if there were a fiduciary duty."
- There was no evidence of a breach of duty based on the tax law which was involved. At no point did the plaintiff "acknowledge the case law against his position, nor did he provide any case law supporting his position."
- The plaintiff had failed to meet his burden to show that the trial court abused its discretion. The District Court had analyzed the facts, the evidence and the case law and made a decision that was not "clearly untenable or to an extent clearly unreasonable."
- The claim was "frivolous and not a good faith extension of law." The well reasoned decision of the Trial Court should be affirmed.

Id. at *6.

Commentary

I will first offer a public disclosure. My law firm was the "victim" of the adverse rulings in both Rowedder and Sticks. Mike Jacobs was unable to get his $1,000 sanction recovery increased in Rowedder, and I lost the $11,000 sanctions on appeal. In both cases defendants had incurred substantial legal expenses in defending actions that lacked legal merit. In neither case were they given any meaningful reimbursement of their expenses.

The most troubling part of the two decisions, at least for me, is as follows. In Rowedder the Supreme Court seems to suggest that compensating the party for his losses (attorney fees and expenses) is almost a negligible consideration. In that case the applicants for sanctions had expended over $63,000 in legal fees and expenses. The Supreme Court sustained the sanction award of $1,000. The court cited language from the trial court that $1,000 plus the "stigma" of the sanction were sufficient as deterrence. While this may be accurate in some cases, it does nothing for the poor defendant who incurred significant expense in a lawsuit that the trial court deemed frivolous.

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The problems with the Sticks decision are multiple, but it seems that the major issues are these. First, the court almost suggests that there is de novo review. The trial court observed the demeanor of the witnesses and concluded that the case was driven by personal animosity and not legal principles. To demonstrate an abuse of discretion the trial court must be upheld unless the decision is clearly untenable. Second, the Court of Appeals appears to adopt a "per se" rule that if the plaintiff survives a motion for summary judgment, there cannot be sanctions. However, the time at which the trial court makes its decision is the time of trial--when the plaintiff puts on its case. If the evidence and supporting law show that the case is utterly without merit, it hardly seems right that the fact that the defendant was unable to persuade the trial court to grant summary judgment should be dispositive. Perhaps the trial court was wrong in its earlier decision. Perhaps the trial court went too far in trying to give the plaintiff its day in court. The bottom line is whether the case has any validity when the trial occurs and evidence is presented.

Practice Pointers

Often times an effort to obtain sanctions results in throwing good money after bad. The client needs to know this. Sanction requests are frequently driven by principle, because the recovery of sanctions may not be sufficient to justify the expense. An attorney should also consider whether to offer a reduced fee arrangement on the sanction request. If "principle" demands a sanction request, perhaps the attorney should also be so motivated. However, the attorney must be careful to avoid allowing his own indignation from driving the decision to ask for sanctions.

Conclusion

Even as defense lawyers, we receive periodic calls from angry individuals (even legitimately injured individuals) who want to pursue a claim. Our ethics require lawyers to screen cases and go forward only with those with arguable merit. Getting sued is no fun. Lawyers have enormous power in their ability to sue people at the drop of a hat. All it takes is a typewriter (as we older defense lawyers sometimes told juries). This power must be exercised cautiously. The legal profession often resists tort reform because we have sanctions to prevent the filing of frivolous lawsuits. However, if the ability to collect legal expenses in the event of groundless suits is significantly undermined, the system is undermined. As the Supreme Court noted in Rowedder, the defendants in frivolous cases are in fact "victims," and the system should demand some sort of recovery for such individuals.

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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.*

HOW TO SEND AN EMAIL THROUGH THE LISTSERV

1. Open your email program.
2. In the To: field, type *members@iowadefensecounsel.org* (Only subscribers can send to the list.)
3. In the Subject field, type LIST and then the subject of your question. Example: LIST: Expert Witnesses in Central Iowa
4. In the body of your email, include your name and contact information.

HOW TO UNSUBSCRIBE FROM IDCA'S LISTSERV

To be removed from the listserv, send an email to *members@iowadefensecounsel.org* with "Unsubscribe" in the subject line.

Save the Date!

Mark your calendars for the Iowa Defense Counsel Association Annual Meeting & Seminar, September 19–20, 2013.

We have an excellent line up of speakers presenting at this year's annual meeting, many of whom were recommended by fellow IDCA and DRI members. Our key note speaker is Dr. Robert Barth who will speak on "Overcoming Expert Opinion with Facts." In addition, Chuck Rosenberg, who as a former U.S. Attorney for the Western District of Virginia who led the prosecution of Zacaris Moussaoui, the so-called 20th highjacker in the 9/11 attacks, will be joining us. Several of our members who have seen his presentation describe him as compelling, surprising and informative.

Also, former Iowa Supreme Court Justice David Baker will be speaking on "Everyday Conflicts," accomplished plaintiff's attorney Brad Brady will present on "Ten Stupid Things Defense Lawyers Do," and Dr. William Kanasky, Ph.D., will speak on the "Economic Impact of Ineffective Witness Testimony."

Download our complete schedule of events at *http://www.iowadefensecounsel.org/files/meeting/View_the_Schedule-At-A-Glance.pdf.* **Registration details will be mailed in July.**

Submit Your Jury Verdicts Online

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.

To access IDCA's Jury Verdicts, go to *iowadefensecounsel.org* and click Member Login at the top of the page. Once logged in, you automatically will be taken to the Members Only section of the website. At the top, click Jury Verdicts.

From here, you can search for jury verdicts by:

- Judicial District
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- Trial Date
- Case Type
- Injury Type
- Plaintiff or Defendant Attorney(s)

We also encourage all members to submit your jury verdicts online. Click Submit Jury Verdict at the top of the page and complete the online form. If you prefer, you may email IDCA Headquarters, *staff@iowadefensecounsel.org*, and request a fillable Jury Verdict form.

IDCA SCHEDULE OF EVENTS

49th Annual Meeting & Seminar	**Sept. 19–20, 2013** 8:00 a.m. – 5:00 p.m.
50th Annual Meeting & Seminar	**Sept. 18–19, 2014** 8:00 a.m. – 5:00 p.m.

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