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IOWA DEFENSE COUNSEL ASSOCIATION

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How Did We Get Here? Where Are We Going? Expedited Civil Actions In Iowa – A Defense Perspective

by Stephen E. Doohen and Siobhan Briley, Whitfield & Eddy, PLC, Des Moines, IA

Stephen E. Doohen

Siobhan Briley

Renowned guitarist Joe Satriani asks the above questions in the lyrics of his 1989 song, "I Believe." Pop-culture references aside, those same questions perhaps come to mind when Iowa defense practitioners contemplate a new docket in the Iowa district courts. On January 1, 2015, Iowa joined a handful of other states[1] in enacting a rule providing for expedited civil actions. With the adoption of Iowa Rule of Civil Procedure 1.281, a plaintiff bringing a civil action (except small claims and domestic relations) may elect to proceed on an expedited basis, where the only relief sought is monetary, and all claims for damages total $75,000 or less.[2]

Two months ago, in February 2016, the author defended an expedited action that was tried to a jury in the Iowa District Court for Polk County. Trying an expedited jury trial, at least for this practitioner, was a new experience, although not altogether unfamiliar. In many respects, it was just like any other jury trial. Likewise, the author took part in a panel discussion on the subject at the recent annual seminar sponsored by the Iowa Academy of Trial Lawyers, held in Des Moines in late February. Questions and comments from the audience during this panel discussion (from both the plaintiff and defense bar) were probing and thought provoking.

Continued on page 3

WHAT'S INSIDE

IDCA President's Letter

Noel McKibbin
IDCA President

With this issue of the *Defense Update,* let me begin by thanking you for your continuing support of the Iowa Defense Counsel Association. In addition, allow me to report to you on events we have planned for 2016.

The *Defense Update* continues to be a meaningful, scholarly publication for our members. Not to steal the thunder from our editorial columnist, this issue is indicative of the quality we have grown accustomed to consuming. The Board of Editors has added a case law update segment and a new lawyer profile segment. They continue to publish temporally relevant articles to further our professional careers. My compliments to the Board: Tom Read, Kevin Reynolds, Brent Ruther, Susan Hess, Clay Baker, Stacy Cormican, and Ben Patterson for the service they provide to our publication.

We now offer advertising opportunities in the Defense Update. If you are interested please contact our Executive Director Heather Tamminga, CAE, at staff@iowadefensecounsel.org or download our Marketing Kit online, http://www.iowadefensecounsel.org/IDCAPdfs/IDCA_Marketing_Kit.pdf.

'TIS THE SEASON

The 2016 legislative session has adjourned. The legislative update in this issue provides a recap of all activity monitored by IDCA this session. Scott Sundstrom, IDCA lobbyist, has been successfully representing our organization throughout the session. As an organization we have been well informed of pertinent legislative activity, and our legislative committee chair, Steve Doohen, along with his committee, has been diligent in promoting our political interests.

SUBSTANTIVE MEETINGS

The 52nd Annual Meeting will be held at the Stoney Creek Hotel and Conference Center in Johnston, Iowa, on September 22—23. Rich Whitty is driving the agenda and it appears to be an excellent program for practitioners, insurance professionals, and corporate counsel. We are currently seeking additional sponsors for the event. If you are interested, or if you do business with vendors who would like to participate, please contact our Executive Director, Heather Tamminga, CAE, at staff@iowadefensecounsel.org.

Our membership committee, led by Kami Holmes and Diane Reinsch, is in the process of designing a "deposition boot camp" program. The event will be held at the Grinnell Mutual Reinsurance campus on October 28, 2016. As the title implies, this will be a day-long training and discussion on the art of taking a deposition. The curriculum will include deposition formalities; rules; information gathering processes; how to control a witness; how to use exhibits; and how to handle objections. All of these skills will be reviewed in a participative practical setting with live witnesses, etc. This will be a wonderful opportunity for lawyers with less than five years of experience.

Please consult our website for additional details on the course as this has limited seats available and will be on a first come-first in basis with IDCA membership having a priority.

Please consult our website for additional activities planned.

Enjoy your Spring.

Best,

Noel McKibbin

Continued from Page 1

This paper will attempt to put some flesh on the subject based upon the author's admittedly limited first-hand perspective. As the reference to Joe Satriani's song title implies, "I Believe" the expedited system designed by the Iowa Supreme Court makes great economic sense, has significant potential, and need be neither feared, nor scorned, by Iowa attorneys.

The History and Purpose of Rule 1.281

The primary purpose and design of Rule 1.281 was to "significantly reduce litigation time and cost" while "increasing access to justice."[3] The Iowa Supreme Court adopted the Rule in August of 2014 after several years of study.[4] In early 2012, the Iowa Civil Justice Reform Task Force produced a report recommending changes to the discovery process "as well as consideration of a separate track for civil cases falling below a threshold dollar value."[5] Following the Task Force's report, the Supreme Court appointed an Advisory Committee Concerning Certain Civil Justice Reform, which was "specifically charged" with proposing amendments to Iowa's Rules of Civil Procedure to implement a "dual-track" system for civil actions.[6] The Advisory Committee provided its recommendations to the Supreme Court in the summer of 2013, and the Supreme Court made changes to the Rule after receiving and considering public comments.[7]

How Rule 1.281 "Expedites" Civil Actions

Actions under Rule 1.281 must proceed to trial within one year of filing.[8] The trier of fact may be a judge or jury.[9] When the case is tried to a jury, the jury is comprised of just six jurors selected from twelve eligible panelists.[10] The spirit of the Rule is perhaps best reflected by the limits placed upon the time to be spent in trial, as each "side"[11] is permitted only six hours to present its entire case – jury selection, opening statement, presentation of evidence, examination and cross-examination of witnesses, and closing argument.[12] Additionally, both sides are expected to submit the matter to the fact-finder within two business days.[13]

To further streamline an expedited action from the outset, Rule 1.281(2) imposes a series of limits on discovery and other pretrial procedures. Each side may serve just ten interrogatories, ten document requests, and ten requests for admission. Only one deposition of each party may be taken. Each side may take the depositions of no more than two non-parties. Finally, each side is entitled to just one expert witness. Motion practice is also limited, with the Rule placing restrictions upon the implications of motions to dismiss, and the overall availability of motions for summary judgment.[14]

By design, it seems, the Rule encourages a good deal of cooperation by the parties. As an example, before trial, the parties must file *one* jointly proposed set of jury instructions and verdict forms.[15] Likewise, parties are encouraged to stipulate to factual and evidentiary matters "to the greatest extent possible."[16] During trial, the court may admit into evidence certain documents without testimony or certification from a custodian if the party introducing the document provided it to the other parties at least 90 days before trial and the objecting party, within 30 days, did not raise a substantial question about the authenticity or trustworthiness of the document.[17]

The Nuts and Bolts Takeaway

The Rule includes one significant new evidentiary provision in keeping with its "expedited" theme. Where the plaintiff seeks to rely on the testimony of a treating health care provider, such testimony may be submitted to the fact-finder in the form of a signed provider "statement."[18] The statement signed by the health care provider must be accompanied by a certification from counsel listing all communications between counsel and the health care provider.[19] Defendants may, at their own "initial" expense, cross-examine the health care provider by deposition, and the deposition may be used at trial.[20]

As a defense practitioner, I confess that, initially, I felt the healthcare provider statement formula offered a competitive advantage of sorts to the plaintiff's bar. Essentially, at first blush, it seemed to be one less hurdle that a plaintiff's attorney would have to overcome in getting the case beyond directed verdict and to the jury. However, my initial reaction was tempered during the recent Academy Seminar panel discussion, when members of the plaintiff's bar voiced strong concerns about the limited effectiveness of such an "impersonal" method of presenting medical evidence. It seems both sides may have to take their medicine in this regard.

The cap on damages recoverable in an expedited action raises another obvious point of discussion. By rule, in an expedited civil action, even if the jury returns a verdict for damages greater than $75,000, the court may not enter judgment in excess of $75,000.[21] Further, the $75,000 limit on damages "must not" be disclosed to the jury.[22] This rule of avoidance does not include any exceptions that would allow plaintiff's counsel wiggle room, such as attempting to avoid the prohibition against mentioning subsequent remedial measures by arguing a need to show "control" or "ownership."[23] Nonetheless, from the defense perspective, and even with the explicit nature of this "must not" directive, it seems warranted that a motion in limine seeking a restriction against mention of this jurisdictional cap would be filed prior to trial.

Discussions during the Academy Seminar panel also revealed there was some "heartburn" amongst the plaintiff's bar about why counsel would ever voluntarily place themselves (and their clients) under the $75,000 jurisdictional cap. Out of curiosity and in follow-up, the author reached out to attorney acquaintances in Texas,

where an expedited system has been in place since 2013. The anecdotal response from a plaintiff's lawyer in Texas was quite pointed and somewhat harsh – "if you file as an expedited action and you ring the bell at trial, you have now shot yourself in the foot and potentially committed malpractice." Given these observations from Texas, it seems this overall concern is not unique to the plaintiff's bar in Iowa. One supposes this concern alone may prevent plaintiff's counsel from regularly filing actions within the expedited system. Only time will tell in that regard.

The defense bar may rightly have some concerns of their own about the expedited action, though the concerns need not be so disquieting as to make defending a proceeding in the expedited system seem like a bad draw. After all, the defense can hardly complain when the ceiling on potential exposure is capped at $75,000. Nevertheless, some thoughts on the subject might be warranted.

First, the "evidentiary" portions of the Rule seem to "hint" that the trial judge has significant leeway in enforcement of the rules of evidence. I saw this in my recent expedited trial in Polk County, particularly in the treatment of the healthcare provider statement. The statement is a form document in the truest sense, and the court permitted a great deal of "argument" concerning the physician's opinions, despite what, at least from the defense perspective, seemed to be a relative absence of detail provided on the completed form itself. The defense practitioner should be aware that courts may permit plaintiffs to "explain" the healthcare provider statement, and seriously consider motions in limine to curtail "argument" about what the completed healthcare provider statement form actually says – and does not say.

Additionally, when the medical documentation reveals pre-existing conditions or subsequent injuries that merit identification and discussion, one feels a bit hamstrung when the only causation-driven medical evidence is presented to the finders of fact via the written healthcare provider statement. In the normal course, a vigorous cross-examination of the medical provider during a perpetuation deposition, or trial testimony, often alleviates any such concerns. Admittedly, the Rule does allow for the defense to take the deposition of a medical provider submitting the healthcare provider statement. However, such a prospect has a bit of a "catch-22" feeling. If plaintiff's counsel is indeed content to try the case "on paper," a cautious defense attorney has to wonder what doors might unwittingly be opened upon seeking out the deposition testimony of a medical practitioner.

Conclusion

Whatever your predisposed notions concerning expedited civil actions may be, there is certainly room for agreement between the plaintiff and defense bars on a handful of issues. The process is undoubtedly fast and, by operation of the discovery rules, quite efficient. As a result, the expedited civil action is necessarily more palatable for clients, at least from an economic perspective. Likewise, from a professional perspective, the new docket presents an excellent opportunity for young lawyers to try jury cases. The nervous client and the battle-tested senior partner can rest a little easier when the young lawyer tries a case where damages are jurisdictionally capped. Finally, from the perspective of the image of attorneys with the general public, one could also readily tell that the jury chosen in the recent expedited trial in Polk County very much appreciated the ramped up pace of the expedited process.

Of course, the option of choosing an expedited trial is the plaintiff's alone. The defense has no say in the matter. Yet, where an honest evaluation of the case reveals that recovery is very unlikely to be higher than $75,000, advising clients to proceed under Rule 1.281 would avoid prolonged (and expensive) litigation – where the outcome is unpredictable in every docket. Knowing that the Iowa bar is quite practical and steeped in Midwestern "common sense," it should not be overly difficult to identify cases that fit perfectly within the framework of the expedited system.

Properly invoked, Rule 1.281 could be a win-win for plaintiffs, defendants, attorneys and Iowa's court system. Here is to hoping that the expedited civil action is here to stay in Iowa.

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[1] Other states that have adopted pilot programs or rules for expediting certain civil actions include Minnesota (pilot program), New Hampshire (pilot program), Texas (Tex. R. Civ. P. 169), South Carolina (fast-track jury process), Oregon (Or. UTCR 5.150), Utah (pilot program), Colorado (Civil Access Pilot Project), and Alaska (Alaska R. Civ. P. 26(g)).

[2] *See* Iowa Rule of Civil Procedure 1.281(1)(a).

[3] Order – Adoption of Expedited Civil Action Rule and Amendments to Iowa Discovery Rules, Aug. 28, 2014.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] For good cause shown, the court may extend the one year time frame. *See* Iowa Rule of Civil Procedure 1.281(4)(b).

[9] Iowa Rule of Civil Procedure 1.281(4)(a).

[10] Iowa Rule of Civil Procedure 1.281(1)(e).

[11] The Rule invokes the important distinction between "side" and "party." "Side" refers to all litigants with generally common interests and therefore may include more than one "party." *See* Iowa Rule of Civil Procedure 1.281(1)(i).

[12] *See* Iowa Rule of Civil Procedure 1.281(4)(f).

[13] *Id.*

[14] *See* Iowa Rule of Civil Procedure 1.281(3).

[15] Iowa Rule of Civil Procedure 1.281(4)(c).

[16] Iowa Rule of Civil Procedure 1.281(4)(g)(1).

[17] *See generally* Iowa Rule of Civil Procedure 1.281(4)(g)(2) et seq.

[18] Iowa Rule of Civil Procedure 1.281(4)(g)(3).

[19] Iowa Rule of Civil Procedure 1.281(4)(g)(3)(2).

[20] Iowa Rule of Civil Procedure 1.281(4)(g)(3)(4).

[21] Iowa Rule of Civil Procedure 1.281(1)(e).

[22] *Id.*

[23] *See* Iowa Rule of Evidence 5.407.

Complying With the (Not So) New Duty of Competency in Technology

by Josh McIntyre, Lane & Waterman LLP, Davenport, IA

Josh McIntyre

On October 15, 2015, the Iowa Supreme Court installed its first major amendments to the Iowa Rules of Professional Conduct since 2005. The Court adopted numerous changes to maintain consistency with the ABA Model Rules, including Rule 1.1's directive for competent representation. Maintaining the requisite knowledge and skill of a competent attorney now explicitly requires that an attorney stay informed of "the benefits and risks associated with relevant technology."[1]

The revised Model Rules grew out of a three-year study by the ABA Commission on Ethics 20/20, which began in September 2009 with the goal of understanding how globalization and technology are transforming the practice of law. The Commission noted that technology poses new concerns to data security and client confidentiality. The ABA's Cybersecurity Legal Task Force put it more ominously: "with increasing technology sophistication comes *decreasing* understanding of the complexities and vulnerabilities inherent in these complex systems. We're at increasing risk of losing control."[2]

What has emerged from the wealth of committee reports, ethics opinions, and disciplinary actions is the realization that there are few bright lines for attorneys. Instead, attorneys must perform their due diligence to establish and maintain a reasonable level of security to protect client information. In this article, I examine some modern threats to confidentiality and provide ten tips for maintaining competent security measures.

The Persistent Threat to Confidentiality

For many generations, the fundamental duty to maintain confidentiality was fairly within the attorney's control. As a consequence, Rule 1.6 directed attorneys to "not reveal information relating to the representation of a client" unless informed consent was given or narrow exceptions applied.

Similarly, there was a time when "going online" was a very purposeful act that required us to endure the screeching of a dial-up connection and the pain of by-the-minute fees. But we now live among the Internet of Things,[3] where everything from cars to refrigerators has a persistent online connection. This data transmission is invisible to us as we walk around with data broadcasting from our wrists and pockets.

Let me prove it to the iPhone users. Grab your iPhone, go to the Settings menu, then select Privacy, Location Services, System Services, and Frequent Locations. Click around to find a map showing the most common places you visit and the timestamps for your stops, information that you have shared with Apple (and maybe the FBI) by failing to disable this feature. The most frequently visited locations are likely your home and your office. Now imagine all of the information you access on your smartphone that may be leaking in a similar way.[4]

Another threat is exemplified by the Amazon Echo, a device that can quickly report news, play music, or control your home's lighting with verbal commands. The Echo uses an always-on microphone that "can hear you from across the room" even when it's playing music. It works by constantly processing audible speech for a prompt. Obviously, you wouldn't want to have a privileged or confidential discussion within its range. Similar technology has been incorporated into TVs, video game consoles, and even smart thermostats.

Worse than the passive risks of new technology are the threats posed by black hat hackers,[5] which only continue to increase. A 2015 study by the ABA found that 15% of all law firms have experienced a data breach; that number climbs to 25% for law firms with more than 100 attorneys.[6] Law firms are a favorite target because they tend to have incredibly valuable information – trade secrets, medical records, sensitive financial data – stored behind little or outdated security. The need to have constant access to client data may lead attorneys to use unsecured storage and transmission methods, such as cloud drives and public Wi-Fi. Attorneys may also be slow to learn of and alert clients to a data breach, giving attackers more time to sell or exploit the data.

Attorneys Must Make Reasonable Efforts to Protect Client Data

In 2014, the ISBA Committee on Ethics and Practice Guidelines addressed whether attorneys could continue to use the Windows XP operating system after Microsoft ended security update support. The Committee concluded that it could not provide technical guidance on "the ever-changing world of technology." Instead, it advised attorneys to conduct their due diligence and undertake a continual review of their security measures.[7]

Amended Rule 1.6 adopts this position and recognizes that attorneys can no longer guarantee complete confidentiality of client data. Attorneys instead must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to" information relating to the representation.[8] This includes taking reasonable precautions to prevent transmitted client data from being intercepted by unintended recipients.[9] Unauthorized access will not constitute an ethical violation if the attorney has taken reasonable steps to prevent it, based upon (1) the sensitivity of the information protected, (2) the likelihood of disclosure, (3) the costs and difficulty of installing the security, and (4) the extent to which the security measures would adversely affect the attorney's own use of the data.[10]

Security Steps to Consider

As with any reasonableness standard, a fact-sensitive balancing is necessary and no checklist can guarantee that particular security measures will be found reasonable in all circumstances. With that disclaimer, I offer the following ten steps that you might take to increase the likelihood that your security measures would be found reasonable.

1. Audit Your Security. A good place to start is to conduct an audit of the data you maintain, how it is used and destroyed, and what security measures are already in place. Hire an outside vendor to conduct penetration testing to determine vulnerabilities in your computer security. The vendor should provide a report explaining in plain language the tests that were performed and the recommended areas for improvement.

2. Review Applicable Laws and Regulations. The large patchwork of industry-specific data privacy laws may still apply when sensitive data is maintained by attorneys. Consider whether the laws that apply to your client also control your storage and use of the data. Examples include HIPAA, the Fair Debt Collection Practices Act, and the Gramm Leach Bliley Act.

3. Take the First Steps. The ethical rules do not require attorneys to use the best security available, and the associated costs will always be a factor weighing against the latest and greatest technology. Instead, take basic measures such as installing a network firewall, changing passwords on a regular basis, and encrypting sensitive data for transmission. Default or easily guessed names and passwords should not be used, and passwords should not be recycled. Basic intrusion detection software should be installed so that you receive appropriate alerts whenever your network is compromised.

4. Maintain Updates. Once a reasonable level of security has been achieved, you must update operating systems, anti-virus, and other security measures on a continual basis. The security firm Symantec recently reported that nearly 1.2 million new threats are released on the Internet *every day*.[11] When security patches are released, attackers study them and target users who have not installed the updates. These updates are usually free or built into the costs of service, so a failure to install an update that would have prevented a breach would likely weigh against an attorney on an ethics charge.

5. Hire Experts. When you do not feel comfortable deciding whether a new technology offers a reasonable level of security, engage an expert. You may also turn to bar associations or qualified employees who have expertise in both technology and the Rules of Professional Conduct.[12]

6. Travel Smart. Take additional precautions when you access client data from outside the office. Using unencrypted (public) Wi-Fi poses the risk that the data will be intercepted during transmission. One option is to utilize a virtual private network (VPN), which creates a secure tunnel through the Internet and allows you to benefit from your office's security.

You may also use two-factor authentication to remotely log in. This requires a password plus another form of identification, such as a passkey accessible only through an app on your smartphone. This precaution dramatically improves security because the attacker can log in only if he has compromised both your password and your smartphone. Three-factor authentication – something you know (password), something you have (passkey), and something you are (biometric marker) – adds even more protection but could be too cumbersome for daily use.

7. Investigate Vendor Practices. In 2011, the ISBA's ethics committee declined to admonish attorneys against the use of cloud-based services.[13] Instead, attorneys should confirm that vendors take steps to ensure that client data will remain secure and confidential. Before storing data on Dropbox or Google Cloud, consider encrypting it with a service such as Sookasa, Boxcryptor, or SpiderOak. Attorneys should also address what will happen to the data if there is a dispute with the vendor. Vendor contracts often provide that access may be discontinued if service fees are not timely paid. Attorneys should ensure that any temporary problems with access do not adversely affect the representation and that the vendor does not claim ownership over the data after the service is terminated.

8. Keep Secure Backups. The growing threat of ransomware can be defeated by a secure, offline backup. Ransomware infects systems by silently encrypting files. Once the user has been completely locked out, the ransomware will demand payment for the ability to access the files. If an uninfected backup has been saved, it can be restored to eliminate the ransomware and the difficult decision of whether to pay a ransom for your clients' files.

9. Develop an Incident Response Plan. Nearly half of the law firms surveyed by the ABA in 2015 did not have a plan for responding to a data breach.[14] The time to consider how to respond to the unauthorized access of client data is well before a breach occurs. An Incident Response Plan should identify those who will be responsible for managing the response, including firm management, IT staff, a digital forensics company, and your insurance contacts. The plan should address how the firm will investigate the attack and decide whether law enforcement should be involved. A great contact to include is your local FBI field office, whose agents are trained to respond to online threats and have procedural tools for tracking the source of an attack much quicker than is possible for a private litigant.

The most important part of responding to a data breach is timely and effectively informing clients or others who may be affected by the attack. Data breach notifications laws are extremely varied and typically apply whenever there is a compromise to personal data about the state's residents. Iowa's requirements are codified at Iowa Code Section 715C and apply whenever the personal information of Iowa residents has been compromised. The statute requires that notification be issued in "the most expeditious manner possible and without unreasonable delay," allowing for time to investigate the breach and restore system integrity. Your Incident Response Plan should address the message you intend to convey to clients about the data that has been compromised and the steps that have been taken to rectify the unauthorized access.

10. Keep Clients Informed. A key component to acting reasonably is adequately informing clients of the risks. The ISBA ethics committee recently recommended that attorneys go beyond the boilerplate in engagement letters and have active discussions with clients about the risks posed by online communication.[15] Few clients want the cost or inconvenience of more secure methods, but having this discussion as a matter of practice will solidify the legitimacy of your efforts.

Conclusion

When the ABA adopted these revisions to Rule 1.1 and Rule 1.6, it recognized that they only make explicit what was already communicated throughout the rules: attorneys must take reasonable steps to identify risks and protect clients. Iowa attorneys should keep in mind that doing so requires attention to the persistent threats and security options presented by new technology introduced into our practices.

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[1] Rule 1.1, Comment 8.

[2] The ABA Cybersecurity Handbook (2013) at 4.

[3] The Internet of Things is the concept of connecting everything to the Internet, making it "smart" and capable of interacting with other devices and data. See "A Simple Explanation of 'The Internet of Things'" by Jacob Morgan, Forbes.com (May 13, 2014).

[4] Yes, this is a great source for discovery to establish the whereabouts of a cell phone and, presumably, its owner. Whether you can obtain this and similar data from the phone or must go to the service provider largely depends upon the data's age and how it is processed. Third party discovery is often necessary.

[5] The generic term "hacker" has unfortunately been co-opted. The traditional jargon distinguishes between illegal actors, known as black hats, and white hat hackers who are hired to ethically test and improve computer security.

[6] http://www.law360.com/articles/705657/1-in-4-law-firms-are-victims-of-a-data-breach

[7] Iowa Ethics Opinion 14-01, Computer Security.

[8] Rule 1.6 (d).

[9] Rule 1.6, Comment 19.

[10] Rule 1.6, Comment 18.

[11] Internet Security Threat Report (April 2016).

[12] Iowa Ethics Opinion 11-01, Software as a Service.

[13] Id.

[14] http://www.law360.com/articles/705657/1-in-4-law-firms-are-victims-of-a-data-breach

[15] Iowa Ethics Opinion 15-01, Email Communication.

Iowa Legislative Update

by Scott Sundstrom, IDCA Lobbyist

Scott Sundstrom

The Iowa General Assembly convened on January 11 this year and likely will finish its work during the second half of April. As has been the case since the 2011 session, the Senate is controlled by Democrats and the House is controlled by Republicans. This partisan divide has largely resulted in a stalemate on legislation that is viewed as either pro-plaintiff or pro-defense.

A. Tort Issues

1. *Statute of Limitations for Building Defect Claims.* House File 2332 would have amended the existing 15-year statute of repose for building defect claims in Iowa Code § 614.1(11) by adding a two-year statute of limitations within the statute of repose. The new two-year statute of limitations would be triggered by standard discovery rule language: A claim would need to be brought "within two years after the act or omission of the defendant alleged in the action to have been the cause of the injury or death is discovered or by the exercise of reasonable diligence should have been discovered." Although this bill did not seem to make drastic changes to the law (the current statute of limitations for personal injury is two years, Iowa Code § 614.1(2), and the statute of limitations for injuries to property is five years, Iowa Code § 614.1(4)), the Iowa State Bar Association strongly objected to the bill. The bill was approved by the House Judiciary Committee, but never debated on the House floor.

2. *Medical Malpractice Statute of Repose.* Senate Study Bill 3053 proposed to add an additional exemption to the six-year statute of repose for medical malpractice claims in Iowa Code § 614.1(9). The bill would have allowed medical malpractice claims to be brought past the six-year statute of repose if "the cause of the injury or death could have been avoided or minimized if the [health care provider] . . . had properly interpreted the patient's test results and had communicated those results to the patient in a timely manner." The bill was intended to overturn *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, PLC,* 819 N.W. 2d 408 (Iowa 2012), in which the Iowa Supreme Court upheld dismissal of case under the statute of repose involving the death of a woman whose dermatologist allegedly failed to properly interpret test results indicating she had skin cancer. The bill was approved by the Senate Judiciary Committee (as was renumbered as Senate File 2272), but was amended to simply state that the Judicial Branch should define the term "continuum of care." This was done to allow interested parties some time to see if they could agree on language. An attempt at revised language was introduced as an amendment to the bill (S-5063). Not surprisingly, however, no consensus on the issue was reached, and the bill was never brought up for debate.

3. *Statute of Limitations for Sexual Abuse Claims Involving Minors.* During the 2015 session, the Senate passed Senate File 447, which would have significantly lengthened the statute of limitations for claims alleging sexual abuse against minors. The House did not take up the bill in 2015, and there was no further activity on the bill this year.

4. *Right to Try Experimental Treatments.* Senate File 2198 would have allowed terminally ill patients the right to try experimental treatments that are still in clinical trials and have not received final FDA approval. The bill contained a provision limiting the liability of the manufacturer of an experimental treatment if the manufacturer complied in good faith with the terms of the bill and "exercised reasonable care." The bill passed the Senate, but was not acted upon by the House.

B. Labor and Employment Issues

The Senate considered a number of bills creating potential new areas of liability for employers. None of the bills survived the legislative process.

1. *Pregnancy Accommodations.* Senate File 2252 would have required employers to provide reasonable accommodations to employees for pregnancy, childbirth, and related conditions (including expressing breast milk). If an employer denied an employee's request for an accommodation, the employer would bear the burden of showing that the accommodation would create an undue hardship on the employer. The bill passed the Senate, but was not acted upon by the House.

2. *Leave for Prenatal Appointments.* Senate File 2243 would have required employers to provide paid leave for pregnant employees to attend prenatal medical appointments "as recommended by an employee's primary care provider in order to promote a healthy pregnancy." The bill provided for a civil penalty of up to $500 for each violation, and provided for other remedies. The bill was approved by the Senate Labor Committee, but was not debated on the Senate floor.

3. *"Ban the Box".* Senate File 2240 would have prohibited employers from "inquir[ing] about or require[ing] disclosure of the criminal record or criminal history of an applicant until the applicant's interview is being conducted or, if an interview will not be conducted, until after a conditional offer of employment is made." The bill provided for a civil penalty of up to $1500 for each violation. The bill was approved by the Senate Judiciary Committee, but was not debated on the Senate floor.

4. *Wage Discrimination.* Senate File 2193 would have amended the Iowa Civil Rights Act to address concerns about "wage discrimination" (most significantly, by paying women less than men). Under the bill, it would be illegal for employers to:

- Prohibit an employee from sharing the amount of the employee's compensation or from discussing information about any other employee's compensation as a condition of employment.
- Seek salary history information from a potential employee as a condition of a job interview or employment.
- Release the salary history of any current or former employee to any prospective employer in response to a request as part of an interview or hiring process without written authorization from such current or former employee.
- Publish or post an advertisement to recruit candidates to fill a position within the employer's organization without including the minimum rate of pay of the position (including overtime and allowance)
- Paying a newly hired employee less than the advertised rate of pay.

In addition, the bill would have made it significantly more difficult for an employer to justify a wage differential. The bill would have modified the existing affirmative defense to a claim of wage discrimination in Iowa Code § 216.6A(3) by requiring that an employer demonstrate that any wage differential is consistent with a "business necessity." The bill defined "business necessity" to mean "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." An employer would not be able to demonstrate a "business necessity" if an employee could "demonstrate" that an alternative business practice exists that would serve the same business purpose without producing the wage differential." The bill was approved by the Senate Labor Committee, but was not debated on the Senate floor.

C. Judicial Branch Funding

1. *Judicial Branch Funding.* In light of slow state revenue growth and competing demands from other state agencies and priorities, the Judicial Branch received the same appropriation in FY 2016-2017 as it is currently receiving in FY 2015-2016: $181.7 million. The Judicial Branch had requested an increase of $5.6 million, which was the amount that is needed to simply maintain the current level of service by funding required salary increases in collective bargaining agreements. Because 96% of the Judicial Branch's budget goes to pay salaries, addressing the budget shortfall will almost certainly result in some combination of reductions in service, furloughs, or layoffs. Chief Justice Cady met with representatives from various stakeholders, including the Iowa Defense Counsel Association, on May 11 to discuss options for dealing with the funding shortfall. The Supreme Court is planning on meeting late May to finalize decisions that will be implemented by the July 1 start of the Judicial Branch's FY 2016-2017.

2. *Judicial Salary Increase.* The Judicial Branch filed a bill seeking a 5% salary increase for judges and magistrates. The bill was amended in the House Judiciary Committee and completely rewritten. House File 2432 would repeal the statutory provisions setting judicial salaries. In their place, the Iowa Supreme Court would be given autonomy to set its own judicial salaries (subject to the overall appropriation given to the Judicial Branch) and would be given significantly more latitude in determining the number of judges and magistrates in judicial districts. The Judicial Branch, the Iowa Judges Association, and lawyer associations supported the bill. The bill passed the House and was approved by the Senate Appropriations Committee with a proposed committee amendment that would have tied any increases in judicial salaries to the amount received by other non-union Judicial Branch employees. The Senate did not take up the bill and it thus died when the legislature adjourned.

NEW LAWYER PROFILE

In every issue of *Defense Update,* we will highlight a new lawyer. This issue, we get to know Andrea D. Mason at Lane & Waterman LLP in Davenport, Iowa.

Andrea D. Mason is an associate at Lane & Waterman LLP, where she practices primarily in the areas of civil litigation, white collar criminal defense, criminal defense, and government compliance. Andrea has defended suits involving legal malpractice and negligence and has defended individuals accused of violations of state and federal law, including complex business and tax offenses. Originally from northeast South Dakota, Andrea received her Bachelor of Arts degree from the University of Northern Iowa, graduating summa cum laude. Andrea received the Purple and Old Gold Award from Northern Iowa, as well as admission into Psi Chi International Honor Society, Omicron Delta Kappa National Honor Society and Golden Key International Honour Society. Andrea then received her Masters of Science from Iowa State University, where she was also inducted into the Alpha Kappa Delta International Honor Society. Andrea received her Juris Doctorate from Drake University, where she graduated with highest honors. Andrea served as Managing Editor of the Drake Law Review and Treasurer of Drake's Moot Court Board. Andrea has also been admitted into the Order of the Coif.

In addition to her membership with IDCA and presentation of the case law update in 2015, Andrea is the Chair of the Young Lawyers Division of the Scott County (Iowa) Bar Association and a member of the Dillon Inn of Court, Scott County (Iowa) Bar Association, Rock Island (Illinois) Bar Association, Iowa Bar Association, Illinois Bar Association, American Bar Association, and Defense Research Institute. Andrea also co-chairs the Scott County Bar Association's mock trial committee, organizing the junior high mock trial competition held each fall.

CASE LAW UPDATES

Case Law Update: Employment and Civil Procedure

By Alex Grasso, Hopkins & Heubner, P.C., Des Moines, IA

Additional Thanks: Nivath Baccam, Legal Assistant to Alex Grasso and Chris Wertzberger, Law Clerk

2014 CASELAW UPDATE ADDENDUM

Ruling re: Attorney Fees, *Smith v. Iowa State University of Science & Technology,* 851 N.W.2d 1 (Story County District Court, April 20, 2015)

Facts: Iowa Supreme Court upheld jury verdict of $500,000 for intentional infliction of emotional distress, $110,732.22 for harm to reputation, but vacated award of $634,027.40 for loss of income. On remand, District Court entered judgment; Smith's attorneys asked for fees and costs under Whistleblower Statute (Iowa Code 70A.28(5)(a)). Court awarded $368,607.35 for attorney fees and costs, holding (1) facts supporting Smith's IIED and Whistleblower claims were inseparable, (2) public policy favored treating Smith's claims as analogous to discrimination/civil rights cases, and (3) trial court's broad discretion to award attorney fees even for unsuccessful cases. Defendants filed Notice of Appeal.

***Citing Bank of America, N.A. v. Schulte*, 843 N.W.2d 876 (Iowa 2014), court upheld summary judgment for creditor in foreclosure action. *U.S. Bank Nat. Ass'n v. Lamb*, No. 14—1536, 2015 2394183 (Iowa Ct. App. May 20, 2015).**

Facts: Cathy Callen and Jereme Lamb executed promissory note in 2006, secured by mortgage on property. They defaulted. U.S. Bank obtained an in rem judgment and decree of foreclosure, but twice the sheriff's sale was postponed and execution returned unsatisfied. U.S. Bank filed a notice of rescission in March 2012. U.S. Bank then initiated the current action and moved for summary judgment. Callen appealed the grant of summary judgment and decree of foreclosure.

Held: Affirmed. IOWA CODE §615.1 states that judgments (in foreclosure/real estate mortgages) are null and void after two years. However, a mortgage remains a lien until the debt it was given to secure it is satisfied and is not affected by a judgment on the note. The district court did not err in granting summary judgment and the timeliness of the rescission had no effect on the mortgage lien on the property.

2015 CASELAW UPDATE – EMPLOYMENT LAW

UNITED STATES SUPREME COURT

***Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, No. 12—1226 (2015)**

Facts: Peggy Young worked part-time for UPS as a driver. After Young became pregnant, her doctor restricted her to lifting no more than 20 pounds during the first 20 weeks and no more than 10 pounds thereafter. UPS required drivers to move packages of up to 70 pounds and assist in moving packages up to 150 pounds. Young stayed home, forfeited pay, and lost her medical coverage. She sued UPS under a "disparate-treatment" theory with respect to other persons "not so affected by pregnancy, childbirth, or related conditions," similar in their ability or inability to work." UPS had "light duty" accommodations available for workers who lost driver's licenses for medical or legal reasons, were injured at work, or were already disabled under ADA. District court entered summary judgment for UPS, affirmed by the 4th Circuit on appeal, on the grounds that Young failed to show a prima facie case of discrimination.

Held: Reversed. Under *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973), and after the Pregnancy Discrimination Act of 2008, an employee can (1) allege "disparate treatment" under the Pregnancy Discrimination Act and (2) defeat summary judgment by showing that an employer accommodated a large percentage of non-pregnant workers, while failing to accommodate pregnant workers, "similar in their ability or inability to work."

***E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, No. 14—86 (2015)**

Facts: Samantha Elauf – a practicing Muslism – interviewed well with an Abercrombie Store Manager, but Manager was concerned about Samantha's religious headscarf. Abercrombie uses an employee dress code or "Look Policy." The Abercrombie District Manager confirmed that the headscarf violated the Look Policy and the Store Manager denied Elauf a job. The EEOC sued Abercrombie under Title VII of the Civil Rights Act. The trial court awarded summary judgment to the EEOC under a "disparate treatment" theory and awarded $20,000 after a damages hearing. The 10th Circuit reversed and entered summary judgment for Abercrombie because Elauf had failed to prove that Abercrombie knew her headscarf was religious.

Held: Reversed. The issue is whether applicant's need for accommodation was a motivating factor in the employer's decision. Here, parties conceded that Abercrombie failed to hire Elauf because of her religious practice. Whether she was not hired "because of" her religious practice does not require a "but-for" showing, rather, just that her practice was a motivating factor in Abercrombie's decision.

8TH CIRCUIT COURT OF APPEALS

***Ludlow v. BNSF Railway Company*, No. 14—2486, 2015 WL 3499859 (8th Cir. June 4, 2015)**

Facts: Ludlow started working in claims for BNSF. After discovering that a co-worker, Fernandes, had forged Ludlow's signature on a document intended for the Department of Veterans Affairs, he reported it to his supervisor, Barry Wunkel. Wunkel did nothing. Ludlow involved the BNSF police. Then, Wunkel started sending complaints to BNSF HR regarding Ludlow's workplace behavior and told his supervisor, Renney, that Ludlow's forgery claim was motivated by jealousy. Renny told his supervisor, Cannon. Wunkel, Renny, and Cannon drafted a "cease and desist" letter and ordered Ludlow to route any further communication about the forgery to Renny. Ludlow and a janitor were having an innocent conversation and Ludlow showed her a karate kick, accidentally making contact with her. When Fernandes discovered this, he reported it to Wunkel. Wunkel reported it to Renney; Renney sent it to his supervisor, Lifto. Then, Lifto, Cannon, Renney, and Wunkel had a conference call with BNSF's Vice President; based solely on this call, Shewmake ordered Ludlow's termination. Ludlow filed suit; one cause of action was the "cat's paw" theory, alleging that BNSF was liable for Lifto, Cannon, Renney, and Wunkel's efforts to convince the VP to fire Ludlow. The jury found for Ludlow and awarded him damages. The trial court denied BNSF's pre and post-verdict JMOL motions. The jury instructions for Ludlow's claim required proof (1) that BNSF attempted to coerce him into not talking to criminal investigators and (2) that Ludlow's refusal was a "motivating factor." On appeal, BNSF argued that "determining factor" was the proper standard and that Ludlow had not proved a causal link between the protected activity and termination.

Held: Affirmed. The "determining vs. motivating" standard has "bedeviled Title VII courts" for 25 years. Here, the court cited *Staub v. Proctor Hospital*:

> "In a cat's paw case, an employer may be vicariously liable for an adverse employment action if one of its agents—other than the ultimate decision maker—is motivated by discriminatory animus and intentionally and proximately causes the action." 562 U.S. 411, 415-416 (2011).

Because BNSF's VP had effectively delegated the factfinding to Ludlow's supervisors, the trial evidence was sufficient to permit a jury to find that the VP was a conduit or rubber-stamp for the supervisors' animus.

Stewart v. Rise, Inc., No. 13—3579, 2015 WL 3952754 (8th Cir. June 30, 2015)

Facts: Stewart, an African-American woman, faced a hostile work environment comprised of mostly Somali born men – her subordinates. Between Stewart's start and termination as an employee, her office fell to second or third to last amongst twenty similar offices. She never used Rise's conflict resolution process or memorialized the instances of harassment. From 2007 through 2011, Stewart signed certifications that she was unaware of any violations of Rise's "Code of Conduct," prohibiting discrimination of any kind. Stewart's subordinates made sexist, racist, and nationalist comments and threatened her and others with violence. Stewart's supervisors worked at a different branch. Stewart received negative performance reviews as her branch's performance deteriorated. She sued Rise for (1) hostile work environment, (2) discriminatory termination, and (3) retaliatory termination under federal/state law. Citing her poor performance, lack of written documentation, and heavy reliance on Stewart's affidavit and deposition testimony, the trial court granted summary judgment for Rise. The court held that Steward had not created a prima facie case for discrimination under *McDonnell Douglas Corp.*, described the offensive comments by subordinates as "stray remarks by non-decisionmakers," and pointed out that Stewart failed to show the incidents were motivated by race, national origin, or sex. Alternatively, the court held that Rise was entitled to the affirmative defenses of *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct 2275 (1998) where an employer (1) exercised reasonable care to correct the harassing behavior, (2) offered corrective opportunities, but (3) the employee failed to take advantage. Here, the trial court reasoned, Stewart had failed to memorialize the harassment, report it through the chain of command, and had otherwise certified that there was no discriminatory conduct. Stewart appealed.

Held: Upheld as to the discriminatory termination and retaliation claims, but reversed as to the hostile work environment. Although tolerance of a discriminatory work environment can be relevant as to whether an employer later terminated an employee with a discriminatory motive, Stewart's predecessor and successor were African-American women, and the facts supporting her discrimination claim collapsed into the hostile work environment claim. The 8th Circuit held that even though a jury could discount the fact that Stewart claimed hostility from subordinates, as opposed to superiors, the instances of hostility were related to her sex, race, and national origin. Similarly, the jury could find against her because she failed to memorialize or otherwise document her claims within Rise, but Stewart had shown enough "accumulation" of hostility to defeat summary judgment. *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997).

IOWA SUPREME COURT

Didinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)

***IDCA Members Frank Harty, Debra Hulett, and Frances M. Haas**

Facts: Plaintiffs Didinger, Loring, and Freund claimed that Allsteel paid them less than male employees for similar work. They sued Allsteel under federal wage laws, then amended the suit to include claims under the Iowa Civil Rights Act both before and after the amended ICRA (IOWA CODE §216.6A) was codified in 2009. Allsteel moved to dismiss Loring and Didinger's claims to the extent they occurred before July 1, 2009, the effective date of the amended ICRA. Loring and Didinger countered that the amended ICRA was retroactive because it was procedural, merely shifting the burden of proof from plaintiff to defendant, and not substantive. Defendants moved to certify the questions to the Iowa Supreme Court and trial court granted motion, citing Iowa Code §684A.1[1].

Questions: (1) Does IOWA CODE §216.6A allow retroactive wage claims before April 28, 2009?

(2) If a prevailing Plaintiff may only recover damages under IOWA CODE §216.6A and §216.15(9)(a)(9)[2], may the same Plaintiff recover damages for prevailing on a wage discrimination claim under §216.6 and if so, what type?

Held: (1) No. Section 216.6A created a new cause of action; strict liability against employers paying unequal wages to protected class members. The legislature removed the need to prove discrimination and defined discrimination as the payment of lower wages. Thus, the law was substantive and applied after July 1, 2009.

(2) Yes, a prevailing Plaintiff may recover lost income based on discriminatory wage payments within 300 days before complaining to the civil rights commission. The court discussed three legal narratives; (1) the "continuing violation doctrine" does not apply to discrete acts of discrimination, whereas a hostile work environment claim can accumulate over time, (2) if there is no discriminatory act but only an "effect" of a past discriminatory act within the limitations period, then the claim is time-barred, and (3) "cumulative impact" is actionable if some of the conduct occurred within the limitations period. The court held that each discriminatory paycheck from Allsteel was a separate act under the IRCA, echoing Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2178-79 (2007). "A pay-setting decision alone is not actionable unless accompanied by unequal payments." *Didinger*, 860 N.W.2d at 573 (Iowa 2015). In addition, the court held that a plaintiff had each paycheck generated new 300-day window for action.[3]

IOWA COURT OF APPEALS

***Colbert v. State, Dept. of Human Services-Bureau of Refugee Services,* 859 N.W.2d 672, No. 13—0633 (Iowa Ct. App. Nov. 13, 2014)**

Facts: Sherrie Colbert claimed she was subject to racial and gender bias at the DHS. Her complaints to the COO of the Iowa DAS received no response. On April 8, 2010, she submitted a resignation letter. The next day, her supervisor admitted to grabbing Colbert's arm, shoving her into his office, and yelling at her over a disagreement with a work-related decision. Colbert reported the incident and complained to the Iowa Civil Rights Commission. A jury returned a verdict for Colbert on the retaliation claim, but decided in favor of the State as to Colbert's four claims of discrimination and hostile work environment based on race and gender. No monetary damages were awarded. The trial court granted the state's motion for JNOV on the basis that the substantial evidence did not support a retaliation claim. On appeal, Colbert claimed that the April 9 incident with her supervisor was the culmination of verbal/physical harassment, the failure to investigate her complaints, and her supervisor's attempt to undermine her in his interview with the Iowa DAS. Colbert likened her case to that of *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673 (Iowa 2004), where a Papa John's manager punched a subordinate (killing him), as a result of the subordinate disclosing the manager's sexual liaisons with another employee.

Held: Affirmed. The court distinguished between the punch in *Harris* (which a jury could find constituted an adverse employment action because it detrimentally affected the terms, conditions, or privileges of employment) with Colbert, where an act occurred, but the record failed to show how the act affected Colbert's terms, conditions, or privileges of employment. Thus, while Colbert may have alleged evidence of a hostile work environment from 2007 to 2010, she failed to meet her *prima facie* burden that (1) she was engaged in statutorily protected activity, (2) her employer took action against her employment, and (3) her protected activity caused the adverse action.

***Juweid v. Iowa Bd. of Regents,* 860 N.W.2d 341, No. 13—1628 (Iowa Ct. App. Nov. 26, 2014)**

Facts: Tenured faculty member at University of Iowa Carver College of Medicine published research about excessive use of PET-CT scans on children. He sent numerous emails to University of Iowa President Sally Mason, university officials, and coworkers disparaging the University and asking for an investigation into the overuse of imaging in children. After an academic investigator recommended disciplinary proceedings, Juweid sued President Mason and twenty-four other defendants. Meanwhile, an administrative panel held a hearing and recommended firing Juweid. After President Mason and the Iowa Board of Regents upheld the panel's findings, Juweid sought judicial review. The district court affirmed. On appeal, Juweid argued that he was denied a fair trial and that Assistant Attorney General George Carroll and President Mason had conflicts of interest because (1) President Mason was both defendant in the civil action and adjudicator in the disciplinary proceedings and (2) AAG Carroll was defending Mason in the civil action.

Held: Affirmed. Bias or pecuniary interest can deny a fair administrative hearing under the framework of *Botsko v. Davenport Civil Rights Comm'n*, 774 N.W.2d 841 (Iowa 2009). The mere fact that "investigative, prosecutorial, and adjudicative functions [were] combined" did not make a due process violation. Although the Board of Regents issued the final agency action and were named in the civil lawsuit, Juweid made no accusations against the Board. The court found no evidence to support Juweid's claim that AAG Carroll's defense of President Mason created a conflict.

***Carter v. Lee County*, No. 13—1196, 2015 WL 161833 (Iowa Ct. App. Jan 14, 2015)**

Facts: Carter was Lee County's maintenance director. During construction of the county jail, he complained to the Board of Supervisors about various items – contractors' deficient work, incorrect materials, mismanaged monies, and errors in the contractors' reports. Eventually, the Board voted to terminate him on the basis that he was not communicating effectively. He sued under the Whistleblower Statute and a jury awarded him $186,000. However, the court granted defendants' JNOV on the basis that Carter's claim was too opaque; (1) he had failed to allege objective evidence that the Board committed wrongs and (2) failed to show he had "blown the whistle" beyond simply complaining at Board meetings. Carter appealed.

Held: Affirmed. The Whistleblower Statute uses an objective standard to determine if a "wrong" occurred. In addition, "disclosure" required more than just complaining at the open meetings about certain decisions where Carter and the Board disagreed. **Dissent:** Because the jury instruction used the word "reported" and not "disclosed," there was substantial evidence that Carter reported his complaints to the Board. Furthermore, reasonableness is a fact question and Carter allege "mismanagement" and "abuse," two broadly defined terms that could have enabled a reasonable jury to find Carter's beliefs were reasonable.

2015 CASE LAW UPDATE – CIVIL PROCEDURE

IOWA SUPREME COURT

***Sioux Pharm, Inc. v. Summit Nutritionals International, Inc.*, 859 N.W.2d 182 (Iowa 2015)**

Facts: Sioux Pharm filed a lawsuit against multiple defendants for various torts and contract claims. Defendant Summit, a nonresident corporation, moved to dismiss for lack of jurisdiction. Summit's website claimed it had a facility in Sioux City, Iowa, but this was actually false and only used to bolster Summit's credibility in that its nutritional supplements used cow byproducts. Summit, a New Jersey corporation, had no bank accounts, offices, agents, or employees in Iowa. Its only contact with Iowa was a single inspection of the Sioux City facility, which was actually owned by a different defendant, Eagle Labs. The district court granted Summit's motion to dismiss for lack of general and specific jurisdiction. Sioux Pharm appealed.

Held: Affirmed as to general jurisdiction, but reversed as to specific jurisdiction. The court held that the passive website, incorrectly stating that Summit had a facility in Iowa, did not meet the "continuous and systematic" test of *Daimler AG v. Bauman,* 134 S.Ct. 746, 754 (2014) to confer general jurisdiction. Because Sioux Pharm never relied on Summit's website, the court rejected the argument of jurisdiction by waiver or estoppel. The held that specific jurisdiction did apply because (1) Summit directed its activities at Sioux Pharm, a resident of Iowa, and (2) the litigation resulted from the Summit's activities[6].

***Book v. Doublestar Dongfeng Tyre Company*, LTD., 860 N.W.2d 576 (Iowa 2015)**

Facts: The Plaintiff was inflating a tire at his father's shop when it exploded and caused severe injury. After suing the designer of the mounting/inflating machine, wholesaler, and national distributor, Plaintiffs amended the petition to include manufacturers of mounting machine and tire (Doublestar). Plaintiff appealed trial court's dismissal of Doublestar, Chinese manufacturer, on the basis of improper personal jurisdiction.

Held: Reversed under the stream-of-commerce test of *World-Wide Volkswagen Corp. v. Woodson*, 100 S.Ct. 559 (1980) and *Svendsen v. Questor Corp.,* 304 N.W.2d 428 (Iowa 1981). The court declined to follow the "stream-of-commerce-plus" test in the plurality opinion of *J. McIntyre Machinery v. Nicastro,* 131 S.Ct. 2780 (2011), citing the enormous confusion and split in federal circuits after the two "foreseeability plus" and "mere forseeability" tests of *Asahi Metal Industry Co. v. Superior Court*, 107 S.Ct. 1026 (1987). Following the dissent in *J. McIntyre Machinery*, the court noted that under the "plus" test, a manufacturer could use independent distributors to "Pilate-like wash its hands" and defeat specific jurisdiction. In Iowa, awareness that the final product is being marketed in the forum state meets the minimum contacts test. Here, Doublestar shipped tens of thousands of tires directly to Des Moines, shipped tens of thousands more to a distributor (implicit that some would arrive in Iowa), and the "volume, value, and hazardous character" analysis from a concurrence in *Asahi* supported jurisdiction. The "fair play" analysis was simple; Doublestar admitted it would be subject to jurisdiction in Tennessee, and the burdens of litigation favor the injured plaintiff.

***Fagen v. Grand View University*, 861 N.W.2d 825 (Iowa 2015)**

Facts: College student sued fellow students (later, just Iddings) for assault and battery and Grand View University/security company for premises liability. Students wrapped Fagen in carpet, duct taped his limbs, threw trash at him, battered him, then placed him up against a wall. Encased in carpet, he fell to the floor and shattered his jaw. At issue were his alleged mental pain and mental disability. After disclosing that he received therapy in middle school, Fagen refused Iddings' request to sign a release for those records, citing patient-physician privilege. At the hearing on Iddings' motion to compel discovery of the records, Fagen argued he was only claiming "garden variety" mental suffering and not a specific psychological condition. He said he would not introduce expert witness testimony regarding emotional damages. The district court sided with Iddings and ordered Fagen to provide the waiver.

Held: Reversed and remanded to determine application of a new balancing test. The court recognized that Iowa law protects patient-physician privilege *but* provides an exception when privileged information becomes "an element or factor" of the claim or defense[7]. Thus, a defendant must first show a good-faith "nexus" between the records sought and claim or defense at issue before the exception applies. The court remanded the case because the record was incomplete as to whether Iddings had made the requisite showing.

PS: Justice Hecht and Justice Appel joined Justice Wiggins' opinion, but Justice Zager concurred "in result only," without writing a separate opinion. **Dissent:** Justices Cady, Waterman, and Mansfield argued that the court answered a question that nobody asked and would have upheld the district court's order compelling Fagen to sign the waiver.

***Homan v. Branstad*, 864 N.W.2d 321 (Iowa 2015)**

Facts: In 2013, the legislature appropriated money to operate the Iowa Juvenile Home in Toledo for the 2014 fiscal year. Five months into the fiscal year, the Iowa DHS closed the home. Plaintiffs sued Branstad and the DHS. The district court granted plaintiffs' temporary injunction on the basis that Branstad had ignored a duly enacted law and could cause harm to union members. The Supreme Court stayed the injunction and granted

the application for interlocutory appeal. In the meantime, the 2014 legislature closed the IJH for the fiscal year 2015.

Held: Reversed and remanded with instructions to dismiss for mootness. Though Iowa recognizes a "public importance" exception to the mootness doctrine, this case was distinguishable from prior precedent, most importantly because the legislature essentially endorsed the executive branch's action.

***Iowa Insurance Institute v. Core Group of Iowa Association for Justice,* No. 13—1627, 2015 WL 3636200 (Iowa June 12, 2015) (decision not reported yet)**

Facts: Workers' compensation plaintiff's bar asked Workers' Compensation Commissioner for declaratory order holding that IOWA CODE §85.27(2) prohibited the application of the work product rule to surveillance materials of employee/claimant because that subsection required employers to produce "all information…concerning the employee's physical or mental condition." After the Commissioner made such an order, a trade association of insurers/employers appealed. Association sought further review after court of appeals affirmed.

Held: Reversed. The statute is limited to health-care-related privileges and does not affect the work product rule. Under principles of interpretation, "all" can mean something short of all-inclusive. In addition, work product rule is a protection or immunity, not a privilege. Thus, the commissioner exceeded the scope of his discretion to the extent the work product rule was eliminated from Workers' Compensation cases. The court also recognized the trade association's argument that the WC system exists to benefit workers – those truly injured need not rely on or prepare for surveillance as opposed to those seeking to game the system.

IOWA COURT OF APPEALS

***Jones v. Busta,* No. 14—0522, 2015 WL 162066 (Iowa Ct. App. Jan. 14, 2015)**

Facts: Plaintiffs sued Busta for personal injury suffered in a car accident. Ninety-three days after filing the petition, the court issued a *sua sponte* order that said unless an application for an extension was made in thirty days, the suit would be dismissed. Plaintiffs filed an application, alleging service was untimely due to a error converting a manual calendar to an electronic one. The court granted the motion and extended the deadline for service through December 20, 2013. Plaintiffs sent the documents for service to the county sheriff on December 4, 2013, but Busta was not served until January 4, 2014. Busta moved to dismiss; plaintiffs resisted and applied for another extension. At the hearing, the court denied the motion to dismiss and granted an extension through January 14, 2014, recognizing that service was achieved on January 4, 2014. Busta moved for interlocutory appeal.

Held: Reversed. Discussing the three actions allowable when service is not perfected within ninety days[8], the court recognized that an extension requires good cause; either an affirmative act to effectuate service or a showing that the delay was not the plaintiffs' fault. Because the December order granted plaintiffs' motion without requiring that "some affirmative act to effectuate service," the trial court court erred in granting the plaintiffs' extension.

***Villarreal v. United Fire & Casualty Company*, No. 14—0298, 2015 WL 162114 (Iowa Ct. App. Jan. 14, 2015)**

Facts: Insured parties litigated a contract claim regarding a first-party claim for proceeds after their restaurant burned down. After a jury trial and award of damages on the contract claim, the insureds filed a satisfaction of judgment in April of 2011. In June of 2011, plaintiffs sued for bad faith, seeking compensatory and punitive damages. Defendant moved to dismiss, citing res judicata and claim preclusion. Citing precedent, the district court denied the motion. Eighteen months later, defendant moved for summary judgment, alleging res judicata and that the plaintiffs were not "insureds" under the policy at issue. Recognizing there was no Iowa case on point, the district courted cited a First Circuit case and granted the motion under federal res judicata principles. Plaintiffs appealed.

Held: Reversed. Both parties agreed that (1) parties in the first/second action are the same and (2) there was a final judgment in the first action, but disagreed on (3) whether the second action's claim could have been fully and fairly adjudicated in the first case. The court distinguished between the protected right (contract rights versus non-tortious claim processing), the alleged wrong (breach of contract versus knowing and intentional failure to conduct nontortious claim process), the possible recovery (contract versus tort remedy), the discoverable evidence (no access to claim file in contract action versus action to claim file in tort), and the relevant evidence (value of building/property versus claims procedure) to distinguish the "time, space, origin, and motivation" of the claims. As to the claim that the plaintiffs were not insureds, the court applied issue preclusion in discussing a stipulation, defendant's answer to petition, and check issued by defendant, all conceding that plaintiffs were insureds under the policy. **Dissent:** Claim preclusion relies on "nucleus of operative facts." Here, both claims were predicated on defendant's failure to pay insurance benefits. Though the majority cited the Restatement (Second) of Judgments, the majority in those cases holds that a second suit for bad faith claim denial is barred following one for breach of contract.

***Estate of Ludwick ex rel. Sorsen v. Stryker Corp.*, No. 13-0754, 2014 WL 5475501 (Iowa Ct. App. Oct. 19, 2014)**

Facts: Michael Ludwick suffered a severe right leg fracture. Doctors inserted rods into his leg. After diagnosing a "nonunion," doctors implanted a product from Stryker Biotech designed to promote bone growth. Ludwick collapsed and died several months later. His autopsy revealed "rubbery, white protrusions" in his right lung and methamphetamine in his femoral blood. The Estate filed a wrongful death action, claiming that Stryker's implant had traveled through Ludwick's body to his lungs, causing a pulmonary embolism. A critical question was whether the methamphetamine caused his death; the Estate claimed either the methamphetamine was a non-illicit form ("L" as opposed to "D" methamphetamine) or that the amount detected would not cause death. The Estate's toxicologists tested the blood, learned it was "D" amphetamine, (the illicit kind[9]), and informed one of the Estate's attorneys, who told the lead attorney for the Estate. Although defense attorneys asked several times for the blood test results, the Estate's attorney denied possession of the test results, but said they were exploring whether testing could be done of the "femoral blood" because the medical examiner's office only had blood from the heart. Trial commenced and proceeded through *voir dire,* openings, and the Estate's case in chief. The night before their toxicologist was scheduled to testify, he gave the Estate's counsel a copy of the blood test results. The toxicologist essentially volunteered during direct that the blood had been tested. The court granted a motion for a mistrial, held a hearing on defendants' motion for discovery sanctions, and granted defendants' request for dismissal of the Estate's petition. The Estate appealed, arguing that the court had no authority to dismiss, and if it did, abused its discretion.

Held: Affirmed. After discussing the rules designed to avoid litigation by surprise or bad faith, especially involving expert testimony, the court held that longstanding precedent gave the trial court authority to dismiss as a sanction. Though true that dismissal is "the harshest of sanctions," the court upheld the dismissal because (1) a substantial element of the Estate's case was that the methamphetamine was the harmless "L" type caused by non-illicit products, (2) the Estate's counsel did deny that "he made a conscious decision not to tell the defendants about the test result," (3) the level of deception warranted dismissal.

***Lotfipour v. PR Partylines, LLC*, No. 14—1319, 2015 WL 4160313 (Iowa Ct. App. July 9, 2015)**

Facts: Plaintiffs were passengers on shuttle bus when it hit a deer on a highway. They suffered severe injuries and sued PR. Trial date was continued once on Plaintiffs' motion. PR moved for summary judgment on the basis that the vehicle was safe and that the driver was confronted with a "sudden emergency." The court granted it as to vehicle safety, but denied it as to negligence. PR filed a motion in limine to exclude expert testimony; plaintiffs had designated two treating physicians but failed to disclose their reports at least thirty days before trial. PR also moved to exclude a "common carrier" claim asserted by plaintiffs in their trial brief. At the limine hearing, PR's counsel argued that if the plaintiffs were allowed to plead a "common carrier" theory, then the court should grant a continuance to allow PR to designate an expert regarding the risks known to the industry. Also at issue was causation; because the plaintiffs had no expert witnesses or reports, PR argued, they couldn't introduce medical bills. The court, *sua sponte*, ordered a continuance. PR moved to reconsider, arguing that the court had essentially eliminated PR's chance for a directed verdict as to causation. PR then set interlocutory review.

Held: Reversed and remanded. The court acted on its own motion. Because the continuance gave the plaintiffs an "opportunity to correct" deficiencies in their evidence, it prejudiced PR. The proper remedy is to remand the case with the evidence "frozen" as it were on the date trial was set to begin, with enforcement of all deadlines relating to evidence and witnesses.

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[1] Supreme Court may answer certified question when (1) proper court asks, (2) question regards Iowa law, (3) question may be dispositive of pending action, and (4) there is no controlling Iowa precedent.

[2] IOWA CODE §216.15(9)(a)(9) allows a prevailing plaintiff under IOWA CODE §216.6A to recover attorney fees, court costs, and either double the wage differential, or if a willful violation, triple the wage differential. In contrast, any other successful IRCA claim only entitles a plaintiff to court costs, attorney fees, and actual damages. *Didinger,* 860 N.W.2d at 562 (Iowa 2015).

[3] *See* IOWA CODE §216.15(13) (requiring plaintiff to file suit within 300 days after alleged discriminatory or unfair practice occurred).

[4] "Hello, this is Governor Mike Huckabee, with a 45–second survey. Do you believe in American freedom and liberty? ... Would you, like me, Mike Huckabee, like to see Hollywood respect and promote traditional American values? I am an enthusiastic supporter of a new movie called Last Ounce of Courage. It is a film about faith, freedom, and taking a stand for American values. May I tell you more about why I recommend that you ... see the movie Last Ounce of Courage? (Please note that only "yes" responses go to the next segment of the script.). Thank you for your interest. Last Ounce of Courage opens in theaters on Friday, September 14, 2012. Last Ounce of Courage will inspire you and your loved ones to celebrate our nation and the sacrifices made to protect our liberties. It is a great story about taking a stand for religious freedom. The film is a timely reminder of all that is worth defending in our nation. Experience the Last Ounce of Courage trailer and see audience reactions at www.lastouncethemovie.com, that's last ounce the movie dot com. Would you like to hear this information again? (Please note that only "yes" responses repeat this segment of the script and all other responses go to the next segment of the script.). Thank you for your answers so far. I have just more question for demographic purposes. Do you own a smart phone?"

[5] *See* 47 C.F.R. § 64.1200(a)(2)(iii) (defining "telemarketing")

[6] Essentially, the *Calder* "effects" test that "foreseeable effects from an intentional tort can support jurisdiction" when the harm occurs in the forum jurisdiction. 104 S.Ct. 1482, 1487 (1984).

[7] *See* IOWA CODE §622.10(1) (the privilege) and IOWA CODE §622.10(2) (the exception).

[8] Dismissal without prejudice, alternate directions for service, or an extension of time. IOWA R. CIV. P. § 1.302(5).

[9] If the D/L ratio was .13 or over, it was likely illicit. Ludwick's heart-blood sample was 6.2.

Case Law Update: Torts/Negligence

By Andrea D. Mason, Lane & Waterman, LLP, Davenport, IA

***McFadden v. Dep't of Transp., St. of Iowa,* 877 N.W.2d 119 (Iowa Jan. 22, 2016) (No. 14-1557).**

Why it's worth the read: McFadden impacts two areas: administrative law and torts. In this case, the Court examines an estate administrator's exhaustion of administrative remedies under the Iowa Tort Claims Act in pursuing her claim for wrongful death in the district court. The Court also discusses two competing interests: the goal of resolving disputes on their merits and the need to comply with court rules. If your argument would benefit from citation to either of these interests, *McFadden* provides the authority. In particular, if you are wanting to hold someone to the requirements of the court, *McFadden* has some very good language (citing to *Esterdahl v. Wilson,* 110 N.W.2d 241, 246 (Iowa 1961)) concerning the necessary and substantive nature of court rules and the need to comply with them to avoid chaos. On the other hand, if you are wanting to avoid a rule and proceed to the merits, *McFadden* has some very good language (citing to *McMillan v. Osterson,* 183 N.W. 487, 488 (Iowa 1921)) for you, as well.

Summary: McFadden presented a wrongful-death claim to the state appeal board, alleging the DOT negligently maintained the highway, causing her husband's motorcycle accident and death. Although McFadden listed herself as claimant, she did not attach to the form evidence of her appointment as administrator of her husband's estate nor expressly allege the claim was made in her capacity as estate administrator. The appeal board took no action on the claim and, after seven months, McFadden withdrew her claim and filed suit in the district court in both her individual and administrative capacities. The district court, affirmed by the court of appeals, concluded McFadden failed to exhaust administrative remedies because she never presented the estate's claim to the appeal board, instead presenting only her individual claim.

The Court concluded McFadden exhausted administrative remedies by complying with the requirements and providing the State with all the necessary information. The Court distinguished previous caselaw, noting the "essential prerequisite in asserting wrongful death claims" was the claimant's authority to act as the decedent's personal representative. That is, McFadden succeeded because she was in fact the estate's administrator at the time the administrative claim was filed. McFadden provided the required information (name, address, telephone number, and age), which is all the administrative rules require; the rules do not require the claimant to list their representative capacity. That, coupled with the civil procedure rules which allow an estate administrator to sue in her own name when acting on the estate's behalf, meant all required information was provided. As such, because McFadden actually served as estate administrator at the time she filed her claim, and because the administrative rules and civil procedure rules together meant McFadden only needed to list her own name, she exhausted all administrative remedies and was allowed to pursue her claim.

***Concerned Citizens of S.E. Polk Sch. Dist. v. City Dev. Bd. of the St. of Iowa*, 872 N.W.2d 399 (Iowa Dec. 11, 2015) (No. 14-1317).**

Why it's worth the read: This case, although superficially intuitive, is discreetly nuanced, causing many a lunch-time debate as we adapt to EDMS. The Court examines the meaning of the time for filing a notice of appeal. That is, whether an electronically filed case begins the day the notice of filing is electronically transmitted or the day the order from which the appeal is taken has been electronically filed. Ultimately, the Court holds the notice of appeal from a final judgment or order of the district court must be filed within 30 days of the date the judgment or order was electronically filed, not the date of the notice of filing. Read *Concerned Citizens*, then read the Court of Appeal's *Ewing Concrete*.

Summary: After judicial review of an agency action, the district court electronically filed, on July 11, 2014, a written ruling with the clerk of court through EDMS. The electronic filing stamp on the ruling read "E-FILED 2014 JUL 11 2:45 PM POLK – CLERK OF DISTRICT COURT." On July 15, after the clerk of court approved the filing, EDMS transmitted the notice of filing to the attorneys of record which included "Official File Stamp: 07-11-2014:14:45:38." On August 12, Concerned Citizens filed a notice of appeal from the district court decision and a motion for extension of time to appeal.

The Court discusses the transition to EDMS as well as the overall goal to continue court practices governing paper filing, not to change them. And, after all, the rules of appellate procedure require a notice of appeal to be filed within 30 days "after the filing of the final order or judgment."

Concerned Citizens, however, pointed to chapter 16 of the court rules, which defines "electronic filing" as the transmission of a document to EDMS "together with the production and transmission of a notice of electronic filing." Thus, claimed Concerned Citizens, the time period to file an appeal from a court order does not commence until the notice of filing was

transmitted; that is, not with the date the stamp reads but when the clerk actually stamped the order.

The Court rejected Concerned Citizens' argument, noting the two-step process of filing and notification does not preclude the appellate rules from continuing to use only the filing as the time to begin the appeal. Further, chapter 16 overall reveals the focus is upon the date of filing, as articulated in the official time stamp, not the notice of filing. Interpreting the appellate rules to vary depending upon the notice of the filing, said the Court, would create confusion and a "moving target" variable from case to case depending upon when the clerk of court is able to approve the filing. Lastly, in the paper world, additional time was not granted to compensate for the time it took to provide notice. Using EDMS to this same effect, then, suffers no hardship. Although this means a party may actually have less than 30 days to submit the notice of appeal, and the clock may begin ticking before a party knows it is doing so, the Court concluded:

> Our rule governing the time to appeal, however, does not exist to ensure a party is given a full thirty days to contemplate the filing of an appeal. Instead, it has been built upon the rationale that justice is better served by a clear and uniform starting point in all cases. It has also been built on trust that clerks of court will promptly perform their duty to ensure notice of filing is provided after a court order is entered. This rationale is continued in the electronic world.

***Ewing Concrete LLC v. Rochon Corp. of Iowa*, ___ N.W.2d ___ (Iowa App. Jan. 13, 2016) (No. 14-1628).**

Why it's worth the read: In our EDMS world, *Concerned Citizens* took a hard-line when interpreting the timeliness of a notice of appeal, while *Ewing Concrete* took a softer approach when sitting in equity. This case provides an interesting contrast between *Concerned Citizens'* need for clarity and *Ewing Concrete's* concern for fairness. Practically, this case provides authority if you missed a deadline: a narrow exception, based on equity, for a missed deadline when EDMS malfunctions. After reading *Ewing Concrete,* though, take caution of *Concerned Citizens* and Iowa Court Rules 16.311(1)(d) and 16.311(2)(a).

Summary: To enforce its statutory claim, subcontractor Ewing had to file a petition by April 30, 2014. On April 30, 2014 at 4:29:48 p.m., Ewing's attorney submitted an e-payment for its petition to EDMS. At 4:35 p.m., EDMS responded with an email confirming receipt of payment which encompassed a recitation of the documents enclosed, including "petition.pdf." However, EDMS did not confirm receipt of the petition. On May 8, 2014, the office manager for Ewing's attorney forwarded the payment-confirmation email to EDMS support, who replied they were researching the issue. The petition was then accepted and file-stamped May 9, 2014. In July 2014, Ewing's new counsel filed an "application to reset filing date for petition," alleging EDMS went down at 4:38 p.m. and remained offline until 7:13 p.m. and, although EDMS should have processed the petition on April 30, it was not processed until May 9, a date outside the statutory deadline.

The Court of Appeals, sitting in equity, considered several factors: 1. neither party caused the problem, but rather the problem was simply a malfunction of EDMS; 2. EDMS is new; 3. the Supreme Court is still taking comment on and developing the final EDMS rules; 4. there is a lack of precedent to guide the matter. The Court concluded an attorney who received notice on April 30 EDMS had accepted payment for the filing of a petition could reasonably believe the petition itself had been filed, especially when the notice contained language referencing "petition.pdf" and no notice of the system being down was generated. Under the specific circumstances of the case, the Court of Appeals, sitting in equity, deemed the petition as having been filed April 30.

***Robert Allen Barker v. Donald H. Capotosto and Thomas M. Magee*, 875 N.W.2d 157 (Iowa Feb. 5, 2016) (No. 14-1550).**

Why it's worth the read: If you are an attorney, you know this is not a profession without risks. It is also not one for the faint of heart. By helping others in a highly technical and complicated field, we expose ourselves to our own potential liability, whether we pursue slip and falls, draft wills, or defend alleged criminals. For those who do criminal defense work, complaints are often in the form of ethics complaints or of ineffective assistance of counsel. *Barker* discusses a less-common form of complaint: legal malpractice against a criminal defense attorney (so-called "criminal malpractice"). This case impacts those who work on criminal matters as well as those who practice in the civil arena.

Summary: Plaintiff filed this legal malpractice action against his former criminal defense attorneys, claiming they acted negligently for allowing him to plead guilty to a specific crime lacking a factual basis. The district court granted the attorneys summary judgment because plaintiff could not show he was actually innocent of any offense forming the basis for the underlying criminal case; this case asks whether a criminal defendant suing his former criminal defense attorney for malpractice must prove actual innocence as a precondition to recovery. Ultimately, the Supreme Court declines adopting proof of actual innocence as a prerequisite; instead, the Court stated "judges and juries should take innocence or guilt into account in determining whether the traditional elements of a legal malpractice claim have been established."

For the underlying criminal matter, Barker had placed graffiti on the wall of a public restroom inviting young males to contact an email address if they were interested in oral sex. After receiving complaints, law enforcement contacted the email address, posing

as a fifteen year old male. When Barker appeared for a meeting with the supposed fifteen year old for a sex act, he was arrested and charged with attempted enticement of a minor and lascivious acts with a child. Later, the lascivious acts charge was amended to solicitation of a minor to commit a sex act (which was later determined to not be a recognizable crime). Barker pleaded guilty to solicitation of a minor and received a suspended sentence and probation. In another county, Barker also pleaded guilty to second-degree theft, which was to run concurrently with the sentence for solicitation of a minor. Barker's probation was revoked and his prison term imposed, following which he filed an application for postconviction relief from his conviction for solicitation of a minor. Barker alleged his counsel was ineffective because there was no factual basis for his guilty plea to solicitation of a minor to engage in a sex act. The district court granted the application, reasoning to have committed the offense, Barker had to have solicited someone else to commit an actual crime, which he had not done. Instead, if the sex act had occurred, Barker would be committing the crime and the child would be a victim, so Barker could not be considered to have asked the supposed fifteen year old to commit a felony. The district could concluded by allowing Barker to plead to a defective plea, counsel failed to perform an essential duty and prejudice was inherent in the conviction; Barker's conviction and sentence were vacated.

Barker did not seek relief from his second-degree theft conviction nor did Barker claim his conduct did not amount to attempted enticement of a child. After Barker filed a criminal malpractice action, counsel argued Barker could not establish he was factually innocent in the underlying criminal case thereby precluding a finding of malpractice. The district court agreed a finding of factual innocence of all transactionally related offenses must be established to show criminal malpractice.

Iowa requires a defendant obtain relief from a conviction before advancing a criminal malpractice action against the former attorney; unanswered, however, was whether Iowa would also require a showing of factual innocence in addition to legal innocence. A majority of jurisdictions also require this second showing of actual (or factual) innocence, as a required component of causation, to claim criminal malpractice. As a second alternative, rather than requiring the plaintiff to demonstrate actual innocence, Alaska has allowed the criminal defense attorney to raise actual guilt as an affirmative defense to the malpractice suit. In proving the former client's guilt by a preponderance of the evidence, the attorney is not limited to evidence admissible on the criminal charge. A third alternative is to reject the actual innocence requirement entirely.

In refusing to require proof of actual innocence, Iowa is again following the Restatement practice and recommendation. The Court concluded continuing to require a criminal defendant obtain relief from a conviction before advancing a claim of criminal malpractice will "serve as an important screen against unwarranted claims" and preserve "'key principles of judicial economy and comity.'" Requiring proof of actual innocence would go beyond respecting the criminal process and impose an additional barrier required of criminal malpractice not required in other malpractice cases. Instead, the innocence or guilt of a criminal defendant will enter into the standard causation inquiry. That is, "[a] criminal defendant who was factually guilty of the crime for which he or she was convicted—or at least guilty of a related crime or a crime with which he or she was originally charged—will likely confront significant causation issues in his legal malpractice action. We see no reason why such issues cannot be resolved, as they generally are in malpractice actions, by the fact finder."

Why the dissent is worth the read: Justices Zager and Waterman dissent. The dissent would join the majority of jurisdictions and adopt the actual innocence requirement for a criminal malpractice action. Noting the Restatement should only be adopted when the Court agrees with and finds the Restatement persuasive, the dissent concludes it is not persuasive and does not go far enough to prevent frivolous or unwarranted claims of malpractice. Further, the dissent agrees the required element of causation requires both legal innocence via the postconviction proceeding and factual innocence and, absent a showing of both, summary judgment would be appropriate. Lastly, the dissent finds the policy considerations noted by the majority of jurisdictions persuasive.

The dissent is a good read for anyone looking to differentiate from a Restatement provision or rely heavily on policy. Importantly also, Justices Zager and Waterman note the majority "has not applied any limiting language that would restrict criminal malpractice liability to only pecuniary damages." It seems this will be the next issue and one for which tort and criminal lawyers need be cautious.

Case Law Update: Contracts & Commerical Law

By Mitchell G. Nass, Bradshaw Fowler Proctor & Fairgrave PC, Des Moines, IA

I. Iowa Supreme Court Decisions

Marlin Lee Just, Noelle Marie Marchant Hughes, and Travis Clinton Hughes, v. Farmers Automobile Insurance Association d/b/a Pekin Insurance, **__ N.W.2d __ (Iowa April 1, 2016) (No. 15-1161).**

Why it matters: The case provides important insight into the proper interpretation of undefined terms of an insurance contract. The opinion further reaffirms the Court's adherence to the "cause theory," which serves as an important limitation on an insurer's liability for accidents involving multiple injured plaintiffs.

Summary: Farmers Automobile Insurance Association's ("Farmers") insured John Crivaro ("Crivaro"). Crivaro was operating a Chevy Tahoe SUV in the early morning hours of April 29, 2011. Crivaro was driving on the wrong side of the highway, and collided with the trailer of the semi-truck operated by Marlin Just ("Just"). Crivaro was ejected from his SUV and was killed. Just slowed down and pulled over to the side of the road. He subsequently noticed he had suffered an injury to his shoulder upon impact. Travis Hughes ("Hughes") had been traveling along the highway in his motorcycle behind Just's semi-truck. When he saw Just's semi-truck pull to the side of the road, Hughes slowed down and moved over to the left lane. He swerved to avoid hitting debris on the highway, and collided with Crivaro's SUV. Hughes sustained serious injuries, and was air-lifted to a nearby hospital.

The insurance contract between Farmers and Crivaro contained a clause limiting Farmers' liability to $500,000 for bodily injury for "each accident." The contract did not define the term "accident." Just and Hughes filed suit seeking a declaratory judgment that the events of April 29, 2011, constituted two accidents for purposes of the insurance contract's limitation of liability clause. Farmers filed a motion for summary judgment seeking a determination that only one accident occurred. The Court granted Farmers' motion.

On appeal, the Iowa Supreme Court applied the "cause theory" and accordingly concluded a single accident occurs "when the same negligence of the insured causes two collisions in rapid succession." The Court reasoned the application of this theory was consistent with the language of the contract itself, which anticipated the involvement of multiple vehicles in a single "accident." The Court therefore declined to follow alternative theories that focus on the effects of the injured parties or seek to isolate discrete events within a continuous chain, reasoning such theories do not effectuate the intent of the parties to the insurance contract.

Holding: The Court affirmed the decision of the district court granting summary judgment to Farmers based on the finding only one accident occurred.

United Suppliers d/b/a Greenbelt Transport v. Renny Hanson, R. Hanson Trucking, Inc. and Kenneth Diriso**, 876 N.W.2d 765 (Iowa March 11, 2016) (No. 14-1553).**

Why it matters: The case represents the first time the Iowa Supreme Court has interpreted the language of Iowa Code Section 532B.1(2), which has the potential of invalidating indemnity provisions existing in contracts between shippers and carriers. The case also offers guidance on the issue of when a party who is not privy to a contract of insurance nonetheless becomes an "insured" under the terms of that contract.

Summary: United Suppliers d/b/a Greenbelt Transport ("United Suppliers") is a wholesale distributor of agricultural chemicals and fertilizers. United Suppliers delivers its own products directly to retailers. It also hires independent trucking companies to deliver its products. United Suppliers entered a lease with Renny Hanson ("Hanson") to transport a portion of its chemicals and fertilizers. Under the lease, Hanson agreed to provide a driver and a 2000 Freightliner semi-tractor in exchange for a portion of the load revenue. Hanson in turn hired Kenneth Dirisio ("Dirisio") as a driver to haul the materials Hanson had contracted to transport on behalf of United Suppliers. On June 9, 2011, Diriso wrecked the semi-tractor and spilled its contents, causing nearly $1 Million in damage.

United Suppliers filed suit against Hanson and Dirisio claiming, in relevant part to this summary, that Hanson and Dirisio breached its contract with United Suppliers by failing to indemnify it for "any loss or damage resulting from the negligence or incompetence of the driver." Hanson and Dirisio filed a third-party petition seeking a declaratory judgment that Hanson and Dirisio were insureds under the insurance contract executed between Nationwide and United Suppliers, and Nationwide therefore could not seek subrogation against Hanson and/or Dirisio. United Suppliers denied Hanson and Dirisio were insureds, arguing the Truckers' Endorsement Hanson and Dirisio relied on was not triggered because United Suppliers was not engaged in for-hire trucking operations. United Suppliers further argued Hanson and Dirisio were excluded from coverage by operation of the Business Auto Coverage clause, which excluded coverage to individuals "from whom you hire or borrow a covered auto." The parties submitted cross-motions for summary judgment on the issue of whether Hanson and Dirisio were insureds on Nationwide's insurance contract with United Suppliers. The District Court granted United Suppliers' motion for summary judgment and denied Hanson and Dirisio's cross-motion, finding they were not insureds.

United Suppliers in turn moved for summary judgment on the ground that it was entitled to judgment as a matter of law on its claim it was entitled to indemnity for Dirisio's negligence pursuant to the lease agreement. The District Court denied the motion, finding the lease was "a contract which is collateral to or affecting a motor vehicle contract," and thus barred by Iowa Code Section 325B.1(2), which invalidates indemnity provisions indemnifying the indemnitee for its own negligence in certain circumstances.

The Iowa Supreme Court concluded that the lease between United Suppliers and Hanson was not "collateral to" a motor carrier transportation contract, because United Suppliers was a private carrier and therefore was not hauling "for hire." The Court noted the legislature was aware of the common law "primary business test" when it enacted section 325B.1(2), and further concluded the application of that test resulted in the conclusion that United Suppliers constituted a private carrier. The Court therefore held section 325B.1(2) did not apply to the lease agreement. Finally, the Court concluded the language of the indemnity provision of the lease extended to the negligence of Dirisio.

The Iowa Supreme Court also revisited the District Court's denial of Hanson and Dirisio's motion for summary judgment on the ground they were insureds under United Suppliers' insurance policy with Nationwide. The Court reversed on this issue, finding Hanson and Dirisio were insureds under the Business Auto Coverage Form. The Court concluded Dirisio was using a covered automobile with United Supplier's permission and did not fit into any of the remaining exclusions enumerated under the Business Auto Coverage Form.

Holding: The Iowa Supreme Court reversed the District Court's decision that Iowa Code Section 325B.1(2) barred United Suppliers' indemnity action. The Court also reversed the District Court's decision finding Hanson and Dirisio were not insureds under the insurance contract.

***Wellmark, Inc. v. Polk County Bd. of Review,* 875 N.W.2d 667 (Iowa Feb. 12, 2016) (No. 14-0093).**

Why it matters: This opinion contains in-depth reasoning regarding how large-scale commercial buildings should be assessed for property tax purposes.

Summary: Wellmark owns a corporate office in Polk County, Iowa, which it uses as a single-tenant headquarters building. The cost of construction exceeded $150,000,000. The Polk County Assessor's office originally assessed the property at $99 million for tax purposes. Wellmark appealed, and the District Court concluded the proper valuation was $78 million. The Polk County Board of Review ("the Board") appealed.

The Court determined it was appropriate to assess the Property based on its current use, and affirmed the Board's assessment. The Court exhaustively analyzed the methodologies utilized in other jurisdictions to arrive at a tax assessment for commercial properties. Ultimately, however, the Court declined to adopt Wellmark's argument that the proper methodology is to determine the value of the property if it were sold for use as a multi-tenant commercial building as opposed to its current use as a single-tenant corporate headquarters. The Court also noted Iowa Code section 441.21 provides that the preferred method of assessment is to determine the "market value," but if the market value is not readily ascertainable, other factors should be considered. The Court addressed several prior precedents applying this methodology.

In turning to the Wellmark property, the Court concluded the market value of the property could not be readily established, and it was proper to consider other factors. The Court adopted the approach that the property should be valued based on its current use. For such purposes, the assessor may envision a hypothetical buyer, and estimate what such a buyer would purchase the property for its current use. The Court affirmed the Board's $99 million assessment.

Holding: The Court reversed the decision of the District Court and reinstated the Board's original assessment.

II. Iowa Court of Appeals Decisions

***R.J. Meyers Co. v. Reinke Manufacturing Co., Inc. and Hook's Point Irrigation,* No. 15-0311 (Iowa Ct. App. April 6, 2016):**

Why it matters: The opinion provides a useful interpretation of contracts containing disclaimers of implied warranties in the context of the sale of goods, and addresses the potential conflict between disclaimers of implied warranties and limited remedies for express warranties.

Summary: Jim Meyers, the sole proprietor of R.J. Meyers Company ("R.J. Meyers"), purchased an irrigation system from Hook's Point Irrigation ("Hook's Point") in 2011. Reinke Manufacturing Co. ("Reinke") manufactured the irrigation system. The purchase agreement executed by R.J. Meyers and Hook's Point included a provision stating "Purchase of the system . . . will be subject to the Terms and Conditions . . . [of] the Reinke Irrigation Systems Warranty." The Warranty included a section titled "limitations of liability," in which Reinke disclaimed liability for breach of implied warranties, and limited the remedies for breach of express warranties to "replacement and repair."

R.J. Meyers experienced repeated problems with the irrigation system, and eventually filed suit on a number of theories, including breach of implied and express warranties and breach of contract. The District Court granted summary judgment to the defendants

on the breach of contract and implied warranty claims. The Court denied summary judgment on the breach of express warranty claim against Reinke, finding the existence of a fact question with regard to whether Reinke had adequately honored the warranty. R.J. Meyers voluntarily dismissed its express warranty claim, but appealed the issues the District Court had denied.

In relevant part to this summary, the Court of Appeals addressed the issue of whether a disclaimer of implied warranties made pursuant to Iowa Code Section 554.2316(2) is superseded by a showing that the limitation on the remedies for the breach of an express warranty fails of its essential purpose. The Court answered the issue in the negative, finding disclaimers of implied warranties and limitations on remedies for express warranties are separate and distinct concepts, and therefore the analysis of one concept does not affect the other. The Court succinctly reasoned that "the failure of the repair and replace remedy for breach of the express warranty does not revive otherwise disclaimed implied warranties."

Holding: The Iowa Court of Appeals affirmed the district court's decision granting summary judgment to the defendants on R.J. Meyers' breach of implied warranty claims.

***Phillip L. Lubbers, Trustee of the Phillip L. Lubbers Living Trust v. MDM Pork, Inc. et al.*, No. 15-0675 (Iowa Ct. App. Feb. 24, 2016).**

Why it matters: The opinion contains an interesting and unique application of the parol evidence rule.

Summary: The Phillip L. Lubbers Living Trust ("the Trust") sold a parcel of real property to MDM for the purpose of building a hog confinement. The parties executed a written Real Estate Purchase Agreement on July 13, 2007. The Agreement contained a standard integration clause. Between 2008 and 2011, Paul Lubbers received the manure produced by the hog confinement at no cost pursuant to an oral agreement between Paul and MDM. The Real Estate Purchase Agreement did not make reference to the agreement concerning the manure. MDM sold the hog confinement facility to Wintefeld in 2012. The terms of the purchase agreement contained an addendum purporting to obligate Winterfeld to permit Lubbers to remove the manure at no cost. Beginning in 2013, Winterfeld no longer permitted Lubbers to retrieve the manure.

The Trust filed suit against MDM, contending in part that MDM breached the Real Estate Purchase Agreement and breached its oral contract to provide an easement for manure access. The District Court granted MDM's motion for summary judgment as to the express contract theory, but denied it as to the breach of oral contract claim. The District Court subsequently made additional findings on MDM's motion for reconsideration of the summary judgment ruling, and concluded MDM was entitled to summary judgment on the breach of an oral contract theory on the grounds the integration clause barred introduction of any oral agreement purporting to permit the Trust to have access to the manure free of charge.

The Trust's theory on appeal was that the Real Estate Purchase Agreement and the oral contract concerning receipt of manure were separate and independent contracts. The Trust therefore argued that neither the integration clause nor the parol evidence rule barred introduction of evidence of the oral contract. On appeal, the Court of Appeals recognized the rule that "[w]hen an agreement is fully integrated, the parol-evidence rule forbids the use of extrinsic evidence introduced solely to vary, add to, or subtract from the agreement." The Court also recognized, however, that the parol evidence rule should not be applied to prevent a litigant from attempting to prove a written contract does not represent what the parties understood to be their agreement. Despite the existence of the integration clause, the Court concluded evidence of an oral agreement was admissible because of (1) the ambiguity in the purchase agreement; (2) the parties past conduct of permitted manure to be removed at no cost; (3) the evidence of other agreements not included in the purchase agreement; and (4) MDM's representatives' claimed lack of knowledge on why Lubber was allowed to remove manure at no cost.

Holding: District Court's grant of summary judgment to the defendant on the breach of oral contract claim reversed.

IDCA Schedule of Events

June 23, 2016

Malo, 900 Mulberry St.
Des Moines, IA 50309
5:00–7:00 p.m.

Des Moines Social

Complimentary to IDCA members; RSVP appreciated

Details online at www.iowadefensecounsel.org.

September 22–23, 2016

Stoney Creek Hotel & Conference Center
5291 Stoney Creek Ct
Johnston, IA 50131

52nd Annual Meeting & Seminar

Online registration opens in June, www.iowadefensecounsel.org

October 28, 2016

Grinnell Mutual Reinsurance Company
Grinell, IA

Deposition Bootcamp

Limited to 24 spots. Online registration opens August 1, www.iowadefensecounsel.org

September 14–15, 2017

Stoney Creek Hotel & Conference Center
5291 Stoney Creek Ct
Johnston, IA 50131

53rd Annual Meeting & Seminar