Dedicated to improving our civil justice system

IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

SPRING 2020 VOL. XXII, No. 2

Find us on Facebook, Twitter & LinkedIn

Fraudsters Also Work From Home

John Lande[1]*, Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, IA*

John Lande

Many organizations have transitioned the bulk of their staff to working from home. While this may reduce the threat posed by COVID-19, it presents new risks for organizations of all kinds and sizes. Fraudsters are adept at using email phishing to take advantage of unsuspecting organizations. A typical email phishing scheme involves fraudsters posing as a trusted individual via email to induce an employee of an organization into providing money, confidential information, or access to internal systems. In one common scheme, fraudsters pose as a vendor and request that an organization redirect vendor payments to fraudster bank accounts by claiming the vendor recently changed banks. With so many key people reliant on email communication to get business done, organizations should keep in mind that fraudsters can also work from home.

One recent case is an example of the kind of threat organizations face. *Mississippi Silicon Holdings, LLC v. AXIS Insurance Company* is the story of an organization fraudsters tricked into sending its vendor payments to fraudsters. Mississippi Silicon manufactures silicon metal, which requires graphitized carbon electrodes. Mississippi Silicon purchased the electrodes from a Russian company, Energoprom. Throughout October 2017, Mississippi Silicon's CFO emailed

Continued on page 3

WHAT'S INSIDE

IDCA President's Letter

Kami Holmes
IDCA President

"Temperate, sincere, and intelligent inquiry and discussion are only to be dreaded by the advocates of error". Benjamin Rush. Attorneys and Controversy. These two words often go hand in hand. At the last board meeting before COVID-19 struck, and before the legislature session was suspended, we discussed perhaps one of the most controversial topics in our industry: caps. "Caps" is basically a dirty word in the litigation world. Caps are always at the forefront when it comes to disagreements in tort reform. In 2017, the Iowa legislature enacted a $250,000 soft cap on noneconomic damages, such as pain, suffering, inconvenience, physical impairment, mental anguish, emotional pain and suffering, loss of chance, loss of consortium, or any other nonpecuniary damages, that a plaintiff could recover in an action against a health care provider. Since this law was enacted we have seen some astronomical verdicts where the exception to Iowa Code § 147.136A has applied; thus, enter new proposed legislation to create a hard cap on noneconomic damages of $750,000. Enter controversy.

Shortly before our last board meeting I received an email from a member who shared the member's concern that tort reform efforts are gradual chipping away at the independence of the judiciary and are essentially damaging our system of democracy. This same member inquired as to what the IDCA's position was on the newly introduced legislation regarding medical malpractice caps. Historically, the Iowa Defense Counsel Association has opposed caps with the rationale that this takes away the rights and freedoms of our juries and judges to decide damages as they see fit based on evidence presented at the time of trial, however the IDCA did not register against the new legislation known as SF 2338, nor did it register for. Why? The answer is simply that we, as a Board, could not come to a consensus to affirmatively register against the bill which should be no surprise given our diverse membership.

I can tell you that there was quite a lively discussion among the members of the board as to why we should or should not register against the current bill. The concerns ranged from concerns similar to the ones raised by the member who emailed me to concerns that if we do not limit these kinds of damages for medical malpractice cases it will have a dampening effect of attracting doctors to the state and thus have a negative effect on cost, access and quality of medical services for our citizens to the discussion that caps could help avoid excessive verdicts that are based purely on emotions rather than on reason.

It appears that at least thirty states have some kind of cap on medical malpractice damages. These caps vary in terms of being "hard" or "soft" and some even have a cap for future medical care expenses. Some states have constitutional provisions prohibiting caps all together. Another argument I have heard against caps on noneconomic damages in medical malpractice cases is that this would be treating one group of tortfeasors differently than another group of tortfeasors, and where is the justification for that? Some states have caps on loss of consortium damages for any kind of case, not just for medical practice cases which may be a topic of discussion in the future depending on what happens with this newly proposed legislation. My guess is that some would then argue that this would be akin to going down a rabbit hole.

So here comes my soapbox. The truth is, we have what basically amounts to "caps" on a lot of different things in our litigation world, not just non-economic damages in a medical malpractice case. While these things may not be the kind of "caps" that are traditionally thought of when you hear the word "caps", these are things we just know that we can't speak about to a jury. A jury will never know how much an insurance company paid on a medical bill or likely if workers' compensation applied. In most circumstances, a jury will never know if a traffic citation was issued if a person pled not guilty to it, even if a court found them guilty. A jury is not going to be able to attribute fault to a person for not wearing a helmet while riding a motorcycle, even if it could be proven that wearing it would have saved the person's life. I have witnessed the same people who argue against non-economic damage caps argue that giving carte blanche freedom to our juries to determine comparative fault for the failure to use a seat belt is unreasonable. Why? If we truly believe that our juries should have all rights and freedoms to determine damages on any given case, why shouldn't they be allowed to hear all of the evidence? It is clear that from the beginning of time we have had evidentiary rules that albeit may change from time to time, are meant to protect various parties on both sides of the fence. You may just look at it differently depending on what side of the fence you are on.

There will always be controversy, especially if something matters. And sometimes controversy can be good.

Continued from Page 1

with an Energoprom "employee" named "Olga." "Olga" informed the CFO that Energoprom had changed banks, so Mississippi Silicon should start sending payments to the new account. Over the next several weeks, Mississippi Silicon transferred over $1,000,000 to what later turned out to be a fraudster-owned bank account. The fraud was discovered when a real Energoprom employee inquired about when it would receive payment from Mississippi Silicon.

Mississippi Silicon made a claim for the loss under its cyber-insurance policy provided by AXIS Insurance. The AXIS policy had three potential coverage provisions that could apply to this fraud: social engineering fraud, computer transfer fraud, and funds transfer fraud. The coverage limit for computer transfer and funds transfer fraud was $1,000,000. The coverage limit for social engineering fraud was only $100,000. AXIS acknowledged Mississippi Silicon's claim under the social engineering fraud provision, and denied coverage under the computer transfer and funds transfer fraud provisions. Mississippi Silicon filed suit against AXIS claiming that the loss was covered under one or both of the $1,000,000 coverage limit provisions.

The United States District Court for the Northern District of Mississippi ruled in favor of AXIS. The court concluded the computer transfer fraud provision did not apply because coverage under that section was only triggered by losses resulting "directly" from "the fraudulent entry of information into or the fraudulent alteration of any information within a Computer System." The court explained that while a fraudulent email from "Olga" began the sequence of events that led to the loss, the "direct" cause of the loss was the CFO initiating the wire to the fraudster bank account. The CFO initiated wire did not involve computer fraud.

The court determined the funds transfer fraud provision did not apply because there were no fraudulent instructions provided to Mississippi Silicon's financial institution. Since the CFO had the authority to, and in fact did, authorize the transfer, the funds transfer fraud provision did not cover the loss.

The court noted that applicability of one coverage provision did not necessarily preclude other coverage provisions from applying. However, in reviewing the entire policy, it was clear that the intention of the parties was to provide exclusive coverage for social engineering losses under the social engineering fraud provision. Thus, the fact that the loss fit within the social engineering coverage provision suggested that other coverage provisions were inapplicable.

Unfortunately, *Mississippi Silicon* has become a common fact pattern. While Mississippi Silicon was particularly at risk for phishing because it did business with a foreign entity, this case's fact pattern has been repeated in dozens of other insurance cases.

A provision of the UCC governing wire transfers makes this type of fraud particularly easy to pull off. Under the UCC, if a bank receives a wire transfer that identifies a beneficiary by name and account number, the bank's automated system can disregard the name if there is a discrepancy and deposit funds solely based on the account number. In other words, fraudsters can tell companies to send funds to "TrustedVendor" at account "1234", and a bank can deposit funds in account "1234" even if the true owner of the account is "FraudsterVendor." By the time organizations find out what happened, the money has been transferred from the fraudster account.

With so many companies doing business remotely due to COVID-19, the opportunities for fraud have only multiplied. Organizations need to make sure they have strong controls in place to reduce the risk of transferring funds to fraudsters. Even if organizations have social engineering insurance, they should consider whether their coverage limit is sufficient for the risk they face from a fraudulent transaction. After all, the fraudsters can work from home just as easily as you can.

---

1 John Lande is a shareholder at Dickinson, Mackaman, Tyler & Hagen, P.C. John's practice is focused on commercial and construction litigation, banking law, and cybersecurity law. John writes and speaks regularly on cybersecurity and data privacy issues.

A 10-Year View of the Restatement (Third) of Torts, Liability for Physical or Emotional Harm in Iowa

Kevin Reynolds[1], Clark Butler[2], Whitfield & Eddy, PLC, Des Moines, Iowa

INTRODUCTION

The Restatement (Third) of Torts, Liability for Physical and Emotional Harm (Proposed Final Draft No. 1, 2005) was adopted *sua sponte*[3] by the Iowa Supreme Court in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). In the ten years that have passed since its adoption, the Restatement or *Thompson* have been cited over 100 times. We estimate that more Iowa cases have cited to and discussed the Restatement Third than any other jurisdiction.

This article will summarize the more significant Iowa cases discussing the Restatement Third. We begin with a shorthand summary of *Thompson*, its facts and holding. We then set forth a year-by-year summary of the noteworthy Iowa cases discussing application of the Restatement (Third) of Torts from *Thompson* to the present.

APPLICATION OF RESTATEMENT (THIRD) OF TORTS: 2009

1. *THOMPSON V. KACZINSKI,* 774 N.W.2D 829 (IOWA 2009).

In *Thompson*, defendant disassembled a trampoline and left the components laying in the yard of their rural home, near a gravel road. Weeks later a thunderstorm with 70 mile per hour winds blew the mat of the trampoline onto the nearby road. Plaintiff was driving on this road when he encountered the trampoline mat, swerved to avoid it, went into the ditch and rolled his vehicle, sustaining personal injuries. Plaintiff sued defendants, the homeowners, for negligence.

In the trial court defendants moved for summary judgment. Defendants argued that they had no legal duty since the accident was "unforeseeable." The trial court ordered dismissal based on this ground, and in addition, found that proximate cause was absent as a matter of law. Plaintiff appealed.

On appeal the Iowa Court of Appeals affirmed the dismissal on both grounds. On further review to the Iowa Supreme Court, however, the Court reversed and remanded for trial. In an opinion written by Justice Hecht, the Court adopted the Restatement (Third) of Torts, Liability for Physical and Emotional Harm, which at that time was merely in "Tentative Draft[4]" form.

In *Thompson*, the court adopted section 7 of the Restatement Third which provides:

§ 7. Duty

a. An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

b. In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

Under this analysis, whether a "duty" exists is still a question of law for the court, but the question of whether a duty exists will not even be posed in most cases. The "foreseeability" test of legal duty is no longer used. The question of foreseeability will, however, be one factor to consider in determining whether or not the duty at issue has been breached. In most cases, whether or not the duty has been breached will be an issue for jury determination.

Thompson also adopted provisions of the Restatement Third relating to causation. section 6 thereof provides:

§ 6. Liability for Negligence Causing Physical Harm

An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.

Thompson also adopted section 26 of the Restatement Third:

§ 26. Factual Cause.

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under Section 27.

The Court in *Thompson* also adopted section 29 of the Restatement Third. That Section provides:

§ 29. Limitations on Liability for Tortious Conduct.

> An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.

In adopting these causation provisions of the Restatement Third, the Court did away with the "substantial factor" element of proximate cause. This made some sense, as this concept injected a fact-based test into the legal test of causation. Also, the term "proximate cause" is no longer to be used. In its place, the Court determined that the term "scope of liability" would describe the "legal cause" element that must be present in any tort case.

Interestingly, a good argument can be made that the bizarre facts of *Thompson* do not meet the "scope of liability" test itself under the Restatement Third. In *Thompson*, what was the conduct of the Defendants that created a risk of harm? If the Defendants had a duty to exercise reasonable care, how did they breach that duty? What was the risk of harm? If the risk of harm was that someone would come along and trip over trampoline parts laying in the yard, then the event that occurred in that case (a thunderstorm with 70 mph winds blew the mat onto a road, causing an automobile accident) was not within the "scope of liability" and thus, the summary judgment should have been affirmed.

As the comments to the Restatement make it clear, scope of liability will ordinarily not be in issue. Cases where it will be in issue have a bizarre or "freakish" quality. The facts of *Thompson* fit this description. Finally, use of the old "reasonable foreseeability" standard can be used as a "check" on scope of liability: if an event is not reasonably foreseeable, then there is a good chance that what happened is not within the "scope of liability" of defendant's conduct.

2. *VAN FOSSEN V. MID-AMERICAN ENERGY,* 777 N.W.2D 689 (IOWA 2009).

Van Fossen was decided the same day as *Thompson*. In this case, a worker's wife was exposed to asbestos while laundering her husband's clothing. Her husband, an independent contractor, had been exposed to asbestos at a jobsite. His wife developed mesothelioma, which is linked as a matter of general causation to asbestos exposure. A summary judgment was granted for defendant, which was affirmed on appeal.

In an opinion written by Justice Hecht (the author of *Thompson*), the Court noted that although the trial court used a pre-*Thompson* "no duty because no foreseeability" analysis, the Court reached the same conclusion using the new analysis under the Restatement Third. The Court affirmed the dismissal in favor of defendant, finding that there was an "articulated, countervailing, principle or policy" against liability in these types of cases. This was based on section 7(b) of the Restatement.

The Court in *Van Fossen* found that a majority of the cases in other jurisdictions on this issue had found that a plant operator has no duty to warn a family member of a worker of the dangers of asbestos. That this was the majority rule in states that have considered this issue appeared to be a key factor in the Court's decision.

2010

1. *ROYAL INDEM. CO. V. FM GLOBAL,* 786 N.W.2D 839 (IOWA 2010).

This case disproves the argument that most "scope of liability" issues will be jury questions and will not be amenable to summary dismissal as a legal matter by the court. In *Royal Indem.*, a $39.5 million plaintiff's judgment in a property damage fire subrogation case was reversed, based on plaintiff's failure to prove "scope of liability." In *Royal Indem.,* a large warehouse used by Deere & Co. caught fire and was destroyed. The warehouse was full of millions of dollars' worth of Deere & Co. products and inventory. Deere's insurance company paid the loss, and then filed a subrogation action against FM Global, who had been hired before the fire to do a fire safety inspection and advise Deere as to whether it should use the building. A part of the claim also involved claimed defects in the fire extinguishing system, which allegedly did not work correctly during the fire and added to the damage.

On appeal, the Supreme Court, in an opinion by Justice Baker, reversed and remanded for a dismissal. It reasoned that plaintiff had not shown "scope of liability" since FM Global had charged less than $6,000 to do the inspection, and in doing so, could not possibly have been undertaking a responsibility where they might ultimately be liable for a $39.5 million loss. Plaintiff also had sued defendant for breach of contract, and the Court found that the magnitude of the loss was not within the contemplation of the contracting parties. Thus, under a contract damages analysis, defendant would also not be responsible.

Based on the facts of this case there was an alternative basis upon which to decide it: the lack of "but for" causation. Notably, the Court found that the cause of the fire was never proven. Since the cause was never proven, this meant that plaintiff could not prove the "but for" element of causation under the Restatement Third analysis: how could it be proven that a "properly done" fire inspection would have found the conditions that led to the fire in the first place, if the cause was unknown? Thus, a principled argument could be made that the Court should have never reached the "scope of liability" issue, as the first element of causation, "cause in fact," was never proven. The explanation for this may lie in the fact that the plaintiff had also sued the defendant since the fire suppression system

allegedly malfunctioned, allowing the fire to spread and damage more property than would otherwise have happened. As to this claim, the factual cause of the fire would not necessarily have been relevant.

2. *FELD V. BORKOWSKI*, 790 N.W.2D 72 (IOWA 2010).

In *Feld*, a fielder was struck by a flying bat in a softball game. A right-handed batter had swung at a pitch, missed, and in an odd sequence of events the bat left the batter's hands and struck the first baseman. Plaintiff sustained a serious head injury. The trial court granted defendant summary judgment, based on the "contact sports" exception established in Iowa common law. Under the "contact sports" exception, in order for a player to be found liable for an injury occurring in the course of the game, it must be proven that the defendant was not merely negligent, but "reckless." On appeal, the dismissal was reversed. The appellate court, per Chief Justice Cady, found that a jury issue had been created as to whether the defendant had acted "recklessly" under the contacts sports exception.

Feld is important because Justice Appel wrote a lengthy and well-reasoned dissent, an opinion joined by Justices Hecht and Wiggins. Part of the dissent addressed whether it was proper for the Court to consider doing away with the contact-sports exception, when none of the parties argued for that or briefed that issue. This is exactly what had happened in *Thompson* originally: the Restatement Third (then in *tentative draft* form) had been adopted by the Court in the absence of briefing and argument by the parties. In *Feld*, Justice Appel argued that this was proper. Substantively, the dissent argued that based on the Restatement Third's duty analysis, the contact sports exception should be discarded and the jury should be instructed to decide whether defendant breached his duty "based on all of the facts and circumstances," which would include the fact that the injury occurred in the course of a sport or game. The dissent urged that this analysis should be done under a negligence standard. Justice Appel also felt that with respect to risks that are not an inherent part of the game, an actor's liability should be governed by a negligence standard. Justice Wiggins wrote a concurring opinion and simply said: ". . . I would address the issue head on and give the contact-sports exception a proper burial." *Id.* at 82. In *Feld*, three members of the Court urged that a well-entrenched common law defense to sports injury cases, the "contact sports" exception, should be eliminated in lieu of a more recovery-oriented "reasonable care" test.

3. *LANGWITH V. AMER. NAT'L. GEN'L. INS. CO.*, 793 N.W.2D 215 (IOWA 2010).

In *Langwith* a claim was brought against an insurance agent, alleging negligence in failing to get proper insurance coverage for an insured. A loss occurred, the insured learned they did not have the coverage they thought they had, and they sued the agent looking for him to make good on the loss. The Restatement Third was referred to in passing, in footnote 3 of the opinion: "Because the duty analysis. . . is based on agency principles and involves economic loss, the duty analysis adopted by this Court in *Thompson v. Kaczinski*. . . based on the Restatement Third. . . is not dispositive." Although the primary holding in *Langwith* was overruled later by legislative action, this case made it clear that the Restatement Third's analysis does *not* apply to cases alleging *economic loss*, as opposed to "physical harm." *See also* section 4, "Physical Harm," Restatement Third, p. 55 (2010)(physical harm means bodily harm or property damage, only).

4. *BROKAW V. WINFIELD-MT. UNION COMM. SCH. DIST.*, 788 N.W.2D 386 (IOWA 2010).

In *Brokaw*, the plaintiff and defendant were high school basketball players. In a game McSorley punched Brokaw. McSorley was given a technical foul and was ejected from the game. Brokaw sued McSorley alleging the intentional tort of assault, and also sued McSorley's school district for negligent failure to control McSorley's conduct. There was evidence that McSorley was an intense player and had a "short fuse," but he had never assaulted anyone before. In a bench trial, the court found against the player but dismissed the claim against the school district. Plaintiff thereafter appealed.

In an opinion by Justice Baker, the Court analyzed the school district's liability by referring to the duty element used in *Thompson's* Restatement Third approach. It started with the "default" duty—the duty to exercise reasonable care when an actor's conduct creates a risk of physical harm. Then the Court asked: "is this an exceptional case where the general duty of reasonable care won't apply?" "An exceptional case is one in which 'an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.'" *Thompson* at 835. The Court noted that the school district was not arguing that coaches as a class have no duty to control the actions of their players. The Court could find no "countervailing principle or policy" to eliminate or modify the "default" duty. As a result, the Court concluded that a general duty to exercise reasonable care applied.

Next, the Court in *Brokaw* addressed "breach of duty." The Court turned to section 19 of the Restatement, entitled "Conduct that

is Negligent Because of the Prospect of Improper Conduct by the Plaintiff or a Third Party." *Brokaw* dealt with the situation where a third person (the assaulting player, McSorley), and not the defendant (the school district), committed the improper act. The Court noted that section 3 of the Restatement sets forth the three factors for a fact finder to consider in deciding whether a person breached a duty:

a. The foreseeable likelihood that the person's conduct will result in harm;

b. The foreseeable severity of any harm that may ensue; and

c. The burden of precautions to eliminate or reduce the risk of harm.

After a discussion of what duty one person has to control the conduct of another person under the Restatement Third, the Court concluded by noting that under the facts, the school district officials did not know, nor in the exercise of reasonable care should have known, that McSorley was likely to commit a battery (i.e, actually throw a punch) against an opposing player. As a result, in *Brokaw* the dismissal of the claim against the school district was affirmed.

2011

1. *HILL V. DAMM,* 804 N.W.2D 95 (IOWA APP. 2011).

In *Hill*, a 13 year-old eighth grade girl boarded the wrong school bus on purpose after school one day. After she was discovered on the wrong bus, she insisted on being dropped off at the wrong bus stop, which was near the place of business of an older man, Damm, with whom she was having an affair. Her parents had recently had her bus route changed to drop her off closer to home so she could be watched after she got off the bus. There was evidence that bus company employees knew that the older man presented a danger to the 13 year-old girl. When the girl arrived at the man's business, she was taken to Illinois by prearrangement with the man's friend and was murdered. The girl's estate and parents sued the bus company for negligence.

At trial, the court granted the bus company's motion for directed verdict, on the grounds that her murder-for-hire was outside the scope of the company's liability. The bus company argued that no one foresaw that the girl would be murdered. The girl's estate argued that there was a foreseeable risk that the girl would be harmed in some fashion by the molestation that was likely to happen. The Court of Appeals reversed, holding that a jury question was generated on "scope of liability:"

> The question we must decide is: At what level of generality should the type of harm in this case be described? The plaintiffs argue "if the risk is understood to be physical harm to Donnisha. . . then it is clear that everyone, including the bus company, was aware of the danger of physical harm to Donnisha." First Student [the bus company] counters that the identifiable risk at the time of the allegedly tortious conduct on the part of First Student was that David Damm would make contact with and sexually abuse Donnisha, not that he would hire a third party to kidnap Donnisha, take her across state lines, and have her murdered.
>
> We think this is a question that should have been submitted to and decided by the jury. Comment i to Section 29 provides: "No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section . . ." Many cases will pose straightforward or manageable determinations of whether the type of harm that occurred was one of those risked by the tortious conduct. Yet in others, there will be contending plausible characterizations that lead to different outcomes and required the drawing of an evaluative and somewhat arbitrary line. Those cases are left to the community judgment and common sense provided by the jury. *Id.* Section 29 comment i, at 504-05.

The lesson of *Hill* is that if "scope of liability" is an issue, unless it is an exceptional case where no reasonable jury could rule for plaintiff under the facts, the court will most likely have a jury decide it.[5]

2012

1. *MCCORMICK V. NIKKEL & ASSOCS., INC.,* 819 N.W.2D 368 (IOWA 2012).

In *McCormick*, a subcontractor was hired by plaintiff's-employer general contractor to perform electrical service work on some "switchgears." The plaintiff was later electrocuted and seriously injured when he came into contact with energized components inside the cabinets housing the switchgears. After doing its work, the defendant-subcontractor had turned the power on, but had locked the cabinets that contained the energized switchgears inside. The trial court granted summary judgment, but the Iowa Court of Appeals reversed. On further review to the Supreme Court, the summary judgment in the trial court was affirmed. The Court found that as a matter of law, the defendant had no control over the switchgears at the time the accident occurred. The Court

reasoned that leaving the switchgear cabinets locked with the power on did not cause a risk of harm.

In *McCormick* there was a dissent by Justice Hecht, joined by Justices Wiggins and Appel. The dissenters noted that leaving the power on created a risk of harm, even if the cabinets were locked. This issue is akin to the age-old question, "[W]hich came first, the chicken or the egg?" What conduct controls the "risk of harm" analysis? Is it that the power was left "on," or is it that the cabinet was locked? The dissenters would have found a jury issue on liability and would have left it up to the jury to decide if the reasonable care duty was breached, based on the facts. As a part of the breach of duty analysis, the jury would consider the fact that the cabinets were left in a locked condition by the defendant.

2013

1. *HOYT V. GUTTERZ BOWL & LOUNGE, LLC*, 829 N.W.772 (IOWA APP. 2013).

In *Hoyt*, a bar patron taunted another patron. Eventually the dispute went outside into the parking lot, where the person who was being taunted punched the other person's lights out. The assaulted individual outside was seriously injured and sued the bar for "negligence," arguing that if proper security had been present, or if the police had been called to the bar sooner, the injury would not have occurred.

The trial court granted summary judgment to the defendant-bar. On appeal, the Iowa Court of Appeals reversed, finding that reasonable minds could differ as to whether the bar owner exercised reasonable care to protect the patron from the customer. As a part of the case, the defendant argued that what happened here did not fall within the scope of liability, since it was not the person being taunted inside who was injured, but rather was the other person. The Court found that "applying an appropriate level of generality" (similar to what was done in *Hill v. Damm*) that "scope of liability" had been shown, since the danger or risk was that *someone* was going to get hurt, not necessarily the person being taunted inside the bar.

2. *MITCHELL V. CEDAR RAPIDS COMMUNITY SCH. DIST.*, 832 N.W.2D 689 (IOWA 2013).

In *Mitchell*, a special needs student was sexually assaulted by another student after school and off campus. The victim had left school and skipped out early that day and the administration did not report her absence to her parents. At trial, the jury found the school district negligent for failing to adequately supervise the student who was assaulted. On appeal, the plaintiff's verdict was affirmed. The Court found that during the trial, the defendant conceded the existence of a duty, based on section 7(a) of the Restatement Third. During the trial the school district moved for a directed verdict on "scope of liability," since the assault occurred after school hours and off premises, and the school district also raised this on appeal.

The Court on appeal held that error was not preserved on the "no duty" argument, and that error was not preserved on the lack of factual causation. The absence of factual causation was that the victim had traveled to several different locations after leaving school, but before the assault. In his concurrence, Chief Justice Cady stated that he would affirm, but he found that error was preserved, and noted that liability was established because it was an act of negligence *during* school hours that caused harm *after* school hours. Justice Cady appeared concerned that the opinion would be read to create duties for school officials running to students off-campus and after-school hours. Justice Waterman dissented, noting that "bad facts make bad law." He would have found that error was preserved, and that the school district would have won the case on a "no duty" argument.

Mitchell is a good review of the different arguments that can be made under the Restatement Third's duty and causation analysis. The elements of plaintiff's case are:

a. Duty;

b. Breach of duty;

c. Causation, consisting of two sub-elements:

    1. but-for cause; and

    2. "scope of liability;" and

d. Damages.

The *Mitchell* Court found that some arguments were not preserved for appeal since they were slotted into the wrong categories. For example, defense counsel argued "no scope of liability" since the assault occurred off campus and after school, but actually that argument should have been made as a "no duty" argument. The "articulated, countervailing, principle or policy" creating an exception to the generalized duty under section 7(b) of the Restatement Third was that a school has no control over a student's actions off campus and after school hours.

3. *DAUGHETEE V. CHR. HANSEN, INC.*, 960 F. SUPP. 2D 849, 865 (N. D. IOWA 2013).

A consumer brought failure to warn and design defect claims against the manufacturers of microwave popcorn butter flavorings containing diacetyl, alleging that she developed "popcorn lung"

from daily ingestion of microwave popcorn. The court denied in part defendant's motion for summary judgment as to the failure to warn claim, holding that genuine issues of material fact existed as to whether defendant knew or should have known that flavorings posed a risk of harm to trigger a duty to warn. The court noted that under the Restatement Third, the foreseeability of harm does not enter into the duty calculus, but should only be considered in determining whether a defendant was negligent.

4. *MIRANDA V. SAID,* 836 N.W.2D 8, 28 (IOWA 2013).

Ecuadorian clients sued an attorney for legal malpractice after their applications for permission to enter the U.S. were denied, and they were denied readmission to the country for 10 years. The trial court granted defendant's motion for a directed verdict on the clients' claims for emotional distress damages. The Court of Appeals reversed that part of the decision and remanded. The Iowa Supreme Court affirmed, finding that the emotional distress damage claims were viable because an attorney-client relationship in the immigration context was the type of relationship in which negligent conduct was especially likely to cause severe emotional distress. Also, a reasonable jury could conclude that the attorney pursued a course of action that had no legitimate chance of success when he filed the applications on behalf of his clients, and he knew it was very likely that this conduct would result in emotional harm.

2014

1. *ASHER V. OB-GYN SPECIALISTS,* 846 N.W.2D 492, 497 (IOWA 2014).

Asher was a medical malpractice case. The trial court ruled that the new jury instructions on causation, premised on the Restatement Third, would *not* apply to a med mal case. The jury found for plaintiff. On appeal, the Court held that error had occurred and that the "new" causation instructions under the Restatement Third would apply to the trial of a medical malpractice case. Medical malpractice cases are based on negligence, and negligence is a tort. Although error occurred in *Asher*, the appellate court found it was not prejudicial. The plaintiff's verdict was upheld on appeal because the appellate court found that the plaintiff's burden of proof under the "old" causation instructions in Iowa was actually *heavier*, given the specific facts of the case.

Asher provides a detailed analysis of the difference between "proximate cause" under the old law and causation under the Restatement Third. In *Asher*, the court found that the case as instructed presented a higher bar for plaintiff to cross in proving causation. The Court found that the old "substantial factor" instruction was more demanding than the proper "scope of liability" instruction. The Court noted that the brachial plexus injury that occurred was established as a matter of law to be within the defendant's scope of liability. Thus, the Court reasoned that the submission of any instruction on causation to the jury beyond one pertaining only to factual causation actually *increased* plaintiff's burden by making it more difficult for them to obtain a favorable verdict. Since the jury returned a plaintiff's verdict in any event, the error that occurred was harmless.

2. *HUCK V. WYETH INC. ET AL.,* 850 N.W.2D 353 (IOWA 2014).

In *Huck*, the Court found that *brand* name pharmaceutical defendants had no liability based on failure to warn, where the plaintiff developed a neurological condition after ingesting the *generic* form of metoclopramide (brand name Reglan®). A summary judgment for all defendants was granted in the trial court, and was affirmed by the Court of Appeals. The Iowa Supreme Court affirmed the dismissal as to the brand defendants, but remanded as against the generic defendants based on common law negligence. The Court found that a common-law tort claim was not preempted to the extent a generic warning was approved by the Food and Drug Administration in 2004. That change in warning added the language: "[T]herapy should not exceed 12 weeks." A reasonable jury could find that a generic manufacturer was negligent by not including this warning in the package insert. The Plaintiff in *Huck* had taken the medicine over an extended period of time.

The Court in *Huck* ruled in favor of the brand defendants holding that they were not liable to plaintiffs, since plaintiff, who had only consumed the competing generic formulation, failed to prove that her injury was caused by a product they sold or supplied. The Court cited section 26 of the Restatement Third in noting that whether a product caused harm to persons or property was determined by the prevailing rules and principles governing causation in tort, and that the prevailing rule required causation in fact.

Huck included a lengthy dissent by Justice Hecht, in which Justices Wiggins and Appel joined. In their dissent, they argued that the Restatement Third's analysis that conduct which gives rise to a risk of harm creates a duty to exercise reasonable care. This supported liability in this case, even though plaintiff ingested no product manufactured or sold by defendant. The dissent reasoned that failure to warn claims are analyzed under a negligence rubric, and that a negligent design theory does not necessarily require the designer to manufacture or sell the product. They argued that the brand manufacturer has a duty of due care in designing the drug or warning, and the generic warning has to be identical to the brand warning under federal

law. Thus, if the branded formulation has a defective warning, then the warning of the generic formulation will be defective as well. Whether the plaintiff in the particular case ingests the brand or generic drug is irrelevant to whether the drug is *designed* defectively or has an inadequate *warning.* Finally, the dissent in *Huck* noted that other jurisdictions had imposed liability on brand manufacturers under similar facts. In conclusion, the dissenters stated: "The brand defendants created risks in designing and manufacturing Reglan®, and created risks in developing its warning which, by virtue of federal law, generics were required to mimic. Those risks gave rise to duties." *Id.* at 393-394. According to their argument, a brand manufacturer can breach its duty to warn and this can cause injury to a generic consumer using a "but for" test of causation.

2015

1. *BENSON V. 13 ASSOCIATES, L.L.C.*, NO. 14-0132, 2015 WL 582053 (IOWA CT. APP. 2015).

In *Benson*, an employee at Genesis Communications was at work at a property that Genesis leased from 13 Associates. While at her station a light fixture fell, causing personal injury. With reliance on a general rule stated in *Van Essen v. McCormick Enterprises Co.*, 599 N.W.2d 716, 720-21 (Iowa 1999), that a non-possessing landlord is not liable for injuries that a tenant or third party may suffer while on the property, the court concluded that 13 Associates, the lessor, had owed no duty to Benson. The district court also noted that under the lease between Genesis and 13 Associates, the "as-is" clause overrode the "keep-in good repair" clause. On appeal, the court found that 13 Associates *did* owe a duty of reasonable care to Benson. This was based on the Restatement Third.

In finding that 13 Associates owed a duty of care, the court discussed the new framework in section 53 of the Restatement (Third). This section was not at issue in *Thompson*, yet it is a part of the Restatement Third. The court noted that the presumption regarding an existence of a duty for landlords had shifted from the Restatement (Second) to the Restatement (Third), and that the new restatement had eliminated the no-duty presumption and describes affirmative duties for landlords. The appellate court found that the district court erred in concluding that 13 Associates did not owe Benson a duty of reasonable care. The court noted that based on Restatement Third sections 53(c) and (e), the lessor had a duty to "disclose any dangerous condition that existed when the lessee (Genesis) took possession, was latent and unknown to the lessee, and was known or should have been known to the lessor." Additionally, section (e)(1) assigned the lessor a duty of reasonable care for any sort of contractual undertaking. In accordance with these sections of the restatement, the court held that the "keep-in-good repair" language of the lease "created a contractual obligation on the part of 13 Associates to care for the structural aspects of the rental property."

2. *STATE V. MAHALBASIC,* NO. 13-2082, 2015 WL 1815983 (IOWA CT. APP. 2015).

Mahalbasic was a criminal case which presented causation issues, and the causation analysis of the Restatement Third was applied. This is an application of the Restatement that perhaps even its drafters had not anticipated, and it demonstrates the breadth of application of the Restatement. Mahalbasic was the driver of a tractor trailer. He parked his trailer in the right lane of the traveled portion of Highway 34 east of Mt. Pleasant, got out, and went to go look at a car which was for sale at a nearby auto dealership. A short time later, a GMC Yukon driven by Hagen slammed into the back of the parked semi-trailer, causing fatal injuries to Hagen and his two-year-old daughter. Upon charging Mahalbasic with involuntary manslaughter, the district court subsequently found him guilty. Mahalbasic then appealed, arguing that the state presented insufficient evidence to support his conviction. Defendant specifically argued that there was lack of proof to show that his actions were the proximate cause of the deaths.

When it came to the proximate cause issue, the appellate court, in citing *Thompson v. Kaczinski*, instead applied the Restatement's "scope of liability" test, and said that "we believe the harm to Hagen and his daughter was a result of the risks posed by Mahalbasic's reckless conduct." Additionally, the court noted that it was reasonably foreseeable that other motorists would collide with Mahalbasic's truck when it had been parked on the highway. In fact, there had been other close calls where other vehicles had narrowly missed Mahalbasic's truck parked on the traveled portion of the highway, just before the accident. Thus, the appellate court held that the district court did not err in its finding that the causation element of the criminal charge had been met.

3. *CUMMINGS V. STATE,* NO. 14-2054, 2015 WL 9450798 (IOWA CT. APP. 2015).

In *Cummings*, another criminal case, two minor children were placed in the care of the Department of Human Services (DHS) after their mother had her parental rights terminated. Both children were later adopted and soon after, the children suffered abuse at the hands of their adoptive parents, ending with one of the children being drowned. The administrator of the deceased child's estate subsequently filed a tort claim with the State of Iowa Appeal Board claiming that DHS caseworkers were negligent in failing to properly investigate the abuse, protect the safety of the

deceased child, and remove the child from the abusive home. The State filed a motion for summary judgement, raising defenses which included, among other things, denying liability and raising the affirmative defense that plaintiff had failed to state a claim upon which relief could be granted. Summary judgment was granted, and plaintiff appealed.

Plaintiffs on appeal claimed that the State was negligent in investigating reports of abuse and, consequently, by failing to protect both children from abuse. Plaintiffs thus asked the appellate court to revisit *Rittscher* and *Callanan* (two Iowa Supreme Court cases) to find that the State can be held liable, pursuant to Restatement (Third) of Torts, when its social workers fail to prevent a child from being abused by either their legal guardians or parents. Defendant argued that the State had a generalized duty of reasonable care, i.e., the State's conduct had created a risk of harm under section 7(a) of the Restatement.

In affirming the district court's dismissal, the appellate court noted that if liability of DHS and social workers for damages based on negligence is to be expanded in light of the ruling in *Thompson v. Kaczinski*, thus overruling *Rittscher* and *Callanan*, it should be done by the Iowa Supreme Court and not the Court of Appeals. As a result, *stare decisis* and public policy heavily dictated the result in affirming the decision of the district court.

2016

1. *STATE V. TYLER,* 873 N.W.2D 741 (IOWA 2016).

Defendant Tyler was found guilty of second-degree murder after a beating of Daughenbaugh. The beating began when Tyler and a group of friends were drinking in an empty lot next to the Des Moines River and Daughenbaugh, drunk and high on methamphetamine, pulled up to the group, uninvited. Soon thereafter, Tyler punched Daughenbaugh, resulting in a beating that caused his subsequent death. After being found guilty of second-degree murder, Tyler appealed, and the court of appeals reversed the conviction, finding that there was insufficient evidence to support any of the three theories of liability which were presented by the State. The State applied for further review, which was granted by the Supreme Court.

On further review, the Supreme Court addressed all three theories of liability that were presented to the jury, one of which was liability as a principal. The court noted that there was substantial evidence that Tyler's punch was a but-for cause that resulted in the death of Daughenbaugh, as the blow by Tyler knocked Daughenbaugh to the ground, and he never got back up. As Tyler countered the causation argument by the State, the Supreme Court cited to *Thompson* and the Restatement Third on causation. In its reference to these sources, the Court noted that in a succession of criminal cases in 2010 and 2011, the court applied an updated law of tort causation in the criminal context and therefore, Tyler's blow was a but-for cause of Daughenbaugh's death. Furthermore, the Court noted that even if "proximate cause" (now called "scope of liability") remained as part of the State's causation burden, the burden was met here. In its holding on this portion of the case, the Supreme Court ended by saying that even if more than but-for causation is required, there was substantial evidence in the record that supported a finding of legal causation in this case.

2. *ESTATE OF GOTTSCHALK EX REL. RASSLER V. POMEROY DEVELOPMENT, INC.,* NO. 14-1326, 2016 WL 1129995 (IOWA CT. APP. 2016).

In *Estate of Gottschalk*, Cubbage, who was a resident at Pomeroy Care Center and also a pre-adolescent pedophile who was a convicted sex offender, sexually assaulted another care center resident, Gottschalk. Gottschalk filed suit against Pomeroy and later sued the State of Iowa for negligence. After Gottschalk died, the Estate substituted as plaintiff in the case. After the district court granted the State's motion for summary judgment, both the Estate and the care center filed petitions for interlocutory appeal.

In the Estate's appeal, plaintiffs claimed that the State had a duty of care to Gottschalk. The Court cited to *Thompson*, noting that the general duty of reasonable care will apply in most cases and the assessment of duty no longer depends on foreseeability of harm based on the specific facts of the case. The Court also cited to the Restatement (Third) of Torts, noting that a duty of care can also exist to a third party when there is a special relationship between the actor and another. In the appellate court's holding, which affirmed the dismissal by the district court, it stated that upon the unconditional discharge of Cubbage from the Civil Commitment Unit for Sexual Offenders (CCUSO), the special relationship between the State and Cubbage had ended. Furthermore, simply because the State volunteered to help the care center after his assault of Gottschalk, this does not show that the State owed a duty to the care center or its residents after Cubbage had been discharged from CCUSO.

3. *ROBESON V. VIETH CONST. CORP.,* NO. 14-2137, 2016 WL 1358504 (IOWA CT. APP. 2016).

Robeson was injured when the toe of her shoe caught in the webbing of an orange plastic construction fence, which was flattened on the ground of a hiking and biking trail that she was walking on. Robeson subsequently sued Vieth Construction, the owner of the orange construction fence, for negligence. Vieth moved for summary judgement, which was denied by the district

court. At trial the court granted Vieth's motion for directed verdict, and Robeson challenged the court's directed verdict on appeal.

On appeal, Robeson argued that Vieth created an unreasonable risk of harm by not maintaining the fence stretched across the trail. Robeson further argued that Vieth knew the fence did not remain erect and that it simply created a hazard. The court noted that Robeson's argument is echoed in the Restatement Third, pertaining to the general duty of land possessors that create a risk of harm for which the ordinary duty of reasonable care is applicable. In reversing and remanding the district court's decision, the appellate court held that under the Restatement Third, Robeson presented a jury question as to whether Vieth exercised reasonable care in regard to monitoring the condition of the construction fence. As a result, the case was remanded for a new trial to determine whether, under the newly formulated risk standard in the Restatement Third and citing to *Hill v. Damm*, Vieth acted negligently toward trail users such as Robeson insomuch that its duty of reasonable care was breached.

4. *ALCALA V. MARRIOTT INTERN., INC.*, 880 N.W.2D 699 (IOWA 2016).

In *Alcala*, a business guest at the Courtyard by Marriott slipped and fell on an icy sidewalk, breaking her ankle. *Alcala* then brought a premises liability action against the hotel, and at a jury trial was awarded $1.2 million in damages. Upon appeal, the court of appeals reversed, and Alcala applied for further review, which was granted by the Iowa Supreme Court. Alcala argued that the continuing storm doctrine ("the doctrine")(which created the general principle that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it) was no longer good law under the Restatement Third of Torts. The Court reversed and remanded the case for a new trial (based on error in submitting a claim for "negligent training" without a proper legal basis for making that argument). In the course of the remand, the Court also held that since the parties did not address the impact of the Restatement Third on the continuing storm doctrine in their appellate briefs, a decision on this issue should be made with the benefit of a district court ruling and full adversarial briefing.

In dissent, Justice Hecht noted that the majority misinterpreted Marriott's objection to the training specification of negligence, because Marriott conceded that it owed a duty (pursuant to Restatement Third and *Thompson*), and thus it was not challenging that it had a duty, but rather was arguing that it did not breach the duty. Finally, the dissent notes that, in regard to the continuing storm doctrine, a claim challenging the manner of snow removal is not subject to the doctrine merely because it seeks to enforce the general rule. Accordingly, the dissent would find no substantial evidence to prove that the weather was so inclement that it was impractical to clear Marriott's sidewalk of ice before Alcala fell. Thus, there was no error in the district court's refusal to give the instruction on the doctrine that Marriott requested.

5. *ESTATE OF MCFARLIN V. STATE*, 881 N.W.2D 51 (IOWA 2016).

In *Estate of McFarlin*, a boating accident on Storm Lake resulted in the death of a ten-year-old boy after a watercraft being driven by the boy's mother's boyfriend hit a submerged dredge pipe at 30 miles per hour. Upon filing multiple tort actions, they all settled, except for an action against the State, alleging that its Department of Natural Resources (DNR) shared responsibility for the accident. The district court granted the State's motion for summary judgment based on the "public-duty doctrine," the court of appeals affirmed, and the mother filed for further review, which was granted by the Iowa Supreme Court.

On further review, the Supreme Court addressed whether the public-duty doctrine barred plaintiffs' common law tort claims. The Court noted that in the reporter's note to section 7 of the Restatement Third, the continued vitality of the public-duty doctrine was explicitly acknowledged. The Court noted that the public-duty doctrine remains good law, even after the adoption of the Restatement Third. Additionally, the Court noted that since Storm Lake was open to the public, the State's safety-related duties there were owed to the general public and there was no special relationship or particularized class of boaters to avoid the public-duty doctrine. In finding that the district court correctly granted summary judgement (barring plaintiffs' common law tort claims), the court concluded the public-duty doctrine applied notwithstanding the generalized duty rule of the Restatement Third, section 7.

Justice Hecht wrote a dissent, joined by Justices Wiggins and Appel. The dissent advocated for elimination or modification of the "public-duty" doctrine, based largely on the reasonable care duty analysis of the Restatement Third. They would have reversed the summary judgment in the district court and let the jury decide if the DNR's reasonable care duty had been breached.

2017

1. *BENNINGHOVEN V. HAWKEYE HOTELS, INC.*, NO. 16-1374, 2017 WL 2684351 (IOWA CT. APP. 2017).

In *Benninghoven*, plaintiffs sued Hawkeye Hotels, alleging that defendant breached its duty of reasonable care owed to its guests when it hired Morrow, a front desk employee. Morrow assaulted

plaintiffs (who were guests at the hotel) after his shift was over and once they were all off of the premises. Plaintiffs urged that defendant had negligently hired Morrow without discovering his criminal history. After the district court granted summary judgment to defendants, plaintiffs appealed.

On appeal, the court noted that generally, a duty of reasonable care under the Restatement (Third) of Torts is required if a person's conduct creates a risk of physical harm, although in exceptional cases, the general duty can be displaced or modified. It was also noted that Iowa recognized an affirmative duty, under the Restatement, for negligent hiring, training, supervision, and retention. Under these theories, plaintiff argued that a general duty and an affirmative duty was required by defendants. In affirming the district court's holding, the court of appeals noted that although a hotel has a special relationship to its guests and thus a duty extends to protect guests from risks arising from the acts of third persons, a hotel's liability does not extend to criminal conduct of an employee who was off duty and off of the premises. As a result, the hotel was not liable for a breach of the duty of reasonable care. Summary judgment for defendant was affirmed.

2. *GRIMM V. CHILCOTE,* NO. 16-1079, 2017 WL 3065150 (IOWA CT. APP. 2017).

In *Grimm*, plaintiff was involved in an accident where she was rear-ended by defendant. Plaintiff sued for personal injuries resulting from the accident. Plaintiff then appealed the court's ruling and requested a new trial, contending that the damages were inadequate, and arguing that one of the jury instructions (relating to a second injury after the subject injury) should not have been given because it was prejudicial. In the appeal decision, the court noted that the jury instruction which was challenged, was not supported by evidence and prejudicially introduced an improper legal theory to the jury. As a result, a new trial on the scope and amount of damages caused was required.

In its discussion, the appellate court cited to the Restatement (Third) of Torts and *Thompson*, examining the analytical framework of the scope of liability issue in sections 29, 30 and 34 of the Restatement (Third). After reviewing these sections, the court found that they suggest that the "second injury" jury instruction in question should be used only when there is evidence of an independent and subsequent act causing injury unrelated to any weakened condition caused by the first injury. There was no evidence that plaintiff's ongoing damages were caused by another act after the incident in question. Rather, the scope of liability remained with defendant. As a result, the trial court erred in giving the jury instruction and found that substantial justice had not been accomplished, requiring a remand and a new trial.

3. *EURICH V. BASS PRO OUTDOOR WORLD, L.L.C.,* NO. 17-0302, 2017 WL 5179011 (IOWA CT. APP. 2017).

In *Eurich,* plaintiff was injured in the entrance to a Bass Pro store when he fell after getting his foot caught on a rug which had wrinkles about 2-3 inches tall. Plaintiff sued Bass Pro and Cintas, alleging negligence. Plaintiff testified in deposition that he saw the rug deficiency before entering the establishment. Defendants argued they had no duty to plaintiff and were not liable for damages, and moved for summary judgment. The district court granted defendant's motion, and plaintiff appealed, claiming that defendants improperly relied on the Restatement Second and the "open and obvious" defense, which had been replaced by the Restatement Third of Torts.

On appeal, the appellate court noted that although they were unclear as to which Restatement the district court applied, they were going to use the Restatement Third. By using the Restatement Third (and reference to *Thompson*), the court noted that in order to prove a defendant was negligent, there must be a showing by the plaintiff that, among other things, there existed a duty on the part of plaintiff to conform to a standard of conduct to protect others. Furthermore, the court noted that the Iowa Supreme Court had adopted the duty analysis for land possessors, which is contained in section 51 of the Restatement (Third) of Torts. The appellate court concluded by saying that the Restatement Third, along with Supreme Court precedent, persuaded them to think that a danger which is known and obvious goes to the question of whether plaintiff was negligent, i.e., the "breach of duty" issue, rather than existence of a duty. had argued that it had no duty to warn plaintiff since the plaintiff admitted he saw the defective condition of the floor mat, and under the Restatement Second analysis, there is no duty to warn of open and obvious dangers. Additionally, a determination of negligence of the parties (along with cause) are questions of fact for the jury.

It is unknown whether the defendant in *Eurich* also argued that "but-for" causation was absent as a matter of law. A warning would have told plaintiff that the rug condition was present, yet, the plaintiff admitted that he saw that condition. Thus, any warning would have simply told him something he already knew, and for this reason the absence of a warning would not be a factual or but-for cause of the accident.

2018

1. *JOHNSON V. HUMBOLDT COUNTY,* 913 N.W.2D 256 (IOWA 2018).

Plaintiff in *Johnson* suffered injuries from being the passenger in a single-vehicle accident, which occurred when the vehicle went off of a road and hit a concrete embankment that was in the roadway right-of-way but on the land of a private owner. At that location the county also had a right-of-way easement. Plaintiff alleged that the presence of the concrete embankment violated a statute that generally required state right-of-ways to be clear of obstructions. Plaintiff sued the county and the private landowner seeking recovery. Plaintiff appealed after the district court granted summary judgment for the county based on the public-duty doctrine.

On appeal in *Johnson*, the Supreme Court noted that plaintiff improperly argued that the public-duty doctrine did not survive the adoption of the Restatement (Third) of Torts. The Court noted that the reporter's comments to section 7 of the Restatement made it clear that the public duty doctrine is retained. This is also reaffirmed in comment i to section 37 of the Restatement. Although the Restatement recommends that a court give appropriate weight to the general duty rule of section 7 before applying a "no-duty" rule, the public-duty rule is not vitiated where the statute in this situation protects the public generally. Additionally, *Johnson* addressed Restatement Third section 38 (discussing affirmative duties) and section 40(b)(3) (discussing special relationships) in the appeal as well. The Court noted that one of the illustrations (regarding all public schools testing students for scoliosis) in section 38 bolstered the conclusion that the public-duty doctrine remains good law. The Court noted that since the county did not possess the land in question but only had an easement, the county did not "occupy and control" the land, and thus it did not have a special relationship with Plaintiff. As a result, the public duty doctrine prevailed and the Court affirmed the ruling by the district court.

Johnson was a 4-3 decision and included a dissenting opinion by Justice Wiggins, joined by Justices Hecht and Appel. The dissenters took the position that the county *did* owe a duty to the Plaintiffs, based on the Restatement Third, and summary judgment in favor of the county in the trial court below should be reversed and the case remanded for trial.

2. *STATE V. ROACHE,* 920 N.W.2D 93 (IOWA 2018).

In *Roache*, defendant was charged with, and pled guilty to, eleven counts which included second-degree criminal mischief and third-degree burglary. In committing his crimes, Defendant stole a backpack from the car of a student who was enrolled in a commercial truck- driving training course. The operator of the training course imposed a $1,900 fine on the student for the loss of a paperback study guide (which was in the stolen backpack), as well as the full cost of the training course. The district court, in ordering Defendant to pay restitution, ordered him to also pay the $1,900 fine that was imposed on the student. Defendant appealed this $1,900 restitution award, and on appeal the Court of Appeals affirmed. Defendant then applied for further review.

Upon further review, the Supreme Court adopted the scope-of-liability analysis in sections 29 and 33 of the Restatement (Third) of Torts for criminal restitution cases. The Court then turned to the issue presented upon appeal. Upon Defendant's challenge of factual causation, the court held that Defendant's conduct was the factual cause in that "but for the theft, the study guide would not have been lost." Additionally, Defendant claimed that the $1,900 fine fell outside of the "scope of liability." In citing to the Restatement Third, the Court noted that liability for intentional torts extends to a broader range of harms than simply negligent conduct. Since the Defendant's theft of the study guide exposed the student to liability, the victim may seek indemnity. The Court noted that essentially, the State was acting on behalf of the victim who sought indemnity for liability. In turning then to the law on damages to determine whether the State met its burden of proof for restitution, the Court held that the $1,900 fine-based restitution award would be reversed, noting that it was punitive and unsupported by substantial evidence.

3. *STATE V. SHEARS,* 920 N.W.2D 527 (IOWA 2018).

In *Shears*, a criminal case, the court considered whether the City of Davenport was entitled to restitution for damage to patrol cars in a criminal case in which the defendant pled guilty to criminal mischief and eluding a police officer. After pleading guilty, the district court ordered defendant to pay restitution to the city, at which point defendant appealed that order. On further review for errors of law, the Iowa Supreme Court affirmed the decision of the court of appeals and the judgment of the district court.

The Supreme Court noted that *Thompson* discussed the question of causation in negligence cases. Additionally, in discussing application of tort principles, the court noted that the Restatement (Third) of Torts says that when the scope of liability arises in a negligence case, the risks which make someone negligent are limited to those which are foreseeable. The Court said that a reasonable fact finder could see that it is foreseeable that police cars could be damaged while trying to apprehend an evading defendant, and that the potential damage to the vehicles would be within the defendant's scope of liability. Finally, in discussing the law on intervening and superseding cause under the Restatement

Third, the Court concluded that under the Restatement's causation standard, the damage to the police vehicles was within the scope of liability in a negligence action against defendant.

2019

1. ***MORRISON ON BEHALF OF ESTATE OF MORRISON V. GRUNDY COUNTY RURAL ELECTRIC COOPERATIVE,* NO. 17-1001, 2019 WL 320178 (IOWA CT. APP. 2019).**

In *Morrison on Behalf of Estate of Morrison*, plaintiffs sued the Grundy County Rural Electric Cooperative (GCREC) alleging that they were liable for the death of Morrison, a passenger in an airplane that had crashed into a power line while landing on a grass airstrip on a farm. Plaintiffs appeal after a jury found that although GCREC may have acted with negligence, the negligence of GCREC did not cause the crash of the airplane resulting in the death of Morrison.

Plaintiff appealed and cited as grounds for appeal jury instructions number 31 (defining negligence) and 32 (relating to causation) that were given regarding scope of liability. Regarding jury instruction 31, the Court held that because the jury found GCREC to be negligent, plaintiffs cannot show that they suffered prejudice from instruction number 31. When it came to instruction number 32 (which the jury rendered a verdict unfavorable to plaintiffs), the court held that when instructing on scope of liability, there is a potential to influence the jury's causation determination. The court found that the district court properly submitted the scope of liability question to the jury, citing to *Thompson* and the Restatement Third. The Court noted that "the scope-of-liability issue is fact-intensive as it requires consideration of the risks that made the actor's conduct tortious and a determination of whether the harm at issue is a result of any of those risks."

2. ***STATE V. HERNANDEZ-MENDOZA,* NO. 18-0083, 2019 WL 1932539 (IOWA CT. APP. 2019).**

In *Hernandez-Mendoza*, defendant was convicted and sentenced for homicide by vehicle, controlled substance violations, and supplying alcohol to minors. Defendant appeals, raising multiple arguments. Among other things, Defendant argued that his counsel was ineffective for failing to challenge legal or proximate cause, which was the "scope of liability" of his conduct. Citing to the Restatement (Third) of Torts as well as *Thompson*, the appellate court noted that the "scope of liability" is limited to physical harms that result from risks that made the actor's conduct tortious (or in this context, criminal).

Additionally, the court included in its analysis that since adopting the Restatement Third view on causation, the Iowa Supreme Court had not found proximate cause still applied in criminal cases, but rather it left open to the possibility that criminal causation might require more than simply "but-for" proof for factual causation. When the law is unsettled, the accused's counsel does not have a duty to raise a claim not recognized in previous authority. Notwithstanding this, Defendant asserted another claim for ineffective assistance for failing to raise proximate cause as it existed before Iowa's adoption through the Restatement Third. This was quickly dispatched by the appellate court, as they noted that the Iowa Supreme Court had explicitly clarified its law on causation through adoption of the Restatement Third of Torts.

3. ***HOLMAN V. DAC, INC.,* NO. 18-1473, 2019 WL 5791015 (IOWA CT. APP. 2019).**

In *Holman*, the district court determined that a group home providing caretaking services to an individual with intellectual disabilities did not owe a duty to protect third parties from the harmful acts of its residents. This was the finding by the district court as it noted that the group home operator, DAC, Inc. (DAC) did not owe a duty to third parties because it lacked a custodial relationship with its resident, Robbins. The district court also concluded that even if the relationship was custodial, there was no duty owed to third parties because Robbin's residence at DAC was for rehabilitative purposes only, not to protect the public.

Upon affirming the ruling of the district court, the Court of Appeals cited to the Restatement (Third) of Torts and *Thompson*, noting that *Thompson* had discussed factors to determine whether a duty to exercise reasonable care exists. Additionally, when it comes to third parties, the Restatement Third notes that the duty to exercise reasonable care does not extend to physical and emotional harm caused by third parties, unless the "special relationship" exception (which includes being a dependent child, and a custodian's relationship with those in its custody) is met. Since no Iowa cases had discussed what makes a particular relationship custodial, the appellate court found that the district court's examination into what makes a custodial relationship was valid. As a result, the appellate court affirmed the finding by the district court that the relationship in question was not custodial, and even if it was, there was no special relationship that existed, and thus no duty of reasonable care that was owed to third parties.

4. ***MURRAY V. STATE,* NO. 18-1813, 2019 WL 6894272 (IOWA CT. APP. 2019).**

In *Murray*, Defendant was convicted of first-degree robbery and second-degree burglary, after a break in and the subsequent bludgeoning of Gloe. Gloe would eventually die as a result of his injuries, and Murray was later charged and convicted of first-

degree felony murder. More than a decade later, Murray filed a post-conviction relief (PCR) application. After the PCR court granted the State's motion to dismiss, Murray appealed.

On appeal, Murray claims, among other things, that *Thompson* and *State v. Tribble* bring about new grounds of law relating to causation, which excused his noncompliance with Iowa Code § 822.3. In the court's affirmation of the judgment by the PCR court, the appellate court held that Murray did not identify any new ground of causation law to excuse his non-compliance, as there was no new causation standard for criminal cases amounting to a new ground of law. This is because *Thompson* bifurcated proximate cause into factual cause and scope of liability in its adoption of Restatement (Third) of Torts, while *Tribble* applied a factual-cause analysis to consider the element of causation. No constitutional implications would necessitate retroactive application to serve as a new ground of law for Murray, as he had hoped for.

2020

1. ***GRIES V. AMES ECUMENICAL HOUSING, INC.*, ___N.W.2D ___(IOWA 2020)(DECISION PENDING).**

Gries is currently pending before the Iowa Supreme Court. The Iowa Defense Counsel Association has filed an *amicus curiae* brief in *Gries* regarding the continued vitality of the "continuing storm doctrine" which can sometimes apply to slip and fall cases occurring outdoors in the winter.

In *Gries*, Plaintiff argued that Thompson and the adoption of section 7 of the Restatement (Third) altered pre-existing duty law in Iowa, such that the continuing storm doctrine should no longer apply. It is IDCA's position that section 7 reaffirmed existing and established duty law in Iowa, and the Iowa Supreme Court has stated this in numerous cases. Further, the well-established "continuing storm" doctrine fits within the definition of an "articulated, countervailing principle or policy" as set forth in section 7(b), such that the normal duty of "reasonable care" is modified.

CONCLUSION

T*hompson v. Kaczinski* and the Restatement (Third) of Torts, Liability for Physical and Emotional Harm (2010) have become entrenched in Iowa tort law over the past ten years. Since then, plaintiffs on numerous occasions have tried to use section 7(a) of the Restatement and its "default" duty to exercise reasonable care to modify or entirely eliminate common-law defenses in ways heretofore unseen in Iowa jurisprudence. Many of the cases on these issues have been decided by narrow 4-3 majorities of the Court. Examples include the "contact sports" exception to negligence liability *(Feld v. Borkowski)*; the requirement that a product liability defendant must manufacture or sell its product to plaintiff in order to be liable (*Huck v. Wyeth*); the "continuing storm" doctrine as applied to slip and fall cases outdoors in the winter (*Alcala v. Marriott* and *Gries v. Ames Ecumenical*); and the "public duty" doctrine (*Estate of McFarlin v. DNR* and *Johnson v. Humboldt County*), to name a few. Eliminating common law defenses that have been established in Iowa tort law for decades, and substituting a generic "reasonable care under all the circumstances" standard, would allow more cases to go to juries and cause fewer summary judgments to be granted. Defendants would lose the benefit of specific jury instructions explaining these defenses. Indemnity and transactional costs for defendants and organizations could be expected to ratchet significantly upwards as a result.

Fortunately for the defense bar and its clients, the Restatement's approach to tort liability retains some balance. Section 7(b) provides that a reasonable care duty may be modified or eliminated by reason of an "articulated, countervailing, principle or policy." The common law defenses listed above are long-standing and well-entrenched defenses based on Iowa substantive tort law which should remain in the law, and fit nicely within the Restatement's framework.

The makeup of the Iowa Supreme Court has recently undergone significant change. With the untimely deaths of Justices Darryl Hecht and Chief Justice Mark Cady, and the retirement of Justice Wiggins, Justice Brent Appel will be the lone remaining standard-bearer of the 4-3 dissenters in many of the Restatement Third cases. Whether new Justices Christopher Macdonald, Chief Justice Susan Christensen and Justice Dana Oxley will change the high court calculus as to the Restatement Third remains to be seen.

The past ten years in Iowa has seen an uptick in astronomical jury verdicts: $10 million for medical malpractice in Dubuque; $4 million for a broken ankle in Davenport; $5 million for wrongful termination and emotional distress in Montezuma; $9 million for medical malpractice in Des Moines; $4 million for a broken leg in Des Moines; $25 million for worker's compensation bad faith in Council Bluffs; and $29.5 million for medical malpractice in Orange City. These verdicts can be directly attributed to the advent of hyper-aggressive, reptile litigation tactics skillfully implemented by the plaintiff's bar, and a reticence on the part of some trial judges to actively control their courtrooms.

To the authors' knowledge, none of these verdicts can be tied to Iowa's adoption of the Restatement (Third) of Torts and its expansion and liberalization of negligence liability. Yet, given the

current "litigation lottery" climate in Iowa, any effort to lower the bar for establishing liability in a tort case, by using *Thompson*, section 7(a) and the Restatement Third of Torts, should be closely scrutinized. Where appropriate, any effort to weaken tort liability standards or to wipe out entrenched common law defenses with the mere stroke of a pen should be opposed in deference to stare decisis and Iowa's time-honored and respected legal traditions.

1 Kevin Reynolds is a member and former President of the Iowa Defense Counsel Association. He currently serves as IDCA's state DRI representative.

2 Clark Butler is a second-year law student at the Drake University Law School, is a student member of IDCA and a law clerk at Whitfield & Eddy.

3 Neither of the parties had briefed or argued the Restatement Third in the trial court, Court of Appeals or Iowa Supreme Court.

4 The American Law Institute (ALI) finally adopted the Restatement Third after *Thompson* in 2010.

5 The other lesson of *Hill* is that the Court continues to follow the "Uhlenhopp" rule: in a close case, it is preferable for the trial court to deny a motion for directed verdict motion and let the case go to the jury. If wrong, it can always be corrected in post-trial motions or on appeal. On the other hand, if a directed verdict is granted and later found to be wrong, then an entirely new trial will be necessary. See State v. Keding, 553 N.W.2d 305, 308 (Iowa 1996).

New Lawyer Profile

Crystal Pound

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Crystal Pound at Simmons Perrine Moyer Bergman PLC in Cedar Rapids.

Crystal Pound is an attorney with a general practice, including business and commercial litigation, labor and employment law, transportation law and municipal law. She is also experienced in guardianships and conservatorships.

Ms. Pound has always shown a passion for helping others. Upon graduating from the University of Iowa College of Law in 2016, she received the Boyd Service Award for her commitment to community service and the Philip G. Hubbard Human Rights Award. Since joining the firm, she has been recognized by her peers as a Super Lawyers Rising Star for 2018 and 2019.

Case Law Update

Spencer Vasey[1]*, Elverson Vasey, Des Moines*

Spencer Vasey

STATE OF IOWA V. DEWAYNE MICHAEL VEVERKA, 19-0603, JANUARY 31, 2020

WHY IT MATTERS

The Iowa Supreme Court addressed and clarified the standard for application of the residual exception to the hearsay rule. The Court identified the five factors that must be analyzed prior to application of the exception and emphasized that no extraneous factors may influence the analysis.

FACTUAL SUMMARY

In November 2016, Christine Veverka reported to the Jasper County Sheriff's Office that her fourteen-year-old daughter, S.V., had been sexually abused by S.V.'s father, Dewayne Veverka. Shortly thereafter, a representative from the Regional Child Protection Center conducted a forensic interview of S.V. in which S.V. provided details of the alleged abuse. The forensic interview was video recorded. After allegedly admitting to a social worker that the abuse had occurred, Veverka was charged with three counts of sexual abuse.

Prior to trial, Veverka filed a motion in limine seeking to exclude from evidence the video recording of S.V.'s forensic interview, arguing the video constituted inadmissible hearsay.

The district court granted Veverka's motion. In response, the State filed a motion to adjudicate preliminary questions of law under Iowa Rule of Evidence 5.104. The State asked the court to make findings and a definitive ruling on the applicability of the residual hearsay exception, Iowa Rule of Evidence 5.807, to the video interview. After holding a hearing and reviewing evidence submitted by the State, the court held the video did not fall within the residual hearsay exception. On appeal, the Iowa Supreme Court was asked to determine whether this preliminary ruling was in error.

HOLDING

On review, the Court vacated the district court's decision and remanded the case for reconsideration. The Court held that the district court had made two overarching errors in its application of the residual hearsay exception. First, the Court held that the district court erred in stating it had discretion regarding the admission of the video interview. Second, it held that the district court had erred in its analysis of the exception by considering extraneous factors and improperly analyzing the factors enumerated in the Court's precedent.

ANALYSIS

The Court initially considered the district court's statement that it had discretion to admit or exclude the videotaped interview. It held that a district court "has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception" and "has no discretion to admit hearsay in the absence of a provision providing for it." 938 N.W.2d at 202 (internal quotations omitted).

The Court then analyzed the residual hearsay exception. Pursuant to Iowa precedent, prior to admitting hearsay evidence under the residual hearsay exception, a court must analyze five factors: (1) trustworthiness; (2) materiality; (3) necessity; (4) notice; and (5) service of the interest of justice. The Court held it was an error to consider a sixth factor—whether the videotape was testimonial in nature—when conducting this analysis. Although the testimonial nature of a statement is relevant to its admissibility under the Confrontation Clause, it is not a permissible consideration in the residual hearsay exception analysis.

The Court also discussed the district court's application, or lack thereof, of three of the five enumerated factors: trustworthiness, necessity, and service of the interest of justice. The Court first reviewed its precedent regarding trustworthiness and outlined considerations supporting a finding of trustworthiness. It explained that a video interview is more trustworthy when the interviewer asks open-ended questions, the interview occurs shortly after the precipitating event, and the interviewee's statements are consistent and detailed throughout the interview.

The Court also discussed the necessity prong, stating the proponent must show the evidence is more probative than any other evidence that can be obtained through reasonable efforts.

Hearsay evidence is not necessary when it does not differ substantially from the testimony of other witnesses.

Finally, the Court reasoned that evidence serves the interest of justice when it is shown to be reliable and necessary, and admitting the evidence will advance the goal of truth-seeking. The Court concluded its opinion by reiterating that the residual hearsay exception is to be used narrowly and applied on a case-by-case basis.

ESTATE OF CHARLOTTE ANDERSON V. LINDSAY M. ARNDT, 19-0565, APRIL 29, 2020

WHY IT MATTERS

The Iowa Court of Appeals applied Iowa Code 321.493, the vehicle-owner-liability statute, to a common situation in dissolution proceedings—when property has been divided but the divorce decree has not been entered and the vehicle remains jointly titled. Ultimately, the Court of Appeals held that a spouse can avoid vicarious liability if he or she effectively transferred his or her rights to the vehicle to the other spouse prior to the accident.

FACTUAL SUMMARY

On July 4, 2015, Austin Arndt ("Austin") was involved in a motor vehicle accident which led to the death of Charlotte Anderson. At the time of the accident, the certificate of title for the Ford F-150 driven by Austin identified Austin and Lindsay Arndt ("Lindsay") as co-owners of the vehicle.

Austin and Lindsay were married at the time they purchased the F-150. The couple filed for divorce in October 2014, and on November 6, 2014, the court entered a stipulated temporary order which gave Austin possession of the F-150 while the case remained pending. In January 2015, Austin and Lindsay agreed Austin would be awarded the F-150 in the divorce decree. This agreement was reported to the court in June 2015. At the June 30, 2015, dissolution trial, the only issues decided were unrelated to the ownership of the F-150. The court entered the final divorce decree after the accident on July 4, 2015.

Anderson's Estate filed a wrongful death suit against both Austin and Lindsay, alleging Lindsay was vicariously liable for Austin's conduct pursuant to Iowa Code 321.493. Lindsay filed a motion for summary judgment, arguing she was not vicariously liable for Austin's actions because she had transferred ownership of the F-150 to Austin prior to the accident. The district court granted Lindsay's dispositive motion. On appeal, the issue presented for review was whether, under these facts, Lindsay was an "owner" subject to vicarious liability pursuant to Iowa Code 321.493.

HOLDING

The Court of Appeals held that Lindsay had transferred all rights and interest in the F-150 to Austin prior to the accident and therefore, she was not vicariously liable pursuant to Iowa Code 321.493.

ANALYSIS

In reaching its decision, the Court of Appeals rejected the Estate's argument that that Lindsay's name on the certificate of title established a prima facie case of ownership. Instead, the appellate court relied upon the Iowa Supreme Court's holding in *Hartman v. Norman*, 112 N.W.2d 374 (Iowa 1961), in which the Court held that the title holder of a vehicle was not vicariously liable for a driver's negligence when the evidence showed the driver had entered into an unambiguous written contract to purchase the vehicle prior to the accident, had made a down payment on the vehicle, and had retained possession of the vehicle.

The Court of Appeals likened the sale in *Hartman* to the transfer of rights to the F-150 from Lindsay to Austin. It noted that Lindsay and Austin had entered a stipulation regarding the F-150 which had been incorporated into the court's November 6, 2014, stipulated temporary order. The temporary order gave Austin an enforceable right to the F-150. Had Lindsay attempted to assert ownership rights to the F-150, she would have been in violation of a court order. Thus, despite the fact Lindsay was still listed on the certificate of title, she had made a bona fide transfer of the vehicle to Austin and could not be held vicariously liable under Iowa Code 321.493.

---

1 Spencer Vasey earned her undergraduate degree summa cum laude from Drake and thereafter graduated with highest distinction from the University of Iowa College being admitted to practice, she joined Elverson Vasey, the firm co-founded by her father, District V Officer Jon Vasey. Her practice focuses on insurance defense, subrogation, coverage opinions.

Amicus Brief Updates

The Iowa Defense Counsel Association would like to update you on two filed amicus briefs.

GRIES V. AMES ECUMENICAL HOUSING

The Iowa Defense Counsel Association, Iowa Insurance Institute and Iowa Association of Business and Industry filed an amicus brief authored by Thomas Boes of Bradshaw, Fowler, Proctor & Fairgrave, P.C. in Des Moines.

Summary: The subject of this appeal, *Debra Gries v. Ames Ecumenical Housing, Inc. d/b/a/ Stonehaven Apartments*, concerns the validity of the continuing storm doctrine in light of the Court's adoption of the Restatement (Third) of Torts in *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009). The plaintiff slipped and fell on an icy walkway outside of her apartment building during a period where it was "misting," but not actively snowing or raining. On appeal, the plaintiff-appellant argued that the Restatement (Third) of Torts effectively abrogated the continuing storm doctrine by implementing a general duty of care which is only to be deviated from in "exceptional cases." She further argued that even if the continuing storm doctrine was held to be viable, it should only apply during an active storm with continuing prescription—not during a "misting." The Iowa Defense Counsel filed an amicus brief advocating for the continued validity of the doctrine and its application to all storms that create hazardous conditions, regardless of the precipitation levels. Click this link to view the brief.

Update: On June 5, 2020, the Court issued an opinion affirming the continued validity of the doctrine and holding a "land possessor has no duty to remove the natural accumulation of snow or ice during an ongoing storm and for a reasonable time after the cessation of the storm." The Court first reviewed the history of the doctrine, noting the doctrine is "long-standing in Iowa." It then highlighted the policy underlying the doctrine—the recognized "feebleness of human efforts in attempting to cope with the power of the elements." The doctrine, it reasoned, "reflects a widespread policy consensus that land possessors should not be forced to undertake snow or ice removal in the midst of a storm." The Court next considered whether the doctrine precluded liability in the case before it. The Court reversed the district court's grant of summary judgment and remanded, holding there was a factual dispute as to whether there was a continuing storm at the time of the incident. The Court clarified the standard to be applied, stating "mere precipitation is not enough . . . there must be meaningful, ongoing accumulation of snow or ice." Justice Appel dissented in part, advocating for the abandonment of the continuing storm doctrine. Read the Appeal Decision here.

33 CARPENTERS V. CINCINNATI INSURANCE

The Iowa Defense Counsel Association, Iowa Insurance Institute and Mutual Insurance Association of Iowa filed an amicus brief authored by Ryan Koopmans and Stephen Locher of Belin McCormick, P.C. in Des Moines.

Summary: In *33 Carpenters Construction, In. v. State Farm Life & Casualty Co.*, the Iowa Supreme Court considered whether a residential contractor acting as an unlicensed public adjuster can enforce its post-loss contractual assignment of insurance benefits against a homeowners' insurer. The plaintiff, 33 Carpenters, had approached the State Farm insureds following a hail storm and offered to inspect their home for hail damage. When damage was found, they entered into an agreement whereby the plaintiff would repair the home, in exchange for an assignment of the proceeds of the insured's State Farm policy. 33 Carpenters submitted estimates directly to State farm throughout this process. The Iowa Defense Counsel filed an amicus brief, advocating for the application of the public adjuster licensure requirements contained in Iowa Code Chapter 522C to 33 Carpenters' conduct. The amicus brief further urged the Court to hold that the assignment of benefits contract was void pursuant to Iowa Code § 103A.71(5). Click this link to view the brief.

Update: The Court issued an opinion on February 14, 2020, concluding that 33 Carpenters' was acting as an unlicensed public adjuster by representing the insureds in their hail damage claim against State Farm. The court applied Iowa Code § 103A.71(5) to further hold that the post-loss contractual assignment of insurance benefits was void. The Court reasoned that 33 Carpenters acted as a public adjuster when solicited the insured's business, advised them ile a claim for damage, and had the insureds sign the assignment of benefits contract. Read more here.

IDCA Annual Meetings

September 17–18, 2020

56TH ANNUAL MEETING & SEMINAR
September 17–18, 2020
Virtual Event
Information available at www.IowaDefenseCounsel.org by mid-July.

September 16–17, 2021

57TH ANNUAL MEETING & SEMINAR
September 16–17, 2021
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, Iowa

IDCA Annual Meeting & Seminar Announcement

The Iowa Defense Counsel Association announces that our in-person Annual Meeting & Seminar, scheduled for September 17–18, 2020, at the Embassy Suites in downtown Des Moines will transform into a virtual event to be held in the same time frame.

This decision was not easy, but ultimately the health and safety of our attendees, exhibitors and speakers led us to conclude that transitioning the face-to-face meeting to a virtual meeting is the safe and responsible action. IDCA knows that many stakeholders are involved in making the IDCA Annual Meeting & Seminar a "must attend" event and we thank everyone for their time and support.

Rest assured, the IDCA Annual Meeting Committee and staff are exercising their creativity and imagination and will deliver a premiere virtual event that offers stellar education and valuable connections. IDCA remains committed to connecting defense attorneys and claims professionals and ensuring shared success.

More information will be available at www.IowaDefenseCounsel.org by mid-July.

Please direct questions to Kristen Deaden, event management professional, meetings@iowadefensecounsel.org.