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Preventing Nuclear Settlements at Deposition: The Role of Cognitive Fatigue on Witness Performance

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INTRODUCTION

Nuclear settlements have not received the same intense attention as nuclear verdicts in today's litigation atmosphere. This is not surprising, as it is well documented that jury damage awards are spiraling out of control in many industries, particularly the transportation, pharmaceutical and healthcare areas. Thus, the topic of preventing nuclear verdicts is finally getting ample attention from the defense bar, as defendants and insurance companies are fearful of being the next victim. However, one could argue that the phenomenon of nuclear settlements is far more prevalent, considering the vast majority of cases never

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IDCA President's Letter

Susan Hess
IDCA President

Greetings everyone:

Spring is right around the corner, or at least the calendar says it is, and 2022 is moving along. Many of us feel as if we are in "Covid-Catchup Mode" as Jury Trials seem to be back in full swing and everyone I talk with seems to be finally catching up with case delays caused by the Pandemic.

Our IDCA Webinar Series has been a success and I would like to take the time to thank all of our presenters for sharing of their time and expertise. Our third webinar featured Dr. Bill Kanasky of Courtroom Sciences. We had very positive feedback from his talk on Nuclear Verdicts at the Annual Seminar, so we asked him back to present on Witness Fatigue. Like most all our CLE presenters, whether at the Annual Seminar or in our new webinar series, Dr. Kanasky volunteered his services so that he could share his expertise for the benefit of our common professional cause.

As I reflect upon the generous spirit of these contributions, I am reminded of those who shared their experience and talents with me. Maybe it's a cliché, but none of us were "born" lawyers. I began my legal career as a high school student with an internship to provide secretarial services at a local Dubuque law firm. Through the encouragement, guidance and instruction of the attorneys that I worked for, I successively served as a paralegal, law clerk, associate, and now managing partner at Hammer Law Firm, PLC. Along the way, I was mentored not only by members of my firm such as David L. Hammer (IDCA President 1991), but also by other longstanding members such as Herb Selby and Angela Simon. Even as I began to serve in more formal leadership roles in Defense Counsel, I benefited from the example set by other leaders of this organization.

As I reflect upon this organization and the people that are involved in it, whatever their involvement may be, I come down to several, simple common denominators: a service to others; a focus on the client; a willingness to mentor; and a desire for the improvement of not only our profession, but particularly the Defense Bar. That is what Iowa Defense Counsel Association is all about–sharing of ourselves and our experiences to make ourselves better advocates for the Defense Bar. If those of us privileged to have enjoyed the rich tradition of Defense Counsel will take the time to share that with our young associates and other peer defense counsel around the state, we can ensure that our Organization remains a respected part of the Iowa Bar Family.

It is easy to forget about such aspirational goals when we are involved in the day-to-day aspects of not only the practice of law, but also of business aspects that require our constant attention. I hope that Defense Counsel is an important part of your professional life. There are many membership benefits at our fingertips. In addition to the CLE opportunities that I discussed above, the community forum page is a place for you to share your defense verdict victories, trial tips, and expert witness inquires. You can also reach other members with questions you have on issues or witnesses you may encounter in your practice. Please remember to visit the forum regularly and consider posting copies of motions, rulings, or articles you have found to be helpful or insightful. Most of all, take pride in your membership in this Organization and share that sentiment with other like-minded practitioners, whether in your own firm or some other, so that we can continue our strong legacy.

Susan Hess

Continued from Page 1

reach a courtroom. Paying nuclear settlements inevitably leads to more lawsuits against that particular client, since word spreads fast in the plaintiffs' bar about which companies are fearful of trials and would rather pay their way out of trouble.[1]

Deposition performance is critical to case outcome, particularly economically. Strong, effective depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher payouts on claims during settlement negotiations (i.e., a nuclear settlement). Specifically, when witnesses drop "bombs" at deposition, those "bombs" end up costing an extraordinary amount of money. Clearly, poor deposition testimony greatly widens the gap between the real and perceived economic value of a case, putting a client in an unfavorable position when trying to settle.[2]

It is universally accepted that an attentive witness who can maintain maximum concentration levels during deposition is far less vulnerable to making critical testimony errors compared to an inattentive witness who struggles to concentrate. The neuroscientific literature clearly illustrates that cognitive fatigue, the failure to sustain the level of attention needed to optimize performance[3], induces significant decline in key areas of executive functioning that are essential to effective witness performance at deposition and prevention of nuclear settlements. However, no one has explored the relationship between witness cognitive fatigue and witness performance. If impaired attention and concentration due to fatigue leads to harmful testimony, then preventing witness cognitive fatigue should be a top priority for defense counsel. As a 30-year veteran trucking attorney recently stated, "when mental fatigue sets in at deposition, bad things happen."

To prevent fatigue-based witness errors at deposition, defense attorneys have preached for decades "*I make my witness take a break every hour during deposition*." The key neuropsychological questions from the authors are:

- Why one hour?
- How long should the break be to sustain optimal performance?
- What should the witness do during the break to sustain optimal performance?
- If the purpose of the break is to prevent cognitive fatigue and allow the witness to replenish their cognitive resources, shouldn't this decision be scientifically supported?

The purpose of this paper is to illustrate that the "take a break every hour" philosophy long held by most attorneys is a gross strategic and neuropsychological mistake that leaves the witness highly vulnerable to cognitive fatigue. This fatigue can often result in poor testimony that unnecessarily harms the defense's case, both strategically and economically.

THE SCIENCE OF COGNITIVE FATIGUE

Cognitive fatigue causes deterioration of key executive functions such as ***executive attention***[4], ***sustained attention***[5], ***goal-directed attention***[6], ***alternating attention***[7], and ***divided attention***[8].

Deluca[9] defines four areas of cognitive fatigue; each of which directly apply to the deposition experience:

1. Decreased performance following an extended period of time;
2. Decreased performance after a challenging mental exertion;
3. Decreased performance after a challenging physical exertion; and
4. Decreased performance during acute but sustained mental effort.

Witnesses can be exposed to all four of these circumstances during deposition. First, many depositions last over extended periods of time, ranging from several hours to multiple days. The cumulative number of hours of deposition testimony alone represents a major mental challenge to a deponent, requiring incredible amounts of mental energy to perform optimally over time. Second, witness testimony requires high amounts of mental exertion. Many questions challenge the witness' memory of events, conduct, and decision-making, while other questions require strenuous document review and interpretation. Multiple cognitive activities can multiply the rate of cognitive fatigue. Third, deposition testimony carries with it a significant biomechanical/physical investment by the witness. Contrary to popular belief, the act of sitting upright and maintaining professional demeanor and body language for multiple hours is physically exhausting. Review of video-taped deposition testimony often illustrates that witnesses eventually resort to postures that are specifically designed to reduce the physical effort of sitting up straight, such as leaning back and/or slouching in the chair, as well as supporting their head with one or both hands. Finally, witnesses must maintain sustained mental effort during deposition in the face of an acute, negative stimuli. Specifically, acute negative stimuli including the three emotional attack methods can force a witness into fight or flight response patterns: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing him or her to depart high road, logical cognition and regress into low road, fight or flight cognition. This neurochemical process known as Amygdala Hijack, results in exponentially higher mental energy expenditure, as well as harmful deposition responses.[10]

Six years later, Holtzer et al's[11] study results suggest that cognitive fatigue should be defined as an executive failure to monitor performance over acute but sustained cognitive effort, which results in decline and more variable performance than the individual's optimal ability. Importantly, their study states that the body of research findings suggest that tasks that are mediated by the prefrontal cortex (PFC) may be more sensitive to the effect of cognitive fatigue. Put another way, tasks that require persistent prefrontal cortex activation may increase the risk of cognitive fatigue on performance (witness testimony). It has been demonstrated that effective witnesses are specifically trained to maintain prefrontal cortex activation throughout deposition, rather than regressing into subcortical (Amygdala) fight or flight information processing[12]. Therefore, this suggests that well-trained witnesses that are successfully utilizing their prefrontal cortex and providing more effective answers simultaneously become more susceptible to cognitive fatigue. In other words, effective witnesses will likely fatigue faster than ineffective witnesses due to intensive prefrontal cortex activation. Perhaps the most impressive finding of their study showed that in a relatively healthy sample of adults, ***only 35 minutes of testing stimuli exposure was necessary to elicit cognitive fatigue***. These findings have huge implications on the philosophy of when witnesses should take breaks during deposition testimony, as they directly contradict the "*I ensure my witness takes a break every hour*" philosophy adopted by most attorneys.

Finally, Borragán et al's[13] literature review shows that cognitive fatigue is associated with significantly impaired cognitive control, high-level information processing, and sustained attention. Additionally, they suggest that exposure to High Cognitive Load (HCL) levels, conditions where the time to process ongoing cognitive demands is restricted, also leads to increased cognitive fatigue. Many plaintiff attorneys deliberately try to restrict the amount of time a witness has to fully process a question by using the tactic of "rapid fire" questioning. This occurs when plaintiff's counsel attempts to speed up the question-answer sequence by rapidly asking the next question the moment the witness has finished their answer. Most witnesses attempt to match the questioner's speed, resulting in a high-pressure situation that can quickly fatigue a witness. This time restriction tactic deserves careful attention, as it shows that witnesses can experience cognitive fatigue not only over the course of the deposition day, but also during the actual question-answer sequence much earlier in the deposition day. This means that cognitive decline can easily occur in "short" depositions that are scheduled for 2-3 hours. Many defense attorneys may give the witness a false sense of security if they inform the witness that cognitive fatigue will not play a significant role in a shorter deposition.

DEPOSITION-SPECIFIC FACTORS THAT EXACERBATE COGNITIVE FATIGUE

- Negative Reinforcement—The concept of negative reinforcement is poorly understood by attorneys and is generally defined by a response or behavior that is strengthened by stopping, removing, or avoiding a negative outcome or aversive stimulus. In a deposition setting, this occurs when a witness repeatedly provides long, wordy, often defensive explanations (response) in an effort to avoid difficult questioning by the plaintiff attorney (adverse stimulus). In other words, the plaintiff represents an adverse stimulus to the witness; thus the witness tries to remove the adverse stimulus by excessive explanation. The human brain is pre-wired to use negative reinforcement in adversarial discussions, as bilateral discussion of an issue often resolves the tension involved in such a discussion. Deponents are notorious for thinking "if I just explain myself to this reasonable attorney, he/she will back off and the deposition will be over sooner." In reality, it is well known that more explanation will not only make the deposition longer but will undoubtably leave the witness open to more intense attack. Importantly, the mental effort involved in excessive explanation during deposition is a key causative factor of witness cognitive fatigue. Witnesses that are instructed to repeatedly "pivot" away from unfavorable facts or allegations during deposition (i.e., "Yes, but . . ..No, because . . .) tend to fatigue quickly and eventually regress into fight or flight response patterns.[14] While witnesses may be told by defense counsel "don't try to win the deposition because you can't," the witness' brain is pre-wired to do the opposite, thanks to negative reinforcement. Fortunately, advanced neurocognitive witness training exists to rewire the witness' brain to disable negative reinforcement circuitry.

- Virtual Testimony—One of the authors can attest that the phenomenon known as "Zoom Fatigue" is real. Specifically, this refers to the (negative) impact of technology and virtual communication on the human brain. Fosslien and Duffy[15] hypothesize that virtual videoconferencing requires extensive amounts of focus and attention that is simply not necessary during face-to-face communication. They believe that virtual communication requires a "constant gaze" at a computer screen, which makes people uncomfortable and tired. Sander and Bauman[16] posit that "People feel like they have to make more emotional effort to appear interested, and in the absence of many non-verbal cues, the intense focus on words and sustained eye contact is exhausting." They suggest online meetings increase cognitive load, therefore leading to faster cognitive fatigue. Specifically, they note that the lack of non-verbal cues, anxiety regarding the reliability

of the technology, and the discomfort of constantly seeing one's own face during conversation are factors that lead to cognitive fatigue. While no empirical research exists to illustrate the causative factors of cognitive fatigue involved in online videoconferencing, it is evident that people experience faster levels of cognitive fatigue in a virtual setting. Therefore, one can conclude that witnesses participating in virtual depositions need more frequent rest breaks to prevent cognitive fatigue from impacting their performance.

- Reptile Questions–The plaintiff Reptile methodology at deposition is an intense neurocognitive manipulation attack that requires intense cognitive effort by the witness to not fall into the Reptile safety and danger rule traps. Specifically, Reptile attorneys use four devastating psychological weapons against defendant witnesses: Confirmation Bias, Anchoring Bias, Cognitive Dissonance, and the Hypocrisy Paradigm. The combination of these powerful psychological tactics does not merely influence witnesses; rather, it controls them. These psychological tactics are precisely what the Reptile plaintiff attorney use to destroy defendant witnesses at deposition[17]. Thankfully, advanced witness training methods have been developed and implemented to modify witness' cognitive patterns, making them impervious to the Reptile attacks. Witnesses who effectively and repeatedly diffuse Reptile attacks during deposition will fatigue at a higher rate than the untrained witness, as their cognitive effort remains at maximum capacity for the entirety of the process. Therefore, strategically determining the time intervals for breaks is crucial to witness success throughout the full deposition.

- Litigation Stress–Interestingly, Matthews et al[18] defines cognitive fatigue as the result of an *individual's evaluation of task demands* and not as high workload per se. This may play a large role in deposition performance, as so many witnesses enter the process with feelings of inadequacy and/or feeling overwhelmed with the legal process. Witnesses who enter the deposition process with high levels of fear and anxiety that are related to the legal process will wear down quickly during testimony. In fact, many witnesses experience intense litigation stress due to unrealistic and inaccurate assumptions about a case. For example, some witnesses feel that if they perform poorly at deposition it will result in termination of their job, loss of personal property, financial penalties, and even incarceration. These sources of stress are all unnecessary and will result in poor witness performance.

- Litigation Guilt/Sorrow–Many fact witnesses enter a deposition with intense feelings of guilt and sorrow towards a plaintiff that was killed or suffered a catastrophic injury. An obvious example of this are nurses who are deposed in birth injury/death cases. These are inherently emotional cases that put intense psychological pressure on witnesses. Another clear example are trucking cases in which a driver, passengers, and/or pedestrians are killed or suffer gruesome injuries. Such cases often have horrific post-accident pictures presented at deposition, and some even have dash-cam footage of the actual accident. Witnesses who are experiencing feelings of guilt and/or sorrow not only cognitively fatigue quickly at deposition but have significantly impaired attention and concentration. The "take a break every hour" philosophy will not be adequate for these emotional witnesses.

- Corporate Representatives - Most corporate representatives are exceptional cognitive multi-taskers, meaning they can process information at lightning speed as they listen and think simultaneously. While this skill is a perfect fit for an occupational setting, it represents an enormous vulnerability at deposition that plaintiff's counsel can quickly capitalize on. Specifically, the majority of errors made by corporate representatives at deposition are inadvertent cognitive errors caused by precisely this same multi-tasking, meaning that a) the witness never heard the full question, therefore giving an erroneous answer or b) the witness misinterpreted a key word or phrase in the question, leading to an incorrect, if not harmful, answer. The fact is, the deposition of a corporate representative, or any other witness for that matter, is inherently an unfair fight. Plaintiff's counsel has heavy weaponry: a list of pre-written questions, documents that are marked up with a highlighter and/or sticky notes, prior depositions, and maybe even a colleague to assist with those documents or additional questions. In turn, the deponent has their brain, a glass of water, and an attorney who usually can only object to "form," and cannot coach their witness. They have no pre-written answers to questions to refer to throughout the questioning, only clean documents without notes or highlights, and no one to turn to for help with an answer. Therefore, the environment is one of vulnerability, and not opportunity. With such an imbalance of resources, cognitive multitasking combined with a fast, efficient communication style leads to habitual errors, many of which can be harmful. This situation is ripe for witness cognitive fatigue. The human brain cannot maintain full attention and concentration for long periods of time without assistive resources, and corporate representative depositions can last for days. Maintaining full attention and concentration, without any resources (notes, phone, computer, etc.) to assist, requires an enormous amount of mental energy (far more energy than is required in an occupational setting, in which people are surrounded by multiple informational resources that greatly limit mental energy expenditure). Therefore, it is crucial that corporate representative witnesses receive breaks frequently, as these witnesses will experience fatigue-based decreases in attention and concentration, regardless of their level of intellect or preparation.

- Personal Issues Unrelated to Litigation—Social factors that are unrelated to the case mentally wear down witnesses at deposition. Examples include divorce, child/spouse/family illness, recent death of someone close, job loss, financial problems, other litigation, and drug/alcohol issues. Many witnesses are concurrently coping with one or more of these social issues at the time of deposition. It is the authors' experience that the COVID-19 pandemic has increased the intensity and prevalence of these social issues. The key for defense counsel is to identify the presence of these issues well before the deposition is scheduled and ensure that a qualified consultant is on board to provide special assistance to the witness. Such witnesses are highly distractible at deposition, as their focus is often elsewhere. The combination of these negative social factors with the inherent stress of the deposition leads to rapid cognitive fatigue and responses that are harmful to the case. These witnesses don't have the cognitive or emotional resources necessary to sustain acceptable deposition performance for one hour and will require more frequent breaks.

PREVENTING WITNESS COGNITIVE FATIGUE

There is no scientific literature that suggests that the "take a break every hour" philosophy is an effective tactic to protect a witness' cognitive abilities and optimize deposition performance. Rather, it is the authors' scientific and experiential opinion that for even the best-prepared, intelligent, well-intentioned witness, a break should be taken every 45 minutes. The scientific literature clearly demonstrates that cognitive fatigue significantly impairs attention and concentration and can begin as early as 35 minutes into a task requiring persistent mental effort. Providing the deponent a break every 45 minutes can not only prevent cognitive fatigue, but also doesn't appear unusual or inappropriate (vs. a break every 20-30 minutes). Forcing a break during deposition every 45 minutes (compared to every hour) gives the witness a substantial advantage throughout the process, as this break interval maximizes attention and concentration levels while simultaneously avoids cognitive fatigue impairments. To use an auto racing analogy, the witness' "pit window" is at the 40-50 minute mark once questioning starts or restarts.

How can the breaking every 45 minutes be done practically at deposition? When the deposition begins, a routine opening will include the statement that breaks can be taken whenever the witness wants and that they just need to answer the pending question prior to the break. Therefore, during deposition preparation, it is wise to advise the client to ask for a break every 45 minutes if defense counsel hasn't already done so. Importantly, witnesses should also be instructed to ask for a break even sooner than the 45 minute mark if they feel their attention and concentration fading. If plaintiff's counsel objects, defense counsel can remind them of their earlier opening instruction regarding breaks. Technically, if the breaks are not taking away from their deposition time, plaintiff's counsel does not have grounds to object. Another way to ensure defense witnesses get more frequent breaks is to make sure that the break occurs in the next hour on the clock, rather than the same hour. For example, if a questioning restarts at 2:30pm, and the next break is requested at 3:15pm, it appears more reasonable compared to questioning restarting at 3:00pm and a break being requested at 3:45pm.

Importantly, witnesses with special physical and/or mental health circumstances require breaks even more frequently for optimal performance. While this will surely aggravate opposing counsel, it is absolutely necessary in preventing cognitive fatigue for these witnesses with additional cognitive, emotional, and/or physical challenges. For example, witnesses who are experiencing chronic pain from a medical condition or injury may not be able to sit in a chair for 45 minutes without experiencing significant pain. Female witnesses who are pregnant often need to take breaks at a higher frequency. Witnesses with significant emotional problems, whether case-related or not, need breaks at a higher frequency than typical witnesses. Finally, elderly witnesses, for both mental and physical reasons, may need more frequent breaks than the average witness. Defense counsel should warn plaintiff's counsel at the start of the deposition that more frequent breaks will be necessary, given these special health circumstances.

An important secondary question is: how long should the break be to fully replenish the witness' cognitive resources? The empirical research in the area is not stellar; however, most studies report that breaks of all lengths were most beneficial for reducing fatigue and increasing vigor, and that the length of the break positively correlates with the quality of performance on subsequent tasks. In other words, a longer break tends to lead to higher performance when the task resumes. At deposition, attorneys and witnesses have schedules so breaks must be limited. However, the authors would argue that a 10-minute break is sufficient to replenish a witness' cognitive "fuel" while a 5-minute break is insufficient time for the witness' brain to refuel. Unfortunately, many witnesses take breaks that last 5 minutes or less purposely, to complete the deposition faster. This is a grave mistake, as insufficient breaks early in the deposition can lead to catastrophic responses in the afternoon as the witness has depleted their cognitive resources and is unable to process and answer questions effectively.

A final question related to breaks during deposition is: what should the witness do during the break? Bennett, Gabriel, and Calderwood[19] recently examined the impact that different "micro-break" durations and activities have on fatigue, vigor, and attention; they also looked at the effect of duration and break activity on "psychological detachment" from work tasks. They discovered that "detachment breaks," those types of breaks that focused on mentally disengaging from a task, of all lengths were most beneficial for

reducing fatigue and increasing vigor; they also more effectively allowed for mental disengagement from work tasks and were more relaxing and enjoyable than the other types of breaks (work-related/switching tasks and relaxation activities). These findings have huge implications on how defense counsel should handle a witness during the break, as performing more witness preparation during the breaks may very well be counterproductive. Rather, the science suggests that defense counsel allow the witness to "detach" from the deposition for at least 10-minutes before allowing the deposition to proceed. The take home message for defense counsel on this point is that the break needs to be a true break for the witness, rather than a coaching session. It is the authors' opinion that a witness must leave the deposition environment to be able to truly disengage and replenish their cognitive energy. This means not only leaving the conference room, but actually leaving the office altogether, preferably allowing the witnesses to go outdoors (weather permitting) to walk around and get fresh air. This change of environment will maximize cognitive replenishment.

CONCLUSION

The scientific literature shows us that the human brain is neurocognitively incapable of maintaining maximal levels of attention and concentration for 60 minutes, therefore the additional 15 minutes of questioning exposes the witness to needless and unnecessary vulnerability. Fatigue-based errors during deposition are 100% preventable if and only if the witness is given the opportunity to rest at the correct time intervals. A longer deposition, with appropriately spaced rest breaks, is much safer for the witness than a shorter deposition with inadequate rest breaks. Witnesses are notoriously incapable of determining when they need a break; therefore the defending attorney needs to be in charge of asking for breaks.

The first step in preventing nuclear settlements is preventing plaintiff's counsel from taking control of the trajectory of the case. Providing witnesses with advanced witness training that consists of cognitive, behavioral, and emotional components has proven to be highly disruptive to plaintiff attorneys who attempt to force a nuclear settlement by torpedoing defense witnesses one by one. This is particularly true in cases in which the plaintiff Reptile questioning methodology is employed. This paper now offers a scientifically supported weapon for defense counsel to use to further protect their clients at deposition. Going forward, preventing witness cognitive fatigue at deposition should be a top priority for defense counsel, as the economic risks are enormous.

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Iowa Supreme Court Gives "Shoulder" A Functional Definition Under Iowa Code Section 85.34(2)(N)

By Troy A. Howell, Lane & Waterman LLP[1]

Troy A. Howell

In 2017, the legislature amended the Iowa Workers' Compensation Act enacting various new provisions. One of the most controversial provisions was adding "shoulder" to the list of scheduled member injuries contained in Iowa Code section 85.34(2). Iowa Code section 85.34(2)(n) now states the "loss of a shoulder" shall be based on four hundred weeks whereas previously a shoulder injury was a whole person (body as a whole) injury subject to the heightened industrial disability (loss of earning capacity) analysis. However, the Iowa legislature did not define "shoulder" or otherwise indicate what constitutes the "shoulder." On April 1, 2022, the Iowa Supreme Court issued its unanimous opinion in *Chavez v. MS Technology LLC*, ____ N.W.2d ____, 2022 WL 981813 (Iowa 2022), defining what constitutes the "shoulder" under Iowa Code section 85.34(2)(n).[2]

In *Chavez*, claimant was wringing out a mop when she heard a pop and felt immediate pain in her right shoulder. *Id.* at 1. Upon evaluation by an orthopedic surgeon, claimant reported experiencing pain on both the anterior and posterior aspect of her shoulder and pain radiating down her right arm. *Id.* The orthopedic surgeon ordered an MRI which revealed "a large full thickness tear of the rotator cuff with retraction to around the level of the glenoid," "severe AC arthrosis," "[b]iceps tendonitis and tearing," "mild supraspinatus atrophy," and "acromial spurring." *Id.* On the orthopedic surgeon's recommendation, claimant underwent a "[r]ight shoulder arthroscopy with arthroscopic repair of the rotator cuff tendon of the supraspinatus, infraspinatus, and subscapularis tendons; extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial depression." *Id.*

Claimant filed a petition with the Iowa Workers' Compensation Commission. *Id.* at 2. The primary dispute at hearing was whether claimant's rotator cuff injury resulted in an unscheduled industrial disability or a scheduled member injury to her shoulder in light of the 2017 amendment to the Iowa Workers' Compensation Act. *Id.* The deputy commissioner concluded claimant incurred an unscheduled injury to the body as a whole. *Id.* Defendants appealed to the commissioner, with the commissioner concluding claimant's injury was compensable as a scheduled member shoulder injury rather than an unscheduled whole body injury. *Id.* On judicial review, the district court affirmed the commissioner's appeal decision. *Id.* The Iowa Supreme Court retained claimant's appeal. *Id.*

The Court began its analysis by stating "[t]he dispositive issue in this case is the definition of 'shoulder' under Iowa Code section 85.34(2)(n)." *Id.* at 3. Claimant contended "shoulder" under section 85.34(2)(n) should be narrowly defined to only include injuries located within the glenohumeral (shoulder) joint which is "a ball-and-socket synovial joint between the head of the humerus and the glenoid cavity of the scapula." *Id.* (citation omitted). Under claimant's argued definition, damage to the proximal side of the joint would be considered an unscheduled whole body injury, damage to the distal side of the joint would be considered a scheduled member arm injury, and damage within the glenohumeral joint would be considered a scheduled member shoulder injury. *Id.* On the other hand, defendants requested the Court affirm the commissioner and district court, which both defined shoulder under section 85.34(2)(n) more broadly to include claimant's injury by defining "shoulder" as the shoulder structure, including injuries to the tendons, ligaments, muscles, and articular surfaces connected to the glenohumeral joint. *Id.* Claimant argued the commissioner and district court rulings that her rotator cuff injury is a "shoulder" injury under section 85.34(2)(n) are incorrect "because every rotator cuff muscle attaches proximally-to the glenohumeral joint." *Id.* at 4.

The Court concluded section 85.34(2)(n) "is ambiguous because reasonable persons can—and do—disagree on the statutory meaning of 'shoulder,' as the deputy commissioner applied Chavez's proffered definition while the commissioner and district court applied Appellees' proffered definition." *Id.* With the meaning of "shoulder" in Iowa Code section 85.34(2)(n) being ambiguous, the Court relied on its rules of statutory construction to guide its interpretation of "shoulder" under section 85.34(2)(n). *Id.* After considering its rules of statutory construction, the Court concluded:

> "shoulder" under section 85.34(2)(n) must be defined in the functional sense to include the glenohumeral joint as well as all of the muscles, tendons, and ligaments that are essential for the shoulder to function.

Id. Therefore, the Court affirmed the commissioner and district court rulings that claimant sustained a scheduled member injury to her shoulder under section 85.34(2)(n). *Id.* at 6.

The Court stated that viewing section 85.34(2) in its entirety, "it is apparent that the legislature did not intend to limit the definition of 'shoulder' solely to the glenohumeral joint." *Id.* at 5. The Court noted the legislature refers to the joints of certain body parts, including the "shoulder joint," in other subsections yet the legislature chose not to include the term "joint" when adding "shoulder" to the list of scheduled injuries. *Id.* (citation omitted).[3] The Court stated:

> If the legislature only wanted to encompass the glenohumeral joint under section 85.34(2)(n), it could have expressly stated so as it did when referring to joints in other subsections. Yet, it chose to list "the loss of a shoulder" as a scheduled injury under section 85.34(2)(n) instead.

Id.

The Court noted it has previously explained that the "loss" referenced in Iowa Code section 85.34(2) includes the "loss of the use of a scheduled member." *Id.* (citation omitted). The Court stated "loss of the use of a scheduled member" is akin to "the loss of function." *Id.* The Court quoted the following in concluding "the shoulder cannot function to its fullest extent without the muscles that comprise the rotator cuff":

> The functional shoulder is . . . not confined to the single anatomical joint known as the "shoulder" or glenohumeral joint, but is a system which in its entirety has the largest range of motion of any joint in the human body.

Id. (citation omitted). The Court further noted that defining "shoulder" in the functional sense under section 85.34(2)(n) best achieves the statute's purpose and this functional definition also aligns with the AMA's Guides to the Evaluation of Permanent Impairment, Fifth Edition, which is the guide used to determine the extent of loss or percentage of permanent partial impairment under section 85.34(2). *Id.* The Court pointed out that the AMA Guides examine the shoulder's active range of motion to evaluate impairment by measuring flexion, extension, internal and external rotation, abduction, and adduction; therefore, it is impossible to evaluate shoulder impairment without some evaluation of the muscles, tendons, etc. that make the shoulder function. *Id.*

Finally, the Court noted "it is clear from Chavez's medical records that her rotator cuff injury is a 'shoulder' injury." *Id.* at 6. The Court highlighted numerous instances in claimant's own medical records where claimant's injury was referred to as a "shoulder" injury or issue. *Id.* at 5-6. As the Court stated, "Chavez's medical records show that the physicians who treated or assessed Chavez's injury considered it to be a shoulder injury." *Id.* at 6.

With *Chavez*, the Court has now clarified that "shoulder" under Iowa Code section 85.34(2)(n) includes the glenohumeral joint and "all of the muscles, tendons, and ligaments that are essential for the shoulder to function." Therefore, those defending workers' compensation shoulder injuries should aim to show, through expert opinion and otherwise, that the injured part of the anatomy, i.e. the muscle, tendon, ligament, etc., is "essential for the shoulder to function." Under *Chavez*, if the injured part of the anatomy is shown to be essential for the shoulder to function, the injury should be found to be a scheduled member shoulder injury under section 85.34(2)(n).

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1 Troy A. Howell is a partner at Lane & Waterman LLP in Davenport where he has practiced in the areas of civil litigation, including commercial and personal injury defense, and workers' compensation defense for over twenty years. He is listed by *Great Plains Super Lawyers* and *The Best Lawyers in America* for Workers' Compensation and Litigation—Labor and Employment respectively and is a Fellow in the Iowa Academy of Trial Lawyers.

2 On that same date, the Court also issued its unanimous opinion in the companion case of *Deng v. Farmland Foods, Inc.*, ____ N.W.2d ____, 2022 WL 981829 (Iowa 2022). In *Deng*, the Court affirmed the district court's judgment classifying the rotator cuff injury as a scheduled member "shoulder" injury under section 85.34(2)(n) for the reasons set forth in *Chavez*. *Id.* at 1. Neither Justice Mansfield nor Justice McDermott took part in either opinion.

3 As noted by the Court, "shoulder joint" is specifically used in the subsection immediately prior to section 85.34(2)(n). *See* Iowa Code § 85.34(2)(m) ("The loss of two-thirds of that part of an arm between the *shoulder joint* and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks."); (emphasis added).

New Member Profile

Natalie D. Sieren

Natalie D. Sieren is a civil litigator at Harrison, Moreland, Webber & Simplot, P.C. in Ottumwa. Natalie practices in insurance defense and general civil litigation. She earned her undergraduate degree in History from Grand View University in 2010. Natalie worked as a Claims Representative in disability insurance and workers' compensation for eight years before attending law school. Natalie is a 2021 graduate of Drake Law School. During her 3L year at Drake Law School, Natalie was a Student Attorney in the General and Advanced Civil Practice Clinic at the Drake Legal Clinic.

Natalie is a native of Ankeny, Iowa. After graduating from law school, Natalie traded the city for rural life. Natalie, a self-proclaimed coffee fanatic, now resides in southeast Iowa with her husband Josey, daughter Isabelle (5), and four-legged sidekick Maya. When she is not acting as a personal chef to her 5-year old food critic (who has an astonishingly discerning pallet for macaroni and cheese), Natalie spends her free time occupying the buddy seat in her husband's tractor during planting and harvest and dreaming up home renovation projects for the farming off season. Natalie is also an owner and avid fan of the Green Bay Packers.

Natalie is enjoying the variety of small-town practice and having the chance to jump feet first into the court room.

Case Law Update

By Austin McMahon

Austin McMahon

FLOYD COUNTY MUTUAL INSURANCE ASSOCIATION ON BEHALF OF MCGREGOR V. CNH INDUSTRIAL AMERICA LLC, 18 F.4TH 1024 (8TH CIR. 2021) (APPLYING IOWA LAW)

WHY IT MATTERS

According to the 8th Circuit in this case, the Iowa Supreme Court had "not yet decided whether a plaintiff may recover under a theory of product liability for damage to the product itself when the plaintiff also seeks recovery for damage to other property." Ultimately, the 8th Circuit predicted that the Iowa Supreme Court would hold that the economic loss doctrine does not permit recovery for the product itself even where the claim sounds in tort and other property was damaged.

FACTUAL & PROCEDURAL BACKGROUND

In 2017, a tractor manufactured by CNH Industrial America LLC caught fire. Floyd County Mutual Insurance Association sued CNH in federal court under a theory of product liability, claiming that its insureds owned the tractor and other property on the tractor, both of which were damaged in the fire, and that Floyd County Mutual was subrogated to its insureds' claims against CNH because Floyd County Mutual had paid its insureds' claim for the damage.

Floyd County sought $145,000.00 for damages sustained to the tractor and $22,787.81 for damages to the other property. Floyd County Mutual invoked 28 U.S.C. § 1332 as the basis for the district court's subject-matter jurisdiction. However, the district court concluded the amount-in-controversy requirement was not met because the damages for the tractor itself were not recoverable due to Iowa's economic loss rule and the value of the damage to the other property ($22,787.81) did not exceed $75,000. Accordingly, the district court dismissed the case for lack of subject-matter jurisdiction.

HOLDING

The 8th Circuit affirmed the lower court's ruling that Floyd County could not recover damages for the tractor due to the economic loss rule.

ANALYSIS

Floyd County argued that the Iowa Supreme Court decided this issue, albeit implicitly, in *American Fire & Casualty Co. v. Ford Motor Co.* 588 N.W.2d 437, 438 (Iowa 1999). In that case, the Iowa Supreme Court permitted a plaintiff to recover under facts, as described by the Court, where a "truck caught fire causing property damage to the truck and its contents." *Id.* Floyd County argued that this language indicates that a plaintiff can recover for the product itself when damage occurs to other property. After examining other language used in the opinion, the 8th Circuit concluded that it was not clear as to whether the plaintiff sought recovery for both the truck and its contents or just the truck. Resorting to the parties' briefing, the 8th Circuit determined that the plaintiff in that case only sought recovery for only the truck itself. Therefore, the 8th Circuit found that *American Fire* was not informative on this issue.

Moreover, the 8th Circuit noted that this aspect of *American Fire*—that a plaintiff could recover damages for the product itself so long as the claim sounded in tort—was abrogated in *Determan v. Johnson*, and that *Determan* also involved a plaintiff seeking recovery only for the product itself. *See* 613 N.W.2d 259 (Iowa 2000).

Therefore, the 8th Circuit concluded that neither *American Fire* nor *Determan* addressed "the situation that we face here," and that the "Iowa Supreme Court has not yet decided whether a plaintiff may recover under a theory of product liability for damage to the product itself when the plaintiff also seeks recovery for damage to other property."

Ultimately, predicting how the Iowa Supreme Court would rule on the issue, the 8th Circuit predicted that the Iowa Supreme Court "would hold that the economic-loss doctrine permits recovery only for the other property and not for the product itself." The 8th Circuit found that this holding would be consistent with the Iowa Supreme Court's rationale for the economic loss rule, namely, that contract law is better suited than tort law to allocate the risk that a product will lose its value by ceasing to function properly. The 8th Circuit also noted that permitting a plaintiff to recover for damage to the product itself if but only if the plaintiff also seeks

recovery for personal injury or damage to other property would result in a windfall for plaintiffs fortunate enough to incur such additional injuries.

MENGWASSER V. COMITO, 970 N.W.2D 875 (IOWA 2022)

WHY IT MATTERS

The Iowa Supreme Court emphasizes that Rule 1.500(2)(b) requires an expert report only for retained or specially retained experts witnesses and that this rule is focused on how the expert came to be involved, not when the expert developed their opinions.

"if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Iowa R. Civ. P. 1.500(2)(b). It is a rule focused on how the expert came to be involved, not when the expert developed their opinions. *See McGrew*, 969 N.W.2d at 321–23.

FACTUAL & PROCEDURAL BACKGROUND

In 2015, the plaintiff was rear-ended while stopped at a traffic signal. After visiting the emergency room and her regular doctor, the plaintiff visited a chiropractor. The plaintiff visited the chiropractor approximately one dozen times in 2015. Thereafter, visits were sporadic, but the plaintiff did see the chiropractor on an "as needed" basis up until the date of trial.

The plaintiff did not name the chiropractor as a 1.500(2)(b) specially employed or retained expert witness and a report from the chiropractor was not disclosed by the deadline for 1.500(2)(b) expert witnesses. Ultimately, a summary of the opinions held by the chiropractor was disclosed pursuant to Rule 1.500(2)(c)(2). In the summary, the chiropractor opined that the accident was the cause of certain injuries sustained by the plaintiff and that the injuries were permanent. These opinions did not appear in any of the chiropractor's medical records or other records pertaining to plaintiff's treatment. The defendants moved to strike the report as to these opinions, arguing that the chiropractor's testimony must be limited to opinions that the chiropractor developed during treatment as evidenced in the plaintiff's medical records.

The district court agreed and excluded the chiropractor's report as to causation and permanency of injury. The district court reasoned that the chiropractor's opinions as to causation and permanency were not formed or stated during the course of treatment of the plaintiff and were not disclosed or even revealed in the chiropractor's medical records as of plaintiff's December 26, 2018, deadline for making expert disclosures.

The plaintiff appealed and the Iowa Court of Appeals affirmed. The Court of Appeals held that the chiropractor could not offer expert opinions that were not developed during treatment unless those opinions were disclosed in a rule 1.500(2)(b) written report. The chiropractor did not submit such a report, and the Court of Appeals concluded that his actual medical records did not directly tie his treatment to any cause or tie the plaintiff's injuries and/or the permanency of the injuries to the 2015 car accident.

HOLDING

The Iowa Supreme Court held that the district court and the Iowa Court of Appeals erred in its application of Rule 1.500(2)(b) and Rule 1.500(2)(c)(2) and held that the chiropractor was a treating physician and that his summary report was properly disclosed.

ANALYSIS

The Iowa Supreme Court stated that Rule 1.500(2)(b) is a rule focused on *how* the expert came to be involved, not *when* the expert developed their opinions. Because the chiropractor was certainly not retained for litigation purposes, the chiropractor was a treating physician. Thus, it was immaterial whether the opinions in the summary report appeared in the medical records pertaining to the plaintiff's treatment, and the deadline for Rule 1.500(2)(b) disclosure did not apply to the chiropractor.

The Iowa Supreme Court noted that although the chiropractor was not required to disclose a Rule 1.500(2)(b) report, the chiropractor was required to disclose a Rule 1.500(2)(c)(2) summary report. The Iowa Supreme Court also held that the summary report was timely disclosed because the scheduling order was silent on Rule 1.500(2)(c)(2) summary reports, and the summary report was disclosed in accordance with the default deadline under Rule 1.500(2)(d) which provides for disclosure 90 days prior to trial.

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IDCA Annual Meetings

September 15–16, 2022

58TH ANNUAL MEETING & SEMINAR

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