

**Iowa Case Law Review**  
**Grefe & Sidney, P.L.C. - 2009 Spring Seminar**

John Werner and Adam Zenor

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## I. TORTS

### A. Negligence

*Sweeney v. City of Bettendorf*, --- N.W.2d ---, 2009 WL 635137 (Iowa)

Facts: Tara Sweeney and her mother, Cynthia Sweeney, sued the City of Bettendorf and Bettendorf Parks and Recreation for negligent supervision, after Tara, an eight year old girl, was struck by a flying baseball bat at a minor league baseball game while on a field trip sponsored by Bettendorf Parks and Recreation. The City of Bettendorf (“City”) filed a motion for summary judgment seeking dismissal of the claims on the ground that Tara’s mother signed a permission slip, which constituted a forcible anticipatory release of future claims against the City. The trial court granted the City’s motion and, alternatively, found insufficient evidence to demonstrate the City violated its duty of care to Tara. The Sweeneys appealed.

Holding: The Iowa Supreme Court held the district court erred in granting summary judgment on two grounds. First the Court held the permission slip did not bar the Sweeney’s negligent supervision claims. Second, the Court found the inherent risk doctrine did not limit the scope of the City’s duty to Tara. Nevertheless, the Court affirmed the district court’s grant of summary because the Sweeneys failed as a matter of law to adduce sufficient evidence to raise a triable issue with respect to whether adequate supervision would have prevented Tara’s injury. Stated differently, the plaintiffs failed to demonstrate that the alleged negligent supervision was the “cause in fact” of Tara’s injuries.

Analysis: With respect to the enforceability of the anticipatory release, the Court sets forth two cases of import: *Baker v. Stewarts’ Inc.*, 433 N.W.2d 706 (Iowa 1998) and *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993). The Court stated the anticipatory release in *Baker* was sufficient to bar liability because the general exculpatory provisions did not clearly cover the negligence of the party seeking to use the release as a shield. By contrast, the exculpatory anticipatory release in *Huber* was upheld, because the document in question emphasized it was a “covenant not to sue” and that it “released” the promoter of the particular auto race “from all liability... for all loss or damage or any claim... on account of injury...whether caused by the negligence of the Releasee or otherwise...” The Court found the permission slip in the instant case issued by the City was analogous to the document in *Baker*, as opposed to the document in *Huber*. As a result, the Court refused to bar the Sweeneys from liability based on the the anticipatory release because “the permission slip contained no clear and unequivocal language that would notify a casual reader that by signing the document, a parent would be waiving all claims relating to future acts or omissions of negligence by the City.”

With respect to the inherent risk doctrine, the Court reversed the trial court's grant of summary judgment because there was an issue of fact as to whether the City fulfilled its duty to act reasonably, under all the facts and circumstances, to protect Tara's safety at the ballpark—specifically with respect to where Tara was seated, which was along the third base line, without any protective netting or the like and absent any meaningful supervision.

With respect to the Court's affirmance of the trial court's grant of summary judgment as to the negligent supervision claim the Court reasoned the plaintiffs would be unable to show anything beyond a mere conjecture or speculation that a more meaningful supervision from the City staff would have prevented the incident. The Court suggested it was unlikely an adult supervisor would have had the courage and verve to thrust himself or herself into harm's way and knock down the projectile.

## **B. Wrongful Discharge**

### ***Jasper v. Hizam, Inc.*, --- N.W.2d --- , 2009 WL 151568**

Facts: In August of 2003, Kimberly Jasper began her employment as the director of a child care facility called Kid University ("Center"). After a short time, the president of the corporation, Mohsin Hussain, informed Jasper the Center was not making enough money to justify the size of the staff. Jasper responded by telling Hussain that any staff cuts would place the Center in jeopardy of violating state regulations governing the minimum ratios between staff and children. Jasper's comments, in fact, were not the first time Hussain was made aware of the State of Iowa's staff-to-child ratio requirements, as he was also informed of the same by a compliance official from the Iowa Department of Human Services and a private consultant. Nevertheless, the staff-to-child ratio issue became a source of friction between Jasper and Hussain. Hussain wanted to reduce staff to decrease expenses; Jasper insisted the Center's current staff was necessary to meet the minimum staffing ratios under the State's regulations. Hussain later proposed Jasper and her assistant director begin to work as staff in the classrooms occupied by the children as a means to reduce staff and expenses. Jasper objected and was terminated soon thereafter. The termination was accompanied by a written letter listing the reasons for termination. Jasper sued the Center and Hussain individually for, among other things, the tort of wrongful discharge in violation of public policy. At trial, Jasper presented evidence that the center violated staff-to-child ratios shortly after she was terminated. A jury returned a verdict in favor of Jasper on her wrongful discharge in violation of public policy claim as to both the center and Hussain. After the verdict was returned, the trial court granted the center's motion for a directed verdict, reasoning Jasper failed to establish the existence of a well-recognized and clearly defined public policy to support her cause of action and that she failed to present substantial evidence to show she was terminated for refusing to violate the state staffing regulations. Jasper appealed, and the Iowa Court of Appeals reversed the district court, finding a clear public policy existed with respect to staffing and Jasper presented substantial evidence to support the jury verdict. Kid University sought further review, arguing not only that no clear public policy exists with respect

to staffing ratios and that Jasper presented insufficient causation evidence, but also that only the corporation as the employer can be liable for claims of wrongful discharge.

**Holding:** The Iowa Supreme Court held the Iowa Court of Appeals did not err in reversing the district court with respect to the finding that administrative regulations may provide a source for public policy and that causation evidence was sufficient to support the jury's finding of liability on the tort of wrongful discharge. Additionally, the Court of Appeals did not err in rejecting Hussain's alternative argument that a corporate officer may not be held personally liable for the tort of wrongful discharge.

**Analysis:** Iowa law recognizes the public policy exception to the employment-at-will doctrine. Put simply, an employer may fire an at-will employee at anytime, for any reason, unless the reason violates a clearly established public policy. Prior to hearing this case, the Iowa Supreme Court derived public policy from the State's Constitution and statutes. Whether public policy should be permitted to be derived from administrative regulations was an issue of first impression for the Court. The Court reasoned that because administrative regulations reflect legislative goals in the "same way" a statute does, administrative regulations may be used as a source of public policy. However, the administrative regulation, like a statute, will only support a claim for wrongful discharge where the regulation is both "well recognized" and "clearly expressed." As applied, the Court determined violation of the specific staffing requirements at issue may give rise to the tort of wrongful discharge. Moreover, the Court determined ample circumstantial evidence existed for the jury to conclude Jasper's termination was caused by Jasper's refusal to cut staff levels below the ratio requirements. Additionally, the Court concluded individual liability could extend to individual officers of a corporation who authorized or directed the discharge of an employee for reasons that contravene public policy. Because Hussain's power to terminate Jasper's employment was tantamount to the corporation's power to do the same, Hussain may be held individually liable with respect to Jasper's wrongful discharge claim.

***Kern v. Palmer College of Chiropractic, 757 N.W.2d 651 (Iowa 2008)***

**Facts:** Dr. Gregory Kern worked as an Assistant Professor at the Palmer College of Chiropractic ("Palmer"), and was under written contract for employment from October 1, 1995, to September 30, 2000. The faculty handbook, which declared the responsibilities of Palmer faculty members, was fully incorporated in the parties' contract. The handbook delineated specific grounds for termination. The provision most relevant to this case is the provision within the handbook which provided for termination upon "Willful failure to perform the duties of the position to which the faculty member is assigned and/or willful performance of duty below accepted standards." On November 30, 1999, Kern's immediate supervisor, Dr. Donald Gran, requested all faculty members draft twenty-five questions suitable for the inclusion in the National Chiropractic Board Examination. Additionally, Gran requested all faculty members, including Kern, draft and submit a statement of professional goals for the year 2000. Gran's secretary and Gran sent

emails reminding faculty, including Kern, who had not completed the task of submitting goals as requested on November 30, 1999. The e-mails relayed the requirements for the goals and that the task was required to be completed “without fail” by March 31, 2000. Notwithstanding the deadline, Kern submitted handwritten National Chiropractic Board Exam questions and a single goal to Gran sometime between April 1 and April 4. Kern’s goal was to “restore all departments campus wide.” Kern’s goal was in reference to a Palmer policy change sometime in mid to late 1999 with respect to its curriculum. At Palmer, it was no secret Kern was dissatisfied with the curriculum change and believed it would negatively affect Palmer students. Kern voiced his concerns at Palmers Faculty Senate in the spring of 2000, and Dr. Riekman announced anyone who disagreed with the reorganization could chose to leave. It was Kern’s resistance which engendered comments to “watch his back” and disproportionate scrutiny of his use of sick days. In fact, Kern had used fewer sick days than the faculty handbook had authorized for the year. Gran also took issue with the substance of Kern’s stated goal and returned to Kern his proposed National Board questions because they were not properly formatted. Kern received help on the formatting issue and submitted the questions, but Gran reprimanded Kern stating that properly formatted exam questions had not been received. Kern found this reprimand to be disproportionate as he was aware of other faculty members who had submitted their proposed questions in handwriting and were not reprimanded. On April 13, 2000, Kern met with Gran and Dr. Kevin McCarthy, Vice President of Academic Affairs for Palmer College. During the meeting, Kern’s supervisors requested distain for Kern’s current stated goal to return to the former curriculum structure. After the meeting, Kern did not submit a new statement of goals. There was conflicting testimony in the record as to whether Kern was indeed required to submit a new statement of goals after the April 13 meeting. McCarthy sent a written ultimatum to Kern directing him to submit the exam questions and written goals to Gran by noon on June 14, 2000 or suffer dismissal. On June 14 Kern submitted the proposed National Board Exam questions and a note, which stated he had already submitted his Statement of Goals and offered to provide another copy if it had been misplaced. Kern was then terminated for “willful failure to perform the duties of the position for which the faculty member was assigned and/or willful performance of the duty below the accepted standard.” Kern appealed the dismissal to the Faculty Judiciary Committee, who found the dismissal was not justified by merely Kern’s failure to timely submit satisfactory professional goals in a proper format. Palmer’s President, however, disagreed with the Committee’s recommendation and issued a decision that Kern’s employment was properly terminated, citing the relevant provision in the faculty handbook. Kern sued, alleging breach of contract by Palmer and intentional interference with contractual relations by Percurco, Riekman and McCarthy.

Holding: The Iowa Supreme Court held the district court erred in award Palmer College summary judgment on Kern’s breach of contract claim. Additionally, the Supreme Court found the district court did not error in awarding Defendant Reikman and Defendant Percurco’s summary judgment motion on Kern’s intentional interference with contract claims. However, the Court found the trial court erred in granting Defendant McCarthy’s summary judgment motion with respect to Kern’s intentional interference with the contract claim.

Analysis: The parties agreed Kern’s employment contract was a “for cause” contract. As such, Palmer was restricted to terminating Kern’s contract for a particular cause for which the parties had contracted—whether Kern’s conduct amounted to a “willful failure to perform” or whether his performance of those duties as an assistant professor fell below “accepted standards.” The Iowa Supreme Court adopts the Michigan Supreme Court’s view on “for cause” contracts, which is the minority view. The minority view provides employees who have secured a contract “for cause” greater protection than the majority rule, which requires a reviewing court only review the determination decision for “objective reasonableness.” Under the minority rule the Court will permit the factfinder to determine whether the termination decision was indeed for the particular cause stated by the employer. The Court’s rationale in expanding the employee’s rights in this regard is that employers need not engage in for cause contracts, where an employee does engage in a for cause contract it provides him a greater protection than an employer’s promise to act in good faith and not be unreasonable, which is the standard for a mere satisfaction contract. Because the record did not clearly reflect Kern willfully failed to perform his duty to submit proposed National Board questions or willfully performed those questions below the accepted standards, the termination while appropriate under an “objective reasonableness” standard, it could not be upheld under the newly adopted Michigan rule.

### **C. Negligent Infliction Of Emotional Distress**

#### ***Moore v. Eckman*, --- N.W.2d ---, 2009 WL 563566 (Iowa)**

Facts: Anthony Moore suffered a tragic death after falling off the back of the car Nicole Eckman was driving. Carole Moore, Anthony’s mother, was not at the scene and did not see her son fall off the car and hit the pavement. Moore did, however, arrive at the scene immediately thereafter to witness her son lying in the street unattended and seriously injured. Carole filed a petition against Nicole Eckman, her parents, and Pekin Insurance Company (Pekin) claiming Nicole was negligent in the operation of her vehicle and caused Anthony’s death. Plaintiff’s petition included claims for negligence, loss of consortium, underinsured motorist coverage, and a bystander claim by Carole Moore for negligent infliction of emotional distress. Pekin sought summary judgment with respect to Carole’s bystander claim on the ground that the bystander claim should fail because Carole did not witness the accident itself. The district court denied Pekin’s motion, and Pekin appealed. After the Supreme Court granted Pekin’s Application for Grant of Appeal in Advance of Final Judgment and Stay of Proceedings.

Holding: The Iowa Supreme Court held the district court erred in denying Pekin’s motion for partial summary judgment with respect to Carole’s bystander claim.

Analysis: Iowa permits a claim for emotional distress as a result of an injury to another. That said, Iowa is cognizant of the fact that a defendant who acts negligently is only liable for injuries to others that are reasonably foreseeable. Indeed, foreseeability is the cornerstone of the *Palsgraf*

analysis. Moreover, the foreseeability element of *Palsgraf* is incorporated in the Iowa Supreme Court decision of *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981). While the Court was sure to note emotional distress would befall family members who failed to meet *Barnhill*'s onsite requirement, the Court nevertheless held fast to the elements set out in the *Barnhill* decision that family members who do not actually witness the accident were not entitled to emotional distress damages. Accordingly because the decedent's mother, Carole, did not observe the accident, Carole's claim for negligent infliction of emotional distress was barred.

#### **D. Invasion Of Privacy**

##### ***In re Marriage of Tigges*, 758 N.W.2d 842 (Iowa 2008)**

Facts: While married, Jeffery Tiggs surreptitiously videotaped his wife Cathy's activities within the marital home. Jeffery had concealed a camera in the couple's alarm clock. The scheme was discovered when Cathy observed Jeffery retrieving a cassette from the recording device. A confrontation ensued and the cassette was damaged. Cathy restored the tape and discovered it contained no graphic images, but she felt violated. Soon thereafter, Jeffery filed for a dissolution of marriage. Cathy, in response, claimed she was entitled to compensation for Jeffery's "toritous ... violation of her property rights" as a consequence of his taping of her bedroom activities. Cathy claimed tort damages in the dissolution action, and the district court agreed, entering judgment in the amount of \$22,500. Jeffery appealed, arguing the judgment against him for money damages must, as a matter of law, be reversed.

Holding: The Iowa Supreme Court held the district court did not err in awarding judgment on Cathy's invasion of privacy claim.

Analysis: This case presented an issue of first impression for the court – whether a spouse may claim an invasion of privacy by surreptitious videotaping of bedroom activities. The court concluded a spouse has a privacy interest in her activities in the bedroom. Additionally, the court concluded Jeffery's videotaping of Cathy's bedroom activities constituted an "intrusion on seclusion" because the Jeffery's intrusion was intentional and the intrusion would be "highly offensive to a reasonable person." The court dismissed Jeffery's argument that Cathy's publication voided her invasion privacy claim, stating an intrusion upon seclusion claim is not contingent upon publication.

#### **E. Fraudulent Misrepresentation**

##### ***Hammes v. JCLB Properties, L.L.C.*, 760 N.W.2d 210 (Iowa 2008)**

Facts: Plaintiffs, Kelly and Jesse Hammes, bought a single family residence from defendant JCLB Properties, L.L.C. (“JCLB”). Prior to the sale, members of JCLB knew that two glass block windows on the northern wall of the residence filled with water “similar to an aquarium.” In fact, JCLB members took other proactive measures to prevent water from filling the window wells and seeping into the basement of the residence. In May of 2005, JCLB signed a Residential Property Seller Disclosure Form and claimed no known water or other problems existed regarding the basement or foundation, that there was no known settling, flooding, drainage or grading problems and there was no known structural damage. Indeed, after plaintiffs moved into the house, during rainstorms and otherwise, water moved into the basement and saturated the basement carpet. In response, the plaintiffs filed suit against JCLB for fraudulent misrepresentation and statutory claim for damages under Iowa’s Real Estate Disclosure Act. The district court denied plaintiffs relief. Plaintiffs’ appealed, arguing reliance was not a prerequisite to recovery under its statutory claim for damages, that they were justified in relying on the disclosure statement from the seller, and that they had proved proximate cause in the amount of their damages.

Holding: The Iowa Court of Appeals held the district court erred in requiring the plaintiffs to prove the fraudulent misrepresentation element of reliance as a part of their statutory claim for damages based under Iowa Code Chapter 558. Similarly, the court of appeals held the district court erred in denying plaintiffs’ recovery on their fraud claim. Further, the court of appeals held the trial court erred in finding no proximate cause existed between the damages, current ongoing water infiltration and mold infestation problems, sustained by the plaintiffs and the misrepresentations and/or omissions by the defendant. Finally, the court of appeals determined the district court erred in barring plaintiffs’ damages on the ground that they were insufficiently proven.

Analysis: With respect to the court’s finding on Iowa Code Chapter 558A, the court was sure to excise the reliance requirement because of the “independent nature” of Chapter 558A vis-a-vis common law claims. Thus, a plaintiff suing under Iowa Code Section 558A.6, will not have to demonstrate reliance to recover the actual damages she suffered, so long as the seller lacks actual knowledge of the misstatement or omission within the disclosure. With respect to the fraudulent misrepresentation and the proximate cause issues on appeal, the court of appeals simply disagreed with the district court. First, on the fraudulent misrepresentation issue, the court of appeals could not understand how a plaintiff would not justifiably rely on a disclosure statement, especially one that is legally required for the protection of the purchasers. Moreover, to deny the plaintiffs in this case recovery under fraudulent misrepresentation which was simply not supported by the record, because there was no evidence the plaintiffs had equal knowledge of the water issues given their cursory inspection. With respect to the proximate cause issue, the court of appeals found that because the plaintiffs’ expert provided testimony as to the mold spore concentrations relationship to the moisture within the north basement wall, sufficient causation had been shown. Last, reversal was required on the issue of whether the plaintiffs had

demonstrated sufficient damages. The court stated some amount of speculation with respect to damages is expectable. The court clearly articulated where uncertainty is permitted and where it is disallowed. If it is speculative or uncertain as to whether damages have in fact been sustained, recovery must be barred. In contrast, if it is certain that damages had been sustained but the uncertainty lies in the amount of damages sustained only, then recovery for damages may be had. Accordingly, the plaintiffs were entitled to damages at an amount to be decided by the district court.

## F. Statute Of Limitations

### *Wilkins v. Marshalltown Medical and Surgical Center, 758 N.W.2d 232* (Iowa 2008)

Facts: Gerald Wilkins, an uninsured, roving utility pole inspector, appeared at the Marshalltown Medical and Surgical Center (MMSC) emergency room complaining of an abdominal pain, blood in his urine, and expectoration of blood from his respiratory tract. Dr. Lance VanGundy examined Wilkins and concluded Wilkins suffered from a number of difficulties including inflammation of the kidneys and presence of protein in his urine. The next day, Dr. Kraig Kirkpatrick, a radiologist, reviewed Wilkins' chest x-ray noting the most common source of Wilkins' medical issues would be prostate cancer. Kirkpatrick's x-ray report was approved by Dr. Mitchell Erickson and made part of Wilkins' file. After another trip to the emergency room the same day, Wilkins was transferred to the University of Iowa Hospitals and Clinics. While eighteen pages of medical records were forwarded to the UIHC, the Kirkpatrick report, noting prostate cancer likely, was not included. Dr. Lisa Antes discharged Wilkins diagnosing his symptoms as alcohol-induced gastritis. After numerous emergency room visits, Wilkins was brought to the emergency room once more on August 14. This time Wilkins could not move or feel his legs. At that time, Wilkins's medical records indicate a suspicion of prostate cancer with metastases to the lumbar spine and secondary paralysis. On February 27, 2004 Wilkins filed a petition against MMSC and specific medical care providers. Defendants denied liability and sought summary judgment on the ground that Wilkins's claims were barred by the relevant statute of limitations. In the alternative, defendants MMSC argued it had no legal responsibility for the actions of the emergency room physicians because the physicians were not employees of the hospital. The district court agreed, granting summary judgment to defendants on the statute of limitations ground finding that Wilkins "knew or should have known of his worsening cancer symptoms prior to February 27, 2002 more than two years before the commencement of his negligence action."

Holding: The Iowa Supreme Court held the district court erred in granting summary judgment to defendants based on the statute of limitations for medical malpractice.

Analysis: The Court determined the outcome in this case was controlled by the Court's decision in *Rock v. Warhank*. Here, Wilkins was not informed of his cancer until August 14, 2002. Because he was not informed of his cancer before that time, as the holding in *Rock* provides, he could not have been expected to know of his injury prior to his date of diagnosis. Consequently, because Wilkins's suit was filed within two years of the date upon which he was provided actual notice, the district court's grant of summary judgment was improper. Alternatively, MMSC argued the district court's grant of summary judgment was nevertheless proper because MMSC could not be said to be vicariously liable for the acts or omissions of the emergency room physicians. The court disagreed, citing the actual status of the agent, here the actual employer of the emergency room physicians, is immaterial under the ostensible agency theory of liability. Because MMSC did not take affirmative steps to combat the natural assumption that the emergency room doctors were hospital employees, the court concluded a reasonable jury could find MMSC was vicariously liable for the emergency room physician's negligence under theories of authority or ostensible agency.

***Rock v. Warhank*, 757 N.W.2d 670 (Iowa 2008)**

Facts: In May of 2002, Pamela Rock noticed a lump in her left breast. Rock called Dr. Warhank to have the lump examined. After examination and a referral for a bilateral mammogram, Dr. Warhank informed Rock the mammogram was normal and not to worry about the lump. In September of 2002, Rock was still concerned about the lump in her left breast. Rock saw Dr. Kelly for treatment. Kelly informed the lump was probably benign but nevertheless referred Rock to Dr. Congreve. Dr. Congreve performed a fine needle aspiration on September 25<sup>th</sup>, and two day later, Dr. Congreve informed Rock the test was "not normal." On October 8, 2002 Dr. Congreve performed the biopsy and diagnosed Rock with breast cancer. Rock filed suit against Dr. Warhank on October 5, 2004, claiming Warhank, among other things, failed to properly examine, diagnose, and treat the cancer in her left breast. Defendant, Dr. Warhank, filed a motion for summary judgment claiming the lawsuit was barred by the statute of limitations. The district court granted the defendant's motion. The Court of Appeals affirmed. Rock appealed to the Iowa Supreme Court.

Holding: The Iowa Supreme Court held the district court erred in granting defendant's motion for summary judgment on the ground that the lawsuit was barred by the statute of limitations.

Analysis: Iowa Code Section 614.1(9) requires medical malpractice claims be brought within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known...of the existence of, the injury...for which damages are sought. With respect to a negligent misdiagnosis case, a court considering a question as to whether a lawsuit is barred by the statute of limitations for a medical malpractice case must answer two questions: (1) when the "injury" occurred, i.e. when did the problem worsen so that it posed a greater danger to the plaintiff or required more extensive treatment; (2) when a claimant knew, or should have known, through reasonable diligence, of the injury and its cause in fact. Expert testimony is

required to determine when an injury occurred. Because the record was devoid of expert testimony as to when Rock's injury occurred, the Court was unable to answer the first question in the analysis. The Court, however, was able to partially answer the second question of the analysis. The Court held Rock could not have known, and should not have known, of her injury and its cause in fact until the day she was diagnosed with cancer, at the earliest. Contrary to the defendant's contentions, the Court found it inconsistent with the plain language of the medical malpractice statute of limitations to charge Rock – a layperson – with knowledge of facts before Dr. Congreve – an expert – was able to know the facts of the medical condition. To hold otherwise, according to the Court, would eliminate any reasonable application of the discovery rule in medical malpractice. Stated differently, to hold otherwise, would impute knowledge to a claimant prior to the date a plaintiff gained actual knowledge of the injury.

***Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008)***

Facts: On January 20, 2001, Juanita Buechel was found dead at her nursing care facility in Mediapolis, Iowa. The nursing care facility's administrator informed the family that Juanita was "found asphyxiated, lodged in the wide space between the mattress and the bed rails." An autopsy revealed the death was caused by accidental asphyxiation due to compression of the neck. Both the Des Moines County Sheriff ("Sheriff") and the Iowa Department of Inspections and Appeals ("Department") conducted investigations. Each found the death an accident, but the Sheriff's report indicated the beds may have to be changed and the Department's report indicated the mattress used in the bed was not correct size. The reports were provided to Juanita's family. On January 15, 2003, Juanita's estate and family members filed suit, alleging negligence against the nursing care facility and a product's liability claim against the unnamed manufacturer of the bed. The petition certified the manufacturer was unknown at the time, pursuant to section 613.18 of the Iowa Code. The manufacturers of the bed – Joerns Furniture Company and Sunrise Medical, Joerns's successor – were identified September 15, 2003, and the plaintiff's amended their petition to include the manufacturers on October 23, 2003. Thereafter, Sunrise filed a motion for summary judgment on the ground that the plaintiffs' suit against Sunrise was barred by the statute of limitations. The district court agreed.

Holding: The Supreme Court held the district court did not err in granting Sunrise's motion for summary judgment for the plaintiff's failure to file the lawsuit within the applicable two-year statute of limitations period.

Analysis: The parties agreed that the plaintiffs' filing of the lawsuit on January 15, 2003, tolled the statute of limitations until September 15, 2003 – the date plaintiff discovered the unnamed manufacturer's identity. Sunrise argued the statute of limitations began to run on January 20, 2001, when the family was informed of Juanita's asphyxiation. Stated differently, Sunrise argued the plaintiffs were placed on "inquiry notice" on January 20, 2001, which triggered the statute of limitations. The plaintiffs' argued there was a genuine issue of fact as to when the statute of limitations began, as they were unaware the bed was defective until they obtained counsel, who

was experienced in products liability claims. The Court disagreed with the plaintiffs' argument, stating: "All that is required is that a person has reason to believe that 'a problem' with the bed may be present that requires diligent investigation and that such diligent investigation would have revealed the existence of the defect." Accordingly, the plaintiffs had five days after learning the identity of the unknown manufacturer to file their amended petition, which was the time remaining on plaintiffs' limitations period.

### **G. Res Ipsa Loquitur**

#### ***Banks v. Beckwith*, --- N.W.2d ---, 2009 WL 484967 (Iowa)**

Facts: Dr. Beckwith attempted to surgically insert a catheter in Mr. Banks for the purpose of delivering chemotherapy to Banks. Banks was placed under general anesthesia while Beckwith attempted to place the catheter in the subclavian vein in the tight area between the clavicle and first rib. Sometime thereafter it was discovered Banks's catheter had fractured and a piece of the catheter had made its way to Banks' heart. As a result, Banks underwent open heart surgery to remove the piece of the fractured catheter. The catheter then was shipped to the manufacturer for testing to determine the cause of the fracture. The manufacturer concluded the catheter itself was not defective but fractured as a result of improper placement. Banks, therefore, filed a lawsuit against Dr. Beckwith and her employer, the Iowa Clinic, P.C., alleging negligence in implanting the catheter. Banks's petition stated he would rely upon the doctrine of res ipsa loquitur to prove his claim. At trial, however, the trial court denied Banks's request to provide a res ipsa loquitur instruction stating: "I think all the evidence in the record is that the fracture of a catheter is a rare occurrence...just because it is rare doesn't mean that we get to the point of the general negligence res ipsa instruction." Without the instruction, the jury found the defendants were not at fault. Banks appealed the trial court's ruling with respect to the res ipsa instruction.

Holding: The Supreme Court held the trial court erred in denying the plaintiff's request for a res ipsa instruction on these facts.

Analysis: A res ipsa instruction is warranted where the facts are such the jury may infer the cause of the injury from the naked fact of the injury itself. In other words, the instruction is proper where a particular resulting injury is so inextricably tied to a particular act of negligence. Res ipsa, of course, does not relieve the plaintiff from proving negligence, but, rather, the specified injury which occurred would not have occurred but for some impliedly negligent act. To achieve a res ipsa instruction, a plaintiff need not show with absolute certainty a particular effect was a product of negligence, as that would eviscerate the rationale for the res ipsa doctrine. Indeed, the crux of the inquiry is whether plaintiffs have demonstrated by substantial evidence, that foundational facts exist to generate a jury question as to the propriety of verdict. Stated differently, to achieve a res ipsa requirement, a plaintiff is not required to eliminate with certainty all other possible causes or inferences, but rather it is more likely than not the injury

was caused by an unspecified negligence. Ultimately, the court found that the trial court improperly weighed the evidence in disallowing the res ipsa instruction as opposed to analyzing whether the res ipsa instruction was warranted.

## H. “Bad Result” Jury Instruction

### *Smith v. Koslow, 757 N.W.2d 677 (Iowa 2008)*

Facts: Daryl Smith died during surgery to repair an abdominal aortic aneurysm and an iliac artery aneurysm. Dr. Allen Koslow, M.D., performed the initial angioplasty by using the dotter technique, which involved insertion of sequential retinal dilators to widen the artery prior to inserting the stint at the location of the aneurysm. After inserting the dilators, however, Dr. Koslow was unable to pass the stint graph through the artery. Smith suffered internal bleeding and, notwithstanding Dr. Koslow’s efforts to locate and stop the bleeding, Smith died on the operating table. Smith’s wife, Shirley, brought an action against Dr. Koslow and the Iowa Heart Center for negligence. She claimed Koslow breached the acceptable standard of medical care by using dilators to widen the artery instead of using balloon angioplasty. She claimed the dilators caused the artery to rupture. At trial, the court provided the jury the “bad result” jury instruction. The instruction reads as follows: “While the result alone is not, by itself, evidence of negligence, yet the same may nevertheless be considered, together with other facts and circumstances disclosed by the evidence in a given case in determining whether or not such a result is attributable to negligence or want of skill.” The jury returned a defense verdict. Smith appealed, arguing the trial court erred in giving the “bad result” instruction to the jury.

Holding: The Iowa Supreme Court held the district court did not error in providing the “bad result” instruction to the jury.

Analysis: The Court reasoned the “bad result” instruction was appropriate because it is a correct statement of the law. The Court, however, noted that although the instruction is a correct statement of law, the instruction itself would constitute reversible error in a particular case if it would unduly emphasize particular theory or otherwise distract the jury in performing its responsibilities to decide the issues of the case. Here, the Court concluded, the instruction did not unduly emphasize the defendant’s theory of the case and thus the instruction was appropriate.

## IX. CONTRACT

### A. Indemnity

Facts: Wells Dairy, Inc. (Wells) contracted with Pillsbury to manufacture certain frozen dessert products at its South Ice Cream Plant in Le Mars, Iowa. The contract included a minimum level of production provision. After the contract was signed, an explosion and fire extensively damaged the South Ice Cream Plant and resulted in a complete shutdown of the facility.

Thereafter, Pillsbury sued Wells for negligence and breach of contract. In response, Wells filed a third party action against American Industrial Refrigeration, Inc. (AIR) and Refrigeration Valves & Systems Corp. (RVS) seeking damages owed to Pillsbury because, according to Wells, the explosion and fire were caused by a defective refrigeration system that AIR and RVS installed, designed, and sold to Wells. Indeed, Wells had hired AIR to design, install, and service a multi-million dollar refrigeration system at the South Ice Cream Plant. RVS, a supplier of piping and other components for ammonia refrigeration systems, supplied much of the equipment for the south plant refrigeration system, including the check valve that catastrophically failed. It was RVS's position that it merely sold goods to AIR and shipped them to Wells. AIR and RVS filed motions for summary judgment with respect to Wells's third party action, which the district court granted. The ruling was rendered moot, however, because Wells won its summary judgment motion against Pillsbury. Because Pillsbury appealed and obtained a reversal on its claim, the district court's grant of summary judgment to AIR and RVS was ripe for review.

Holding: The Iowa Supreme Court held the district court erred in granting AIR and RVS's motions for summary judgment based on Wells's equitable indemnity claims of an alleged breach of professional duties.

Analysis: While Wells could not make out its implied contractual indemnity claim, it was able to survive summary judgment on its equitable indemnity claims. Its implied contractual indemnity claims failed because the equipment at issue was not under the exclusive control of AIR or RVS. As such, it would make sense to thrust the implied indemnity obligation on AIR or RVS. In contrast, Wells's equitable claim against AIR was meritorious because the contract with AIR involved the provision of professional engineering services. As such, AIR held an "independent duty" sufficient to support an equitable indemnity claim. Similarly, RVS held an obligation to perform its work to the standard of engineering profession and to provide a refrigeration system that was fit for ordinary and intended use.

## **B. Underinsured Motorist Insurance**

### ***Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678 (Iowa 2008)***

Facts: Rhonda Thomas had an automobile insurance policy with Progressive. Her husband, Scott, was an excluded driver on the policy. Nevertheless, Scott drove the vehicle and was injured in an accident with a second vehicle. The other vehicle's driver paid policy limits to Scott. The Thomases then sought UIM coverage from Progressive, a claim Progressive denied citing the named driver exclusion within the contract. In response, the Thomases filed suit against Progressive, seeking UIM benefits under the Progressive policy. The district court held the named driver exclusion did not apply to the UIM coverage of the policy, but denied the Thomases' motion for summary judgment, concluding fact issues existed as to the degree of fault which should be allocated to Scott with respect to the accident. Progressive filed for interlocutory review.

Holding: The district court erred in finding that the named driver exclusion did not apply to the policy's UIM coverage.

Analysis: The Thomases argued the policy was ambiguous in light of the context surrounding the named driver exclusion. The named driver exclusion was found within the general provisions section of the policy, not in the specific exclusions listed in the uninsured/underinsured motorist (UM/UIM) coverage part. Additionally, the Thomases argued second sentence of the exclusion, acted as a limitation on the first. Progressive, by contrast, argued the named driver exclusion barred "any claim arising from an accident or loss involving a motorized vehicle being operated by [the] excluded person." The Court relied on traditional contract interpretation tools in finding the policy language unambiguous. Furthermore, the Court rejected the Thomases' argument that the UIM statute, specifically the statutory rejection requirement, was not satisfied in this case because the insurer did not obtain a rejection of UIM coverage as to Scott. Because Scott was specifically excluded by the policy, Progressive was neither required to provide him UIM coverage under the statute, nor required to obtain a written rejection of UIM coverage as a condition of his exclusion.

### ***Rolf v. Nationwide, 2009 WL 605650 (Iowa App.)***

Facts: Plaintiff Carol Rolf was injured in an accident on July 29, 2004 while riding as a passenger on a motorcycle driven by Adam McCarty. At the time of the accident Rolf and her husband were insured under an automobile insurance policy issued by Nationwide, which included UIM coverage. A provision of the policy barred UIM claims unless such claims were commenced within two years after the date of the accident. Rolf did not file a UIM claim

initially because Rolf received workers compensation benefits for her injuries because she was en route to a mandatory company picnic. Her workers compensation benefits, however, did not fully compensate her for her injuries. Because McCarty's automobile insurance policy contained a liability limit of \$25,000, Rolf's attorney advised that she file a UIM claim against her insurance company. In September of 2006, Rolf proceeded with her UIM claim against her insurer, whom she believed to be Allied Insurance Company. Nationwide, however, was the proper defendant in the suit as they were the insurer at the time of the accident. Nationwide filed a motion for summary judgment, contending that any claim brought by Rolf for UIM coverage was barred because it was brought within the two years of the accident as required by Rolf's insurance policy. Rolf resisted, arguing her UIM claim against Nationwide did not accrue until she discovered that McCarty's liability limit was \$25,000. The district court denied Nationwide's motion and Nationwide sought interlocutory review, which was granted by the Supreme Court.

Holding: The Iowa Court of Appeals held the district court erred in denying Nationwide's motion for summary judgment because the two year statute of limitations, within the Nationwide insurance policy was "reasonable."

Analysis: In Iowa, the statute of limitations to bring a claim for insurance benefits is ten years, but it is permissible for parties to an insurance policy to modify the statutory time limitations. Courts, however, will only honor the modification of the limitations period if the limitation period is "reasonable." Here, the court found the two-year limitations "reasonable" because it was sufficient to allow the plaintiff to investigate and file the case and not so short as to amount to a practical abrogation of the right of action. The Court distinguished its earlier case of *Nicodemus v. Milwaukee Mut. Ins. Co.*, 612 N.W.2d 2d 785 (Iowa 2000), where the Court struck as invalid a two year limitations period because the insurance policy contained an exhaustion provision which required that the insured not only investigate her tort claim and file suit within two years, but also that the insured conclude her litigation against the tortfeasor and file the action against the insurer within the same two-year period. Stated differently, in *Nicodemus* the two year limitations period effected a practical abrogation of the right of action. Here, no such practical abrogation existed. Consequently, the court found the district court's ruling denying Nationwide's summary judgment motion improper.

### **C. Restrictive Covenants**

#### ***Hand Cut Steaks Acquisitions, Inc. v. Fountain Three, 2009 WL 775459* (Iowa App.)**

Facts: In 1996, Brinker Iowa, Inc. and others, including DF & R Operating Company, entered a Restrictive Covenant within the real estate development known as The Shoppes at Fountain III ("Shoppes") in West Des Moines, Iowa. DF&R owned a site within the Shoppes from 1998 to

2003, where it operated a Don Pablo's Mexican restaurant. DF&R sold its interest in the site to Hand Cut Steaks in 2003. Hand Cut Steaks purchased the real estate within the Shoppes with requisite knowledge of the applicable covenant. The applicable covenant stated that DF&R or its successors and assigns shall not use the DF&R parcel as an Italian restaurant or any other use that is in competition with Romono's Macaroni Bar and Grill. Hand Cut Steaks then operated a Colton's Steak House and Grill on the site from 2003 to 2005, when it closed due to lack of business. The Hand Cut Steak site has been vacant since that time, incurring approximately \$280,000 in costs annually. Old Chicago expressed interest in obtaining the site, but negotiations stalled after Old Chicago raised concerns about the applicable covenant. Hand Cut Steaks filed a petition for declaratory judgment, seeking the Court find the applicable covenant did not bar the operation of the site of an Old Chicago Restaurant on the Hand Cut Steak's site in the Shoppes. Hand Cut Steaks argued that the applicable was (1) vague, ambiguous, and constitutes an unlawful restriction on Hand Cut Steaks' free use of its property and (2) that Old Chicago is not "an Italian restaurant" nor is it in competition with Romano's Macaroni Bar and Grill located at The Shops." The district court granted summary judgment with respect to the first issue and, after a two day bench trial, determined Old Chicago was an Italian restaurant and would be in competition with Romano's if it was located within The Shoppes. HCS appealed the district court decision.

Holding: The Iowa Court of Appeals held the district court did not err in granting summary judgment with respect to the propriety of the applicable covenant and with respect to whether Old Chicago is an Italian restaurant or would be deemed in competition with Romano's.

Analysis: Restrictive covenants are recognized within Iowa law and may contain language barring "any" competition among those agreeing to the covenant. In this case a clear and unambiguous agreement was reached. Additionally, the court found that credible evidence was presented at trial with respect to Old Chicago's sales and food mix, which demonstrate that over 70% of Old Chicago sales are derived from food and not alcoholic beverages and 46% of its menu items are Italian. Moreover, even if Old Chicago was not an Italian restaurant it was in competition with Romano's because the two would have been located within such close proximity to each other, a mere three hundred to four hundred feet. Such a scenario was exactly what the applicable covenant was designed to protect.

#### **IV. WORKERS' COMPENSATION**

*Larson Manufacturing Company, Inc. et al. v. Julie Thorson, ---*  
*N.W.2d ---,*

**2009 WL 349578**

Facts: Julie Thorson began working for Larson Manufacturing in 1974. Invariably, Thorson's job duties included continuous, repetitive movement. Occasionally, overhead work was required.

From 1986 through May 1999, Thorson frequented health care professionals for neck, back, and knee injuries. On July 23, 1999, Thorson filed two petitions for workers' compensation benefits: one for a 1998 knee injury and the other for a "cumulative injury" from 1993 to 1999. Prior to the arbitration hearing on her petitions for workers' compensation benefits, Thorson underwent a medical exam by Dr. Justin Ban. Dr. Ban diagnosed multiple work-related injuries: a surgically treated right medial meniscal tear, cumulative trauma disorder, chronic cervicothoracic strain/sprain, and chronic pain disorder. These injuries, according to a report authored by Dr. Ban in 2000, caused a total whole-person work related impairment of sixteen percent. Larson countered Dr. Ban's report with evidence from three medical professionals. First, Larson offered a January 2005 report from Dr. Donna Bahls, a board certified independent medical examiner, who concluded work activities were not the cause of Thorson's condition. Dr. Bahls also concluded Thorson suffered no work-related whole body impairment. Second, Larson offered a January 2005 medical report authored by Dr. Charles Wadle, a psychiatrist, who opined there was no discernable psychiatric diagnosis for Thorson at the time and, consequently, disputed Dr. Ban's impairment rating. Last, Larson offered a March 2005 report from Dr. John Kuhnlein, who determined Thorson's work activities were not necessarily the exclusive cause of Thorson's chronic pain and impairment and allocated a one percent whole-body permanent impairment rating. The commissioner found Thorson sustained a work-related cumulative injury on April 26, 1996, but that Thorson's claims were not barred by the statute of limitations because Thorson did not know, nor should she have known, the conditions would have a permanent adverse impact on her employment until she received Dr. Ban's report in 2000. The district court affirmed the commissioner's decision. Larson appealed, arguing, among other things, its due process rights were infringed by the agency's finding that Thorson suffered a cumulative injury on April 26, 1996 and Thorson's cumulative injury claim is barred by the applicable statute of limitations.

Holding: The Iowa Supreme Court held the agency neither erred in finding Thorson's cumulative injury occurred over three years prior to her workers' compensation petition, nor erred in its finding that Thorson's cumulative injury was not barred by the applicable statute of limitations.

Analysis: The Court rejected Larson's due process argument because Thorson's workers' compensation petition asserted she sought recovery for an injury which occurred "cumulatively, gradually, and progressively," and caused her to be disabled at "various times from 1993-1999." Similarly, the Court rejected Larson's statute of limitations argument as a workers' compensation claimant is entitled to the protection of the "discovery rule." While the commissioner found Thorson's cumulative injury became manifest on April 26, 1996, the statute of limitations does not necessarily begin to run on the date the injury becomes manifest. A cumulative injury is "manifest" when a reasonable person is aware of an injury and also that the injury was caused by the person's employment. A statute of limitations period for a cumulative injury, by virtue of the discovery rule, will only begin to run when the employee knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or when the employee knows of the injury's severity. Accordingly, although the record could have supported an earlier injury date, for the commissioner to have determined

Thorson's injury date was the date Thorson filed her workers' compensation petitions was supported by evidence in the record.