Appellate Case Law Review

Iowa Academy of Trial Lawyers:
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Medical Malpractice – Statute of Limitations

Four recent decisions of the Iowa Supreme Court focus on application of the statute of limitations in medical malpractice cases. The decisions are:

1. *Rathje v. Mercy Hospital,* 745 N.W.2d 443 (Iowa 2008)
2. *Murtha v. Cahalan,* 745 N.W.2d 711 (Iowa 2008)
3. *Rock v. Warhank,* 757 N.W.2d 670 (Iowa 2008)
4. *Wilkins v. Marshalltown Medical and Surgical Center,* 758 N.W.2d 232 (Iowa 2008)

In each decision, the Iowa Supreme Court attempts to clarify the medical malpractice statute of limitations, Iowa Code section 614.1(9). The Court holds that the medical malpractice statute of limitations begins when a potential plaintiff has (1) actual or imputed knowledge of an injury, and (2) actual or imputed knowledge of the cause in fact of the injury. In *Rathje*, the Court, in an opinion written by Justice Cady, observes that it has visited the medical malpractice statute of limitations on a number of occasions, and there is an extensive body on law interpreting the statute. "Yet, this law has raised some questions about the fairness of the outcome of a number of these cases. This perception has not gone unnoticed by us, for we have freely acknowledged the statute can 'severely restrict[ ] the rights of unsuspecting patients.'" *Rathje*, 745 N.W.2d at 447 (citing *Schlote v. Dawson*, 676 N.W.2d 187, 194 (Iowa 2004)). The Court states that in *Rathje* the injury and cause did not occur at the same time, and as a result, a two pronged analysis must be made:

> If the limitation period to file a lawsuit under the statute is interpreted to commence once plaintiffs gain sufficient information of the injury or physical harm without regard to its cause, some plaintiffs may not know enough to understand the need to seek expert advice about the possibility of a lawsuit to protect themselves from the statute. In some instances, the cause of medical malpractice injuries may be evident from facts of the injury alone, but in other cases it may not. Yet, in all cases, a plaintiff must at least know the cause of the injury resulted or may have resulted from medical care in order to be protected from the consequences of the statute of limitations by seeking expert advice from the medical and legal communities. The fundamental objective of applying the discovery rule to the statute of limitations is to put malpractice plaintiffs on comparable footing as "other tort claimants" to

be able to "determine within the period of limitations whether to sue or not." [*U.S. v. Kubrick*, 444 U.S. 111, 124, 100 S. Ct. 352, 360, 62 L. Ed. 2d. 259, 270 (1979)]. Thus, the discovery of relevant facts about the injury to commence the statute of limitations must include its cause in order to justify the commencement of the limitation period. The Iowa legislature could not have intended to commence the running of the statute of limitations through inquiry notice before inquiry is warranted.

We think it is clear our legislature intended the medical malpractice statute of limitations to commence upon actual or imputed knowledge of both the injury and its cause in fact. Moreover, it is equally clear this twin-faceted triggering event must at least be identified by sufficient facts to put a reasonably diligent plaintiff on notice to investigate.

Rathje, 745 N.W.2d at 461 (emphasis added). *Murtha v. Cahalan*, 745 N.W.2d 711 (Iowa 2008), was filed the same day as *Rathje.*

The key to applying section 614.1(9) in this case is determining when the plaintiff knew or should have known of her injury, *i.e.*, the physical harm suffered. However, in order to make this determination, the initial question must be at what stage her condition became an "injury" within the meaning of the statute. In a case involving a condition that is not immediately diagnosed, such as Murtha's, the "injury" does not occur merely upon the existence of a continuing undiagnosed condition. Rather, the "injury" for section 614.1(9) purposes occurs when "the problem [grows] into a more serious condition which poses greater danger to the patient or which requires more extensive treatment." *DeBoer [v. Brown]*, 673 P.2d [912], 914 [(Ariz. 1983)]. Once a fact finder identifies the injury by answering that question, the statute requires it to determine when the plaintiff knew or should have known of the injury and the cause in fact of the injury. These inquiries - what constitutes the injury and its cause and when the plaintiff is charged with knowledge of such injury and its cause - are highly fact-specific. Under the summary judgment record before us, these issues cannot be resolved as matters of law, as the district court did, but must be resolved as factual issues.

A reasonable fact finder could conclude that none of the events before September 5, 2001 (the beginning of the two-year period preceding the filing of Murtha's lawsuit) were "injuries" within the meaning of section 614.1(9). Prior to that date, Murtha was aware of a lump in her breast, but physical examinations, mammograms, and ultrasound examinations indicated her condition was benign. On December 7, 2001, Dr. Baker was concerned about the grittiness of the lump during a needle biopsy, but the biopsy was nondiagnostic. The doctors remained uncertain about whether the lump was cancerous until June 14, 2002, when the lump was excised and diagnosed as cancerous. Thus, in the absence of definitive medical evidence regarding the development of Murtha's cancer, a jury question exists as to when Murtha suffered an "injury." Even if a fact finder concludes that Murtha's lump developed into cancer or her cancer progressed, *i.e.*, she sustained an "injury" for section 614.1(9) purposes, prior to the two-year period preceding the filing of her lawsuit, it is still a fact question under this record as to when she knew, or should have known, of that injury and its cause in fact. A reasonable fact finder could conclude that Murtha should have known of her injury and its cause only after December 7, 2001, when Dr. Baker expressed his concern that she may have a serious condition and recommended excision. This date was well within the two-year period preceding the lawsuit.

Murtha, 745 N.W.2d at 717-18. The case is returned to district court for further proceedings.

In *Rock v. Warhank,* 757 N.W.2d 670 (Iowa 2008) the Court stated:

> ...[W]e are unable to answer the first *Murtha* question - when did the injury occur - as a matter of law.
>
> However, we are able to partly answer the second *Murtha* question - when did Rock know of her injury and its cause, or when should Rock have known of her injury and its cause through reasonable diligence - as a matter of law.

Rock, 757 N.W.2d at 674. The Court concluded that Rock could not know there was a potential cause of action for medical malpractice until she was diagnosed with cancer:

> It is inconsistent with the plain language of the statute to charge Rock - a layperson - with knowledge of facts before Dr. Congreve - an expert - knows these facts or conveys them to her. If we were to hold the statute of limitations begins to run at the start of an investigation into the existence of a possible injury, then the statute would always be triggered prior to the date the plaintiff gained actual knowledge of the injury unless the injury was immediately apparent. Such a holding would eliminate any reasonable application of the discovery rule in medical malpractice claims.

Id. at 676. The district court should not have granted summary judgment.

Wilkins v. Marshalltown Medical and Surgical Center, 758 N.W.2d 232 (Iowa 2008) involves diagnosis of prostate cancer and use of an emergency room for care. In reversing the district court grant of summary judgment to the defendants, the Court stated:

> The outcome of this case is controlled by our decision in *Rock v. Warhank,* 757 N.W.2d 670 (Iowa 2008). In *Rock,* we held that in a medical misdiagnosis case involving cancer, the earliest possible triggering date for the statute of limitations under Iowa Code section 614.1(9) is when the patient is properly diagnosed with cancer. *Rock,* 757 N.W.2d at ___. In this case, Wilkins was not informed that he had cancer until sometime after August 14, 2002. That date is well within two years of the commencement of the present action. Wilkins's claim is thus not barred as a matter of law by the governing statute of limitations.

Wilkins, 758 N.W.2d at 235-36. Claims that the statute of limitations defense is supported by Wilkins's failure to follow up his emergency room care with a private health care provider are rejected.

The hospital argued that it should not be held liable for the acts of the emergency room doctors. They were employees of McFarland Clinic which contracted with the hospital to provide emergency room services. The Court rejected the argument, holding there are fact issues about the ostensible agency of the hospital.

Medical Malpractice – Jury Instructions

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

Smith died from a series of heart attacks suffered on the operating table while Dr. Koslow is attempting to pass a stent through the iliac artery where aneurisms were present. Jury trial resulted in verdict for the defendants. Plaintiffs contended that the following jury instruction overly emphasized the defense and was not proper:

> The mere fact that a party was injured does not mean that a party was negligent.

The Supreme Court affirmed the district court's granting of the instruction. Justices Hecht and Wiggins dissented. The majority stated:

> In this case, we conclude the district court did not err by giving the supplemental instruction. Although the instruction was essentially embodied in the instruction on the elements for recovery of negligence, it was appropriate in this case to separately advise the jury that the injury, alone, did not mean Koslow was negligent. The closing argument presented by counsel for Smith supported the instruction in this case. In his argument, counsel for Smith repeatedly told the jury the bad result of the surgery was either caused by a spontaneous rupture of the artery or the care administered by the doctor. Consequently, the choice invited the jury to infer liability from the bad result in the event it concluded the artery did not spontaneously rupture. The instruction properly informed the jury that its verdict could not be decided in such a manner. Courts generally give jury findings considerable weight, and a supplemental instruction that properly assists the jury in the correct application of the law to the facts is not error.

Smith, 757 N.W.2d at 681-82. Justice Hecht in his dissent argued:

> ..."Stuff happens" is a cute phrase on a bumper sticker, but it should not be included in jury instructions. I would hold the district court committed reversible error in giving the "mere fact of injury" instruction. My analysis begins with the observation that the instruction was entirely unnecessary. The jury was told through other instructions everything they needed to know about the definition of negligence. There simply was no need to remind the jury that the fact Mr. Smith died did not mean Dr. Koslow was negligent in performing the procedure.
>
> That the instruction was unnecessary is not, however, its principal defect. The court's instructions on the law should not give undue prominence to any part of the case. *Stover v. Lakeland Square Owners Ass'n,* 434 N.W.2d 866, 868 (Iowa 1989). In particular, the instructions should not "overemphasize one party's theory of the case." *Sunrise Dev. Co. v. Iowa Dep't of Transp.,* 511 N.W.2d 641,644 (Iowa Ct. App. 1993). The "mere fact of injury" instruction violated these cardinal principles by gratuitously affirming a central premise of Dr. Koslow's theory of defense: Bad things occasionally happen during emergent medical treatments despite a physician's compliance with the relevant standard of care.

Id. at 683. Justice Hecht also argued that the instruction improperly communicated the court's doubts that the treatment provided by Dr. Koslow fell below the accepted standard and that a jury might view the instruction as a back-handed comment on the evidence.

Medical Malpractice – Verdict Forms in Medical Malpractice

Schroeder v. Albaghdadi, 744 N.W.2d 651 (Iowa 2008)

The plaintiff contends that the district court improperly instructed a jury in a medical malpractice case. There were two forms of verdict: one based upon a fact scenario presented by an emergency room doctor who treated plaintiff and supposedly contacted the defendant about plaintiff's condition, and the other, based upon the facts proffered by the defendant doctor. The jury found for the defendant doctor. The Supreme Court approved the district court instructions.

> Betty [the surviving spouse of the deceased] and Albaghdadi based their theories of negligence on two different sets of facts that were mutually exclusive. The parties tried the case by giving the jury only two alternative ways to decide it. The record did not allow the jury to incorporate parts of each side's expert testimony in deciding this case. The court did not give the verdict forms to the jury as potential factual scenarios in which a standard of care may or may not have been adhered to by Albaghdadi. The verdict forms provided the jury with a road map to determine the standard of care Albaghdadi owed Homer consistent with the jury's fact-finding. The verdict forms were also consistent with the manner in which the parties tried the case.
>
> Therefore, we find the court properly designed the two verdict forms to allow the jury to determine the applicable standard of care once it decided the disputed facts. Although there may have been a better way for the court to instruct the jury, such as using special interrogatories rather than verdict forms, the court did not impermissibly comment on the evidence by using these forms.

Schroeder, 745 N.W.2d at 657.

Medical Malpractice – Use of Investigation by the Iowa Board of Medical Examiners

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525 (Iowa 2007)

Dennis Cawthorn was treated by Dr. Daniel Miulli at Mercy Hospital in Des Moines for injuries suffered in a job related injury to his spine. A jury returned a verdict in favor of Cawthorn in excess of ten million dollars. The Supreme Court reversed and remands agreeing with Mercy about that evidence from an Iowa Board of Medical Examiners investigation of Dr. Miulli should not have been admitted. The Court agreed with Mercy that the evidence was confidential under Iowa Code section 272C.6(4) (1999). The Court observed the plaintiff proffered the evidence "to show that Mercy should have been aware that Dr. Miulli was not qualified to perform the surgery on Cawthorn and to establish willful and wanton disregard for Cawthorn's rights as a patient so as to establish his right to punitive damages." *Cawthorn*, 743 N.W.2d at 527. The case is remanded.

Statute of Limitations – Tolling of Statute for Unknown Defendant

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

Plaintiffs asserted a wrongful death claim against unknown defendants, citing section 613.18(3) of the Iowa Code (2003). The plaintiff died when her head became lodged between the bed rails and mattress. The lawsuit was filed five days prior to the second anniversary of the victim's death. The

manufacturers of the defective bed are identified on September 15, 2003. An amended petition naming the manufacturers is filed October 26, 2003. The Supreme Court affirms a district court decision dismissing the lawsuit for failing to file within the two year statute of limitations. The Court finds the plaintiffs had five days (the difference in time between when the original petition was filed and the date of the second anniversary of the tort) after the unknown defendants were identified to file their amended petition. The Court does not consider a defense based upon the fifteen year statute of repose created by Iowa Code section 614.1(2A)(a).

Statute of Limitations – State Tort Claim Act

Hook v. Lippolt, 755 N.W.2d 514 (Iowa 2008)

The Supreme Court holds that summary judgment should have been granted to the defendants. At the time of the collision, Carl Lippolt was acting as a volunteer for the Iowa Department of Human Services. Section 669.24 of the Iowa Code provides immunity for Lippolt's negligence in causing the collision. Claims against the state were not asserted within the time proscribed by the Iowa Code. *See* Iowa Code § 669.13. The Court asserts that Hook waited too long to properly investigate who had liability:

> We think an injured party who knows of her injury and its cause must conduct a reasonable investigation of the nature and extent of her legal rights that includes inquiry into the identity of any vicariously liable parties. An injured party's duty to investigate the identity of persons liable for her injury is not a seriatim process that stops upon the discovery of one defendant and arises again only when that defendant's liability is questioned.

Hook, 755 N.W.2d at 523. The Court also rejects Hook's argument that she was the victim of fraudulent concealment by Lippolt and that she should be able to maintain a claim against him because he had automobile liability insurance.

Statute of Limitations – Civil Rights

State ex rel. Claypool v. Evans, 757 N.W.2d 166 (Iowa 2008)

Claims that the design of condominiums creates access problems for persons with physical handicaps are alleged to result in housing discrimination and to be a violation of the Iowa Civil Rights Act. The Civil Rights Commission files separate suits: one of behalf of Jeff Frank and his wife and the other on behalf of the Commission. The Supreme Court affirms a district court decision dismissing the lawsuits because they were not filed within the applicable statute of limitations.

The Court concluded that the statutes of limitations involving complaints by the individual condominium owner began to run when Jeff Frank and his wife bought their unit:

> Accordingly, Frank's 180-day period for filing his complaint with the commission and two-year period to file his petition with the district court began in August of 1999 when he purchased his unit. He filed his complaint in April of 2002 and his petition in November of 2005. Consequently, Frank's complaint and petition were untimely, and the statutes of limitations bar his action.

Claypool, 757 N.W.2d at 171. The complaints made by Alicia Claypool, the Iowa Civil Rights Commissioner, failed for a similar reason: they were not brought within two years of the sale of the last condominium unit. The Court rejected the state's request that it adopt what is known as the encounter theory:

> Claypool and Frank suggest an interpretation known as the encounter theory should apply to this case. Under the encounter theory, "a disabled homeseeker's cause of action does not become complete until he personally encounters the defendant's inaccessible building." Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases under the Fair Housing Act*, 40 U. Rich. L. Rev. 753, 850 (2006). The plain language of the Iowa statute is not consistent with such a reading. The plain language of the statute defines the discriminatory practice as the *sale* of a housing unit designed and constructed to be inaccessible to a person with disabilities. Therefore, the statutes of limitations begin to run on the sale of the unit as to Frank, and on the last sale of the units as to Claypool. The encounter theory is more consistent with a tort theory, whereas Frank and Claypool have brought statutory claims under the Iowa Civil Rights Act. Tort law cannot "trump statutory provisions that deal expressly with the statute of limitations."

Id. (citing *Garcia v. Brockway*, 526 F.3d 456, 464 (9th Cir. 2008)) (Emphasis in original). The Court also rejected an argument by the state that the violations of the law at the Blue Jay Ridge Condominiums were ongoing and the statute of limitations defense should not apply.

Time for Appeal – Disciplinary Board

Iowa Supreme Court Attorney Disciplinary Board v. Attorney Doe No. 639, 748 N.W.2d 208 (Iowa 2008)

The Attorney Disciplinary Board has ten days to obtain permission from the Iowa Supreme Court to appeal a decision of the Grievance Commission of the Iowa Supreme Court to issue a private reprimand. The Board failed to seek within ten days permission to appeal the Grievance Commission decision in Attorney Doe No. 639's case. The Supreme Court holds that the ten-day deadline is mandatory and jurisdictional:

> The Board must file its application for permission to appeal within ten days from when the Commission files its disposition. Iowa Ct. R. 35.11(2). Here, a party, not the tribunal, caused the delay in proceedings by failing to meet this deadline. The rule states the consequence for failing to file an appeal within the required time is that the Commission's decision becomes final. *Id.* r. 35.9. This language clearly evidences intent by this court to make the ten-day filing requirement mandatory, not directory. *See Zick v. Haugh*, 165 N.W.2d 836, 837 (Iowa 1969) (holding rule pertaining to time for taking an appeal to supreme court from an order, judgment, or decree of the lower court is mandatory and jurisdictional).
>
> Once the ten-day period for seeking permission to appeal expired, the Commission's private admonition of Attorney Doe became final. Accordingly, the Board's untimely application was insufficient to allow this court to review the Commission's action.

Iowa Supreme Court Attorney Disciplinary Board v. Attorney Doe No. 639, 748 N.W.2d at 210. The Board's appeal is dismissed.

Statute of Repose

Estate of Ryan v. Heritage Trails Associates, Inc., 745 N.W.2d 724 (Iowa 2008).

Two workers suffered severe injuries when a weld on a 27-year-old anhydrous nurse tank failed. One of the workers died from the injuries suffered. They filed suit against a number of entities alleging failure to properly warn of the dangers associated with handling anhydrous ammonia and failing to provide proper training. The manufacturer of the nurse tank, Trinity Industries, was not named by the plaintiffs. They believed that the statute of repose, section 614.1(2A)(a) of the Iowa Code applied. The defendants filed third-party claims seeking indemnity and contribution from Trinity. Trinity urged the district court to find it had no liability under the statute of repose. The district court denied Trinity's requests.

The Supreme Court concluded that Trinity did not have a duty to indemnify or contribute. The Court concluded there was no common liability among and between Trinity and the other defendants. "In 2003 the statute of repose prevented Ryan's and Nissen's causes of action against Trinity from accruing. Because Trinity could not be liable for Ryan's and Nissen's damages, Trinity did not have common liability with Agriliance, CHS, CF, or Heritage Trails. Therefore, as a matter of law, section 668.5(1) precludes Agriliance's, CHS's, CF's, and Heritage Trails' contribution claims against Trinity." *Estate of Ryan*, 745 N.W.2d at 730-31.

Judgments entered by the district court against Trinity are ordered vacated.

Damages – Remittitur

WSH Properties, L.L.C. v. Daniels, ___N.W.2d___ , 2008 WL 4603453 (Iowa 2008)

WSH Properties, L.L.C. bought a hog confinement operation at tax sale and obtained title by a tax deed. Curt Daniels was the sole owner of Indian Creek, a corporation that owned and operated the hog confinement. WSH sued Indian Creek and Daniels to recover pens, gates, crates, waterers, and feeders that WSH contended was included in the tax sale and deed. WSH also contended that without the property it was unable to lease the real estate. A jury found that WSH was entitled to all of the disputed property, fixed its value at $299,850, and also awarded damages of $533,952 for wrongful detention of the disputed property. Defendants filed a motion for new trial contended the verdict was the result of passion and prejudice. The district court determined the appropriate remedy would be remittitur. It directed the value of the disputed property was $120,000, based upon the plaintiffs' evidence. The award for wrongful detention was reduced to $246,000 ($110,000 annual rental value minus $28,000 per year for expenses for three years). The plaintiff filed a remittitur. The district court denied the defendants' motion for new trial and entered judgment for the reduced sums. Defendants appealed. The court of appeals ordered a new trial, concluding that the jury's verdict was the result of passion and prejudice, and the district court abused its discretion by ordering remittitur and denying the defendants' motion for new trial.

The Supreme Court granted further review and analyzed the verdict to see if it was the result of passion and prejudice. The Court concluded that there was evidence from which the jury could have found the damages in the amounts it did (replacement cost versus fair market value of the items taken). The Court held that the trial court's decisions regarding remittitur were correct ("Here, we agree with the trial court that the jury used the wrong standard-replacement cost-to measure the value of the removed property .... We also agree there was no basis in the record for the jury to ignore the

uncontroverted testimony of the plaintiffs own expert witness that the rental value of the property during the pertinent time period was $110,000, the market having declined since the $207,000-per-year lease was in place."). The plaintiff is given fifteen days from the issuance of procedendo to file remittitur with the district court clerk. Otherwise, there will be a new trial.

Implied Warranty of Workmanlike Construction

Speight v. Walters Development Co., Ltd., 744 N.W.2d 108 (Iowa 2008)

The Supreme Court extends the implied warranty of workmanship and negligence in the construction of the home from the original purchaser to subsequent purchasers.

> We believe that Iowa law should follow the modern trend allowing a subsequent purchaser to recover against a builder-vendor for a breach of the implied warranty of workmanlike construction. As in many jurisdictions, this court has eliminated the privity requirement in products liability cases raising a breach-of-implied-warranty claim. *See State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449,456 (Iowa 1961). As the court discussed in *State Farm*, the privity requirement was eliminated in other jurisdictions to "'ameliorate the harsh doctrine of *caveat emptor*,'" and because "'the [implied warranty] obligations on the part of the seller were imposed by operation of law, and did not depend for their existence upon express agreement of the parties,'" privity was not necessary. *Id*. at 454 (quoting *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358,161 A.2d 69 (1960)). The same is true in a case such as the present one in which a home buyer raises an implied-warranty claim. Further, the implied warranty of workmanlike construction is a judicial creation and does not, in itself, arise from the language of any contract between the builder-vendor and the original purchaser. Thus, it is not extinguished upon the original purchaser's sale of the home to a subsequent purchaser. The builder-vendor warrants that the home was constructed in a workmanlike manner, not that it is fit for any particular purpose the original owner intended. As such, there is no contractual justification for limiting recovery to the original purchaser.

Speight, 744 N.W.2d at 114. The Court rejects contentions that allowing subsequent purchasers to enforce the implied warranty of workmanlike construction will create unlimited liability for contractors. The Court notes that the statute of repose creates a safety net for the home builder.

Anticipatory Nuisance – Injunction

Simpson v. Kollasch, 749 N.W.2d 671 (Iowa 2008)

"No one wants to live near a hog confinement operation." *Simpson*, 749 N.W.2d at 672. The Court found that the district court was correct when it denied requests from neighbors to enter injunctions prohibiting construction of two large confinement animal feeding operations. The Court stated that:

> The neighbors' experts raised legitimate concerns regarding the operation of Sow 1. However, those experts conceded they could not be certain a nuisance will necessarily result if General Development is allowed to develop and operate Sow 1. Moreover, while the neighbors' attorney argued the defense experts were biased toward the hog industry, the district court found those experts credible, at least to the extent their testimony cast doubt on whether Sow 1 would cause a nuisance.

> In recent years, hog confinement operations have become more controversial as they grow in number and size. Our task here is a narrow one - we are asked to determine whether the neighbors have proven an anticipatory nuisance. We agree with the district court they have not.

Simpson, 749 N.W.2d at 677-78.

Negligent Infliction of Emotional Distress

Overturff v. Raddatz Funeral Services, Inc., 757 N.W.2d 241 (Iowa 2008)

The district court enters summary judgment for the funeral home on claims by deceased's surviving spouse that it committed negligent infliction of emotional harm and negligent interference with a contractual right. The Supreme Court concluded that the funeral home followed rules in effect regarding decisions involving the deceased and that the funeral home had no contractual relationship with the widow of the deceased. As a result, it owed her no duty.

Trade Secrets

Cemen Tech, Inc. v. Three D Industries, L.L.C., 753 N.W.2d 1 (Iowa 2008)

The district court entered summary judgment for the defendants on numerous claims made by Cemen Tech, Inc. (CTI), including violation and appropriation of its trade secrets, unfair competition, and breach of fiduciary duties. The defendants were several entities and individuals who had entered into negotiations with CTI to acquire the company, as well as several former employees and a customer of CTI. The Supreme Court found the district court should not have granted summary judgment for the defendants on the trade secrets, unfair competition and breach of fiduciary duty claims. The Supreme Court reviewed Iowa law governing trade secrets, including Chapter 550 of the Iowa Code (2001), the Uniform Trade Secrets Act (upon which Chapter 550 is based), and Restatement (Third) of Unfair Competition (1995). The Court concluded that CTI had trade secrets regarding its product and methods, and that it acted reasonably to protect its confidential information. The Court also found the district court was in error when it refused to allow CTI to assert claims of "reverse palming off" to support its unfair competition claims. Claims that former employees of CTI breached their fiduciary duties to their former employer should not have been dismissed on summary judgment.

Standing

Godfrey v. State of Iowa, 752 N.W.2d 413 (Iowa 2008)

Gertrude K. Godfrey, a resident of Sioux City, may not maintain an action contending that House File 2581, which included the Iowa Values Fund and a number of other provisions, violated the single-subject provision of article III, section 29 of the Iowa Constitution. The Court affirmed its position that for a party to be able to bring a case, the individual "'must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected.'" *Alons v. Iowa Dist. Ct.,* 698 N.W.2d 858, 864 (Iowa 2005) (quoting *Citizens for Responsible Choices v. City of Shenandoah,* 686 N.W.2d 470, 475 (Iowa 2004)). *Godfrey,* 752 N.W.2d at 418. Over the dissent of Justice Wiggins, the Court rejected Godfrey's argument that her challenge to the act on the basis that it violates the single-subject provision of the Iowa Constitution is a matter of significant public policy and should

be allowed to proceed despite her lack of standing. The Court admitted that Godfrey presented an issue of public importance, but it is not of enough importance to allow the Court to waive its standing requirements and allow judicial intervention into the internal affairs of the legislative branch of government.

Real Party in Interest – Bankruptcy

Lobberecht v. Chendrasekhar, 744 N.W.2d 104 (Iowa 2008)

The issue is who is the proper party to prosecute a medical malpractice claim. The plaintiff had gastric bypass surgery performed by Dr. Chendrasekhar on December 18, 2002. Lobberecht had continuing abdominal pain. In March 2003, he removed her gall gladder. The abdominal pain persisted. Later in March she was diagnosed as having a fistula along the staple lines of her stomach pouch. Then, in April she was diagnosed with a possible hernia. In late April 2003 Dr. Chendrasekhar repaired the hernia but was not able to do anything with the fistula because of excessive scar tissue.

On May 28, 2003, Mr. and Mrs. Lobberecht filed a Chapter 7 bankruptcy petition. The petition did not identify any potential medical malpractice claims. They were discharged on August 26, 2003.

In January 2004, Mrs. Lobberecht sought care from a doctor in Oskaloosa who treated her abdominal pain and addressed issues related to the fistula. In December 2004 a medical malpractice lawsuit was filed against Dr. Chendrasekhar and Iowa Clinic, his employer. The district court granted summary judgment for the defendants, agreeing with their argument that Mrs. Lobberecht did not have standing and was not the real party in interest.

The Supreme Court agreed with the defendants and district court that the bankruptcy trustee was the proper party to bring the lawsuit. The Court stated, "[T]he question is not when the cause of action was lost, but when it was *acquired*. In other words, *could* the plaintiffs have sued prior to May 28, 2003, the date they filed their bankruptcy petition? If so, the cause of action belonged to the trustee in bankruptcy and not the plaintiffs." *Lobberecht,* 744 N.W.2d at 107 (Emphasis in original). For bankruptcy purposes the medical malpractice claim accrued on December 18, 2002, the date of the surgery. The Court finds that the district court should not have dismissed the lawsuit, but it should have allowed a reasonable time to substitute the bankruptcy trustee as the plaintiff.

Jurisdiction and Venue – Minimum Contacts with the State of Iowa

Capital Promotions, L.L.C. v. Don King Productions, Inc., 756 N.W.2d 828 (Iowa 2008)

The Supreme Court concluded that the contacts among and between the state of Iowa and Don King Productions, Inc. were not sufficient to allow Capital Promotions, L.L.C. to maintain an interference with contract action. In support of its decision, the Court noted that there was no contact with the state of Iowa regarding a boxing match that gives rise to the claims of interference with contract. When the alleged interference occurred, boxer Tye Fields was living in Nevada. His manager who was in Nevada arranged with King Productions to have Fields fight in St. Louis, Missouri. These discussions occurred in Nevada. Fields signed the contract for the boxing match in St. Louis, Missouri, on February 3, 2005. The fight was to be held on February 5, 2005.

Supporting its conclusion, the Court stated, "...[W]e do not think the plaintiff has established that King Productions expressly aimed its *tortious activities* at Iowa. The defendant is alleged to have interfered with a contract between an Iowa company, Capital, and a Missouri resident, Fields. But the acts alleged to constitute the interference were directed toward Fields, who was by then a resident of Nevada, and Baxter, his Nevada manager. These allegedly tortious acts took place in Nevada and Missouri and were centered on a fight to take place in Missouri. Thus, Iowa was not the focal point of the alleged tort." *Capital Promotions, L.L.C.,* 756 N.W.2d at 837 (Emphasis in original).

Venue in Lee County

Froman v. Keokuk Health Systems, Inc., 755 N.W.2d 528 (Iowa 2008)

Where is proper venue in Lee County? The Supreme Court held that the tradition of allowing a plaintiff in Lee County to file either in the Iowa District Court for Lee County at Fort Madison (Lee County North) or the Iowa District Court for Lee County at Keokuk (Lee County South) failed to comply with Iowa law. The Court stated that because of the close relationship between venue and jury pools, the north and south divisions of Lee County are separate counties for the purposes of venue. The Court's decision is intended to prevent forum shopping in Lee County.

Timely Service

Antolik v. McMahon, 744 N.W.2d 82 (Iowa 2007)

The Supreme Court concluded that there was not good cause for a delay in service of the original notice upon the defendant, and that the defendant had a right under Rule 1.421 to raise the issue by motion for summary judgment.

Age Discrimination

Weddum v. Davenport Community School Dist., 750 N.W.2d 114 (Iowa 2008)

A teacher with at least twenty years of service in the Davenport Community School District but who did not become age 55 until after a deadline to apply for early retirement benefits had passed was not the victim of age discrimination. The Court stated, "[W]e find the ICRA plainly allows early retirement plans with minimum age requirements." *Weddum,* 750 N.W.2d at 118. The Court based its conclusion upon section 279.46 of the Iowa Code. The Court concluded this provision "expressly gives school boards the power to offer early retirement incentives to its employees conditioned upon reaching a minimum age." *Id.* The Court rejected arguments that the plan was not a subterfuge and that Weddum was singled out for discrimination.

Iowa Consumer Credit Code Does Not Apply to a Cell Telephone Contract

Anderson v. Nextel Partners, Inc., 745 N.W.2d 464 (Iowa 2008)

The customer service agreement between Nextel and Anderson obligated it to provide Anderson with month-to-month service. She was to pay as the charges came due. The Supreme Court held that this contract is not a "credit" transaction that falls within the definition of Iowa Code section 537.1301(l2)(a)(1). Also, "[n]either the fact that the contract refers to 'credit' nor the performance of

a credit check transforms an otherwise non-credit transaction into a credit transaction." *Anderson,* 745 N.W.2d at 467-68. The district court correctly granted summary judgment for Nextel.

Judgment Notwithstanding the Verdict – Uninsured Motorist

Easton v. Howard, 751 N.W.2d 1 (Iowa 2008)

Steven Easton was a passenger in a pickup truck operated by Jeanette Howard. He was not wearing a seat belt and was either ejected or jumped from the truck when Howard made a sudden u-turn. A jury awarded Easton damages in an uninsured motorist claim against American Family Mutual Insurance Company. The Supreme Court reviewed the decision and ordered judgment in favor of American Family, concluding that the evidence at trial failed to support the jury verdict. The Court observed that there were equally plausible theories of what happened - failure of the door or Easton jumped from the truck; Easton failed to present substantial evidence to support his theory that Howard failed to maintain control of the vehicle and that the failure to control was a substantial cause of his injuries.

Underinsured Motorist Insurance – Excluded Driver

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

Rhonda Thomas's husband, Scott, was excluded as a driver on her automobile insurance policy with Progressive. Scott was injured in a collision with another driver while driving the vehicle insured by Progressive. The other driver paid the limits of coverage. Scott attempted to recover underinsured motorist coverage from Progressive. Progressive denied coverage. The district court held that the exclusion did not apply to underinsured motorist coverage. Progressive appealed. The Supreme Court concluded that the policy is not ambiguous and that it clearly excluded any coverage for Scott Thomas. The Court relies upon *Kats v. Am. Family Mut. Ins. Co.,* 490 N.W.2d 60 (Iowa 1992):

> ...Like the stepson in *Kats,* Scott was specifically excluded from coverage by the named driver exclusion. Because Scott had no liability coverage under the policy, Progressive was not required to offer VIM coverage to him. Therefore, section 516A.l does not require a written rejection of VIM coverage as a condition of Progressive's exclusion of Scott from VIM coverage. *See Castaneda [v. Progressive Classic Ins. Co.],* 166 S.W.3d [556,] 563 [(Ark. 2004)] (Imber, J., concurring) (stating because statute required VM coverage "only when there is liability coverage" and since named insured's son, who was driving vehicle at time of accident, was subject of named driver exclusion, insurer was not required to obtain a rejection of coverage).

Thomas, 749 N.W.2d at 686-87. The district court is directed to enter judgment for Progressive.

Contract – Force Majeure

Pillsbury Co., Inc. v. Wells Dairy, Inc., 752 N.W.2d 430 (Iowa 2008)

Does an explosion at the Wells Dairy ice cream plant in LeMars constitute force majeure? Wells filed motions for summary judgment arguing a force majeure clause in the agreement with Pillsbury excused it from performing on the ice cream contract and that Pillsbury did not have standing to assert the claims: it was not the real party in interest. The district court held that the force-majeure clause relieved Wells from performing under the production contract. The district court also held that

Pillsbury was not the real party in interest to pursue the action against Wells. It directed Pillsbury to substitute the real party. An attempt to substitute Zurich Insurance was resisted by Wells. The district court entered judgment for Wells. The Supreme Court reversed the district court concluding that there is a fact issue on the ability of Pillsbury to maintain the lawsuit.

Regarding the force majeure claim, the district court found that the force majeure clause was ambiguous and susceptible of two meanings. The Supreme Court reached a different conclusion:

> ...[W]e disagree with the district court and find the force-majeure clause is not ambiguous. "Force majeure" is "an event that can be neither anticipated nor controlled." Black's Law Dictionary 657 (7th ed. 1999). A "force-majeure clause" is a clause "allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled." *Id.* A force-majeure clause is not intended to shield a party from the normal risks associated with an agreement. 30 Richard A. Lord, *Williston on Contracts* § 77:6, at 299 (4th ed. 2004).
>
> Wells claims the parties to the contract did not intend the force-majeure clause to have its common meaning: thus, Wells is relieved from performing even if a strike, accident, explosion, flood, fire or the total loss of the manufacturing facilities was caused by an event within its control. Had the parties meant to change the common meaning of the force-majeure clause, the parties should have had a discussion or negotiations regarding the definition of a force-majeure event. *See, e.g., Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F.Supp. 850,855-56 (N.D. Ill. 1990) (finding that because the parties "deal[t] with the question of regulatory force majeure with considerable specificity ... it is the contract, rather than a body of judicial doctrine, [the court] must interpret"). The record is clear that when the parties entered into the 1999 production contract they did not negotiate what would constitute a force-majeure event. The only discussion between the parties involved what would be the obligations of the parties if a force-majeure event occurred. Therefore, in light of the lack of discussion between the parties concerning the meaning of the force majeure clause, Wells' claim that the common-law meaning of the force majeure clause does not apply is an unreasonable interpretation of the contract. *See, e.g.. Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1110 (C.D.Cal. 2001) (stating if there is no evidence that the force majeure events were specifically negotiated by the parties, the common law meaning of force majeure is read into the contract).
>
> In addition, Wells' interpretation of the force-majeure clause is not reasonable in light of the purpose of the contract. The purpose of the contract was for Wells to provide Pillsbury with a specific amount of product in a defined period of time. When the contract is read in its entirety, the obligations of each party are described in detail. There is nothing in the language used by the parties, which describes each party's various obligations, that indicates a party's negligence would excuse nonperformance of a specific obligation. Moreover, an agreement excusing a party's performance due to that party's negligence defeats the purpose of having an agreement requiring specific performance within a specified period of time.
>
> Wells' interpretation of the force majeure clause is inconsistent with the absence of any discussions between the parties indicating the common understanding of a force-majeure clause was not intended by the parties and with the purpose of a production contract that requires specific performance to be completed in a specified period. Therefore, the contract is not reasonably susceptible to more than one interpretation.

> Accordingly, as a matter of law we find the phrase "that is beyond the reasonable control of that party" modifies all the events enumerated by the parties in the force-majeure clause. Consequently, we find that Wells is not entitled to summary judgment based on the force-majeure clause, and we reverse the district court's ruling on this issue.

Pillsbury Co., Inc., 752 N.W.2d 440-41.

Contract - Lack of Consideration and Intentional Interference

Meincke v. Northwest Bank & Trust Company, 756 N.W.2d 223 (Iowa 2008)

Janice Meincke loaned $90,000.00 to her daughter and a nephew. The loan was secured by a mortgage on property owned by the daughter, nephew and their plumbing business. The daughter and nephew restructured a bank loan, and the bank required that Janice Meincke subordinate her loan to the bank's. She signed a subordination agreement. Two and one half months after the debt restructuring the plumbing business closed. The bank foreclosed and sold the building. Janice Meincke received nothing for her loan. She sued, contending there was no consideration for the subordination agreement and that the bank interfered with her contract. The district court found sufficient consideration (it loans money based upon the signed subordination agreement.). The district court also concluded that the bank did not interfere with Janice Meincke's contract (Janice signed the subordination to help the family, and there were good faith reasons to believe that the plumbing company would be financially secure with the restructured loans.). The Supreme Court affirmed the district court decision, citing Janice Meincke's trial testimony, " ... [S]he understood the bank would lend more money to Craig and Sandra if she signed the subordination agreement. By signing the subordination agreement, Janice impliedly requested Northwest Bank to refinance Craig and Sandra's loans, thus she requested the bank suffer a detriment." *Meincke*, 756 N.W.2d at 228. The intentional interference argument is rejected. The Court observed that it was not improper for the bank to request Janice Meincke to subordinate her position to the bank's.