



# “Anchors Aweigh:” Defense Techniques for Arguing Damages

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# Large Verdicts in Iowa

- Crashworthiness case in Polk County: \$40,000,000
- Workers' Compensation bad faith case in Council Bluffs: \$25,000,000
  - Reversed on appeal
- Slip-and-fall, broken ankle case in Scott County: \$1.6 million, retried after appeal: \$4,000,000
- Medical malpractice case in Dubuque: \$10,000,000\*
  - 80 y/o Plaintiff with terminal cancer
- Employment law case in Montezuma: over \$4,500,000
  - \$4,280,000 for past and future emotional distress
- Low speed auto accident, broken leg case in Polk County: \$4,000,000\*
- Employment law case in Polk County: \$1,430,000
  - \$1,056,000 for past and future emotional distress
- Med mal verdict in Sioux County (6-13-18): \$29,000,000\*
- Med mal verdict in Polk County, stipulated liability: \$12,000,000\*

\*--denotes verdict by a known "Reptile" Plaintiff's attorney



# What is the Reptile Theory?

- David Ball and Don Keenan, *“Reptile: the 2009 Manual of the Plaintiff’s Revolution”*
- Seeks to have jurors decide a case using their “reptilian brain;” the “fight or flight” reflex
- Uses an emotional approach to take juror’s focus away from the facts and the law
- Can result (and *has* resulted) in enormously high jury verdicts



# Hallmarks of the Reptile

- Aggressive use of the “would you agree with me” question form
- “Would you agree with me that a product manufacturer should not needlessly risk harm to members of the public?”
- “Would you agree with me that safety is the No. 1 priority in designing a product?”
- “On a scale of 1 to 10, where would you list “safety” as a concern for a manufacturer?”
- “Would you agree with me that a manufacturer should do everything possible to make its products safe?”



# Common Reptile Techniques

- Deposing a corporate witness who has not been prepared
  - A Rule 30(B)(6) witnesses' testimony legally binds the corporate defendant
- Asking a series of innocuous-sounding questions, and then closing in the for the “kill”
- Doing ridiculous things to make you incessantly object and appear as if you are “hiding something” from the jury
- A preference for state court where you can get away with “murder”
  - E.g., in most state courts, counsel is allowed “free wheeling” *voir dire*
- Unique approach to “emotional distress” damage claims



# Common Reptile Arguments

- “You are the conscience of the community”
- “Send a message”
- “You are the ones who will determine how safe the products will be”
- Wholesale violation of the prohibition against the “Golden Rule” argument
- “My people are telling the truth, the Defendants are liars”
- “People in this town are watching this case”
- Anchoring: repeating an astronomical number in an effort to desensitize the jurors and get them comfortable with it



# Iowa cases that address Reptile tactics

- *Conn v. Alfstad*, 801 N.W.2d 33 (Iowa App. 2011)
- *Kinseth v. Weil-McLain*, 913 N.W.2d 55 (Iowa 2018)
- *Bronner v. Reicks Farms, Inc.*, 2018 WL 2731618 (June 6, 2018)
- *Kipp v. Stanford*, Iowa Ct. App. No. 18-2232 (filed June 17, 2020)



# *Conn v. Alfstad* (Iowa App. 2011)

- Defendant engaged in misconduct in arguing the case to the jury
- Arguments:
  - What plaintiff was asking for would be a “life-changing sum,” HELD: improper personal comment on the evidence
  - To give plaintiff a verdict “would be like hitting the jackpot at the casino;” HELD: improper personal comment on the evidence
  - Counsel suggested “the public is watching you;” HELD: improper argument, asks the jury to decide the case based on extraneous factors
- *Conn* cites with approval: *Edwards v. City of Phila.*, 860 F.2d 568, 574 n. 6 (3d Cir. 1988)(rejects position that “Golden Rule” argument is only prohibited on subject of damages; it applies to liability arguments, too)





# *Kinseth v. Weil-McLain (Iowa 2018)*

- Asbestos exposure case
- Plaintiff's decedent (boiler installer) died from mesothelioma
- Wright County (Clarion), Iowa, 4 week trial
- Plaintiff's verdict: \$4 million compensatory, \$2.5 million punitives
- Trial court denied motion(s) for mistrial
- Iowa Court of Appeals reversed
- Iowa Supreme Court remands the case for a new trial



# *Kinseth v. Weil-McLain*

- Defendant filed extensive Motion *in Limine* before trial
- Trial court orders:
  - Plaintiff shall not mention prior jury verdicts or other lawsuits
  - No reference or comment on the amount of time or money spent on the defense, including attorney time and expenses and expert witness time and expenses
  - No argument that the jury should “send a message”
  - No reference to the wealth, power, corporate size or assets of Defendant, that would suggest that the jury should compare the relative wealth of Plaintiffs when deciding the issues



# *Kinseth v. Weil-McLain*

- In closing, Defendant objected 5 times, alleging violations of *in limine* order
  - 3 objections sustained
- In rebuttal, Defendant objected 2 times; both were sustained
- Court adjourns court for the day at 4:30P
- Next morning, Defendant moves for mistrial
- Trial court denies motion for mistrial
- Verdict: \$4 million compensatories; 25% fault on Weil-McLain
- Jury decides punitives are warranted
- Both parties argue punitive damages issue
- Jury awards \$2.5 million in punitives



# *Kinseth v. Weil-McLain*

- Trial court denies post-trial motion for new trial
  - Defendant waived any argument for mistrial when he did not make a contemporaneous objection
  - In any event, counsel's transgressions did not warrant a new trial
- Iowa Court of Appeals reverses
  - Motion for mistrial was timely, even though it was made the next day, and was not made immediately after closing arguments
  - Plaintiff's arguments were sufficiently inflammatory to warrant a new trial, even though not all were objected to at the time they were made—cumulative effect
- Iowa Supreme Court remands the case for a new trial



# *Kinseth v. Weil-McLain*: the arguments

- Defendant identified 12 different arguments made in summation that warranted a mistrial
- Plaintiff's counsel compared expert's income with what the verdict in this case should be
- Plaintiff's counsel argued for an amount of compensatory damages that would "send a message"
- Repeatedly referenced the amount of \$ Defendant spent on defending this case and other cases



# *Kinseth v. Weil-McLain*

- HELD: error was preserved and new trial granted, even though Defendant failed to make contemporaneous objections to every argument
- “Continued objections by counsel to prejudicial statements of opposing counsel in his arguments to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel.”
- NOTE: closing arguments in *Kinseth* were reported.



# *Bronner v. Reicks Farms* (Iowa App. 2018)

- Auto accident, left turn failure to yield
- Defendant/owner of vehicle stipulated to liability
- Issue tried: damages, only
- Medical bills stipulated: \$59,189.67
- Suing for: past and future medical; past and future pain, suffering and disfigurement; past and future loss of full mind and body
- Plaintiff's counsel: Trial Lawyers for Justice
- Verdict: \$1,559,189.00
- Howard County (Cresco, IA); Pop. 9,566
- New trial granted by trial court (Judge Margaret Lingreen) based on lawyer misconduct; new trial order affirmed on appeal

# Plaintiff's arguments in *Bronner*

- “Bronner and her parents are ‘truth-tellers’”
- “What happened to Plaintiff has been ignored and not taken seriously”
- “Nerve damage to Plaintiff’s face will cause it to droop over time”
  - There was no medical expert testimony
- “The verdict will reflect what preventing this injury is worth to their community”
- “Stand up for Plaintiff and award her appropriate damages”
- In rebuttal: “You have been misled by defense counsel”
- “Everything we have told you is 100% truthful”
- “If they could give her zero and walk away, they would”





# *Kipp v. Stanford* (Iowa App. 2020)

- Medical malpractice case
- Trial court denies objections, motions for mistrial re: Plaintiff's arguments
- Plaintiff's verdict
- Defendant physician moves for a new trial
- Trial court reviews the arguments in their totality and grants a new trial
- Iowa Court of Appeals affirms grant of new trial



# Plaintiff's arguments in *Kipp*

- Repeated references to “accountability”
  - “suggests a punitive or moralistic consideration to liability”
- The jury has the power to “be a hero”
  - suggests that jurors are only ‘heroes’ if they find for Plaintiff!
- Defendant doctor “betrayed” Plaintiff
  - Focuses jury’s attention on the quality of the doctor’s conduct, and suggests the doctor has been dishonest or deceitful
- Defendant doctor needed to “admit his mistake”
  - A story used by Plaintiff’s counsel equates doctor’s conduct to that of a scheming child



# Plaintiff's arguments in *Kipp*

- Plaintiff's references to "the community" and the social consequences of their decision
  - "Such statements improperly urged the jury to focus on the greater societal impact and context of their decision and the reaction the community will have to the jury's decision, rather than focusing the jury's attention on the facts before it"
- "What would we trade for Natalie's experience?" was an improper Golden Rule argument
  - This argument "asks the jurors to put themselves in the place of a party or victim. Courts frown upon this type of appeal to the emotions or personal interests of the jurors"
- Practice pointer: add *Kipp* to your Motion *in Limine* "toolkit"



# “Anchoring”

- Plaintiff’s technique to inflate awards for personal injury damages, most notably pain and suffering/emotional distress
- Example: fender-bender accident on city street; defendant had been drinking
  - Plaintiff: “We are suing for \$16M in this case”
  - Verdict: \$4M for a broken leg
  - Post-trial juror interviews: “We thought we were being conservative; after all, they were asking for \$16M!”
- **“Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments,” *101 Iowa L. Rev. 543 (2016)***
- Law review article based on a social science study on juror behavior



# *Anchoring* study: methodology

- Mock jurors
- Shortened medical malpractice trial
- 6 different damages arguments
- Plaintiff either demanded \$250,000 or \$5,000,000 in non-economic (i.e., pain and suffering, disability) damages
- Defense response was 1 of 3 choices:
  - Counter-offer anchor of \$50k
  - Ignore Plaintiff's demand
  - Attack Plaintiff's demand as outrageous
- Jurors then render a decision on liability and damages
- Both individual juror and collective jury responses studied



# Excerpts from *Anchoring* article

- “Numerous studies establish that the jury’s damages decision **is strongly affected by the number suggested by the plaintiff’s attorney**, independent of the strength of the actual evidence (a psychological effect known as “anchoring”). Indeed, the strength of the effect appears so powerful that some researchers advise that **“the more you ask for, the more you get.”**”



# Excerpts from *Anchoring* article

- “For the defendant, what strategy should his or her attorney use to counteract the plaintiff’s attempt to anchor with a high *ad damnum* (damages) demand? Can a defendant attack the plaintiff’s high demand and thereby undermine the plaintiff’s credibility? Alternatively, should defendants provide a lower damages number to the jury? Such a “counter-anchor” could wash out the plaintiff’s anchoring effect, **but some attorneys worry juries will interpret such a response as a concession of liability.** But are concession effects real?”



# *Anchoring* study: takeaways

- Anchoring has a powerful effect on damages
- Anchoring has a small negative effect of liability determinations
- “Credibility effects” are overwhelmed by “anchoring effects”
- No defense strategies were an effective antidote to a “high” anchor
- Defendant’s choice to offer a lower counter-anchor award did not adversely affect liability determinations
- Making a counter-anchor in a strong defense case is a bad idea
- In strong plaintiff’s cases it is less likely to hurt





# Arguing Damages from the defense side

- Example case: *Wallis v. Townsend Vision, Inc.* (C. Dist. Ill. 2009)
- Judge Richard Mills *sua sponte* bifurcated trial: 1<sup>st</sup> phase: liability; 2<sup>nd</sup> phase: damages
- Plaintiff's injury: severe amputation injury of dominant (right) hand
- 32 year old female, single parent, deaf, attractive witness
- 3 kids under the age of 10
- On-again, off-again boyfriend who physically abused her
- \$250,000 in meds
- Claim of PTSD w/psychiatric testimony to support it

# *Wallis v. Townsend Vision, Inc.*

- Plaintiff's demand before trial: "\$3,500,000 and not a penny less"
- Defendant's offer: \$0
- 2 week trial
- 1<sup>st</sup> week: liability phase. Jury verdict: for Defendant on negligence; for Plaintiff on strict liability.
- 2<sup>nd</sup> week: evidence and argument on damages, only
- Forced me to think about: how do I argue damages in this case?
- Treating physicians and psychiatrist by video depositions
- Arguments by counsel



## *Wallis v. Townsend Vision, Inc.*

- Plaintiff's argument: \$12,000,000 ("high anchor")
- Stressed severe pain and suffering
- Permanent injury
- Single parent, loss of employment prospects
- High medical bills
- PTSD
- Potential for future medical and psychiatric care



# *Wallis v. Townsend Vision, Inc.*

- Defense argument: \$400,000.00
- For example:
  - “You could buy the best house in town in Beardstown, IL for \$400,000”
  - “You could put the 3 boys through college and have plenty left over”
  - “You could buy a more modest house and bank the rest”
- Primary strategy: I took Plaintiff’s number (\$12,000,000) and explained to the jury exactly how much money that was
- I had asked Plaintiff’s forensic economist: “Could I get a 10% rate of return on a long term, reasonably safe investment in today’s economy?”
- Expert answered: “Yes, that would be possible”



# *Wallis v. Townsend Vision, Inc.*

- Let's talk about the "value of money"
- I had prepared a PowerPoint presentation. I started with a slide that said: "\$12,000,000"
- That amount could be invested in a long term, reasonably safe investment
- 10% rate of return: "that's what her economist testified to"
- \$1,200,000 per year income
- 30 year work life expectancy (to age 62)
- $30 \times \$1,200,000 = \$36,000,000$
- "Mrs. Wallis and her boys could spend \$1,200,000 per year for the next 30 years, and if she were to die, the principal of \$12,000,000 would still be there for the boys to inherit"
- "This is simple interest. This is conservative. If we were to compound interest, which banks do, it would be even more \$. She could double her principal every 7 years."



## *Wallis v. Townsend Vision, Inc.*

- On the morning of closings, Townsend's carrier wanted my opinion as to what the jury's verdict would be
- I told them: "I think it's going to be \$1,200,000"
- Closing arguments
- Jury deliberated
- Make up of jury: 8 females (during jury selection with the magistrate judge, of 35 people called, 33 were women, 2 were men)
- Jury verdict: \$900,000.00
- After the verdict the judgment was paid and there was no appeal



# Conclusion

- The Reptile has clearly taken up residence in Iowa
- Defendants need to aggressively think about, discuss, try and pursue techniques to counter the Reptile, and this includes DAMAGES
- Iowa trial and appellate courts are starting to act to curb excesses of the plaintiff's bar
- High damage demands (high "anchors") may seem insanely ridiculous, but the social science data strongly suggests that they WORK
- The defense bar must develop effective strategies to argue damages and counteract Plaintiff's tactics





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