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IOWA DEFENSE COUNSEL ASSOCIATION

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IOWA *DAUBERT* REVIEW: How Rule 702 and *Daubert* Can Be the "Silver Bullet" to Win Your Next Case

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1. INTRODUCTION

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) significantly changed the legal landscape regarding the admissibility of expert witness testimony. Although this case was initially controlling precedent in federal court only, in the nearly thirty-year period since that case was decided numerous *Iowa* cases, as well as federal precedent in the Eighth Circuit Court of Appeals, have used *Daubert* and its analytical framework to limit or bar unreliable expert witness opinion. In several cases, a summary judgment of dismissal and an entry of judgment for the defendant has been the result.

The purpose of this article is to review some of the primary *Daubert* precedent which could be of particular assistance to Iowa defense counsel. These cases provide good examples of the wide-ranging application of *Daubert* and Rules of Evidence 702 and 5.702 to different fact scenarios. In many situations, the *Daubert* analysis sounds the "death knell" for the case.

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WHAT'S INSIDE

IDCA President's Letter

Steve Doohen
IDCA President

Greetings everyone.

While 2020 has certainly been a tumultuous year, our defense organization remains vibrant and healthy. Nearly half of our members registered for and attended our 56th Annual Seminar on September 17—18. For the first time in our history, the Seminar was held in a "virtual" format. While it was a shame we could not be together in person, the success of the meeting, in an entirely new format, is a testament to the commitment and dedication of our members. Thanks for helping us pull it off!

Many thanks as well to the wonderful sponsors of our Annual Seminar. Many of these vendors and organizations have been sponsoring our Seminar programming for years. Quite simply, the event could not continue without their generous support. Please thank them when you see them.

Thanks as well to everyone who dedicated their time and energy to presenting at the Seminar. The speakers were terrific - both timely and informative. I know the papers and outlines that became part of the program materials will be excellent reference sources in my briefcase for years to come.

The next time you run into Heather Tamminga and Kristen Dearden, please let them know how much you appreciate their hard "behind the scenes" work in putting the Annual Seminar together. When the event runs smoothly, they certainly deserve the lion's share of the credit. With all their great ideas and persistence, they definitely make it easy on the program chair. Our organization is in great hands with their dedicated management assistance.

Finally, and most importantly, many thanks to our outgoing President, Kami Holmes. Kami is a great asset to this organization. It never ceased to amaze me how much energy she devoted to her efforts during her term as President. She was the driving force behind a number of fresh ideas that breathed new life into the very structure of our organization. She has initiated a long-term strategic plan that was sorely needed in order to keep us focused on the future. She has revamped our website, beefed up our efforts to share important information, and committed a great deal of effort to growing our membership. Her efforts will no doubt be a very difficult act to follow.

I have some ideas about how to continue forward with Kami's terrific initiatives as we march toward, and into, 2021. I cannot do it without all of you, our great members. If you have ideas, want to get involved, think the Board needs to know something, or simply want to chat, I would welcome your communication. Feel free to email me at doohen@whitfieldlaw.com with any thoughts.

All my best —
Steve Doohen

New Lawyer Profile

Austin McMahon

In every issue of Defense Update, we will highlight a new lawyer. This issue, we get to know Austin McMahon at Swisher & Cohrt, P.L.C, in Waterloo, Iowa.

Austin McMahon is an Associate at Swisher & Cohrt, P.L.C. in Waterloo, where he practices civil litigation with an emphasis and focus on insurance defense litigation. Austin was born and raised in Waterloo, Iowa, and graduated from the University of Northern Iowa with a bachelor's degree in Political Science and a minor in Politics & Law in 2015 before earning his law degree from Drake University Law School in 2019.

Austin is a member of the Iowa State Bar Association, the Black Hawk County Bar Association, and the Iowa Defense Counsel Association.

Austin and his wife, Alexa, live in Waterloo. They enjoy spending time with family and friends, being outdoors, and sports.

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We begin with a recent Iowa products liability case, *Hirchak v. Grainger*, that was filed in state court but removed to federal court under 28 U.S.C. § 1441. We then discuss federal and state-court cases, including a noteworthy Iowa case, *Ranes v. Adams Laboratories*. After we touch on contrary precedent, we conclude with a list of 100 sample questions that could be posed to an opposing expert in order to lay the foundation for a *Daubert* or *"Ranes"* challenge.

2. HIRCHAK V. GRAINGER

On November 17, 2020 the Eighth Circuit Court of Appeals ruled in favor of a products liability defendant in a case involving the admissibility of expert witness opinion under Rule 702. *Hirchak v. W. W. Grainger et al.,* 980 F.3d 605 (8th Cir. 2020). *Hirchak* was originally filed in state court in Marion County, Iowa but since there was "complete diversity" among the parties, the case was removed to the federal district court for the Southern District of Iowa. See 28 U.S.C. 1441.

In *Hirchak*, a factory worker, was seriously injured when a load of steel fell on him after a hoisting device known as a "web sling" failed. The sling had no capacity tag or warning label, so in order to tie the defendant to the product, Plaintiff retained an expert who opined that the web sling had been sold and distributed by Grainger.

In the trial court Grainger filed a motion for summary judgment which included, as one of its brief points, what was in effect a *Daubert* motion, seeking to exclude Plaintiff's expert's product identification opinion. If the product could not be tied to Grainger, then the case would be at an end. The basis for the motion was that although Plaintiff had proven the *manufacturer* of sling, which was a foreign company who was not a party in the case (and over which Plaintiff could not likely get jurisdiction), Plaintiff had not proven that Grainger had *sold or otherwise distributed* the sling. An obvious possibility not accounted for by Plaintiff was that the sling was manufactured by the same manufacturer, but was supplied by some other distributor. As a result, Plaintiff's expert's opinion was unreliable and therefore inadmissible under Federal Rule of Evidence 702. In a ruling by federal District Court Judge Rebecca Goodgame Ebinger, the defense motion was granted, excluding the expert's opinion. Without admissible evidence of product identification, the district court then granted Grainger's Motion for Summary Judgment. As a result, the case was dismissed. The well-reasoned district court decision can be found at 2019 WL 4804640.

Plaintiffs then appealed to the Eighth Circuit. In an opinion authored by Judge Raymond Gruender, the Eighth Circuit Court of Appeals affirmed the dismissal of the case. This decision is important, as it holds that an expert's opinion that does

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CALENDAR OF EVENTS

57TH ANNUAL MEETING & SEMINAR

September 16–17, 2021
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, Iowa

58TH ANNUAL MEETING & SEMINAR

September 15–16, 2022
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, Iowa

not account for other *obvious* possibilities is unreliable and inadmissible. The appellate court distinguished other cases where the court had held that a plaintiff is not required to account for *every* other possibility in expressing a reliable opinion.

There was an additional reason to support exclusion of the expert's opinion in *Hirchak* that was not addressed by the court. On an appeal from a summary judgment ruling, the appellate court's review is *de novo*, and the court may affirm on any basis the record supports. *Janvrin v. Continental Resources, Inc.,* 934 F.3d 845 (8th Cir. 2019). In resisting Defendant's motion, Plaintiff's expert in *Hirchak* submitted not only his 52-page expert report, but an affidavit that contained additional opinions, including that the expert's identification analysis had "excluded every other possibility." Clearly he had not, since he failed to investigate another, obvious possibility: that the sling manufacturer also made web slings for other suppliers. Thus, the court could have affirmed the dismissal based on the argument that the expert's opinions as set forth in the affidavit were incorrect on their face and thus, unreliable and inadmissible into evidence.

3. *DAUBERT* IN THE EIGHTH CIRCUIT

Since the issue in *Hirchak* was product identification that involved an engineering analysis of the sling, and *Daubert* in Iowa only applies to "novel" or "scientific" evidence, query whether the same result would have been obtained had the case remained in state court. It should be noted that the appellate court opinion in *Hirchak* nowhere cites to or even mentions *Daubert*. Apart from any *Daubert* analysis, in order to be admissible into evidence, *both* federal *and* Iowa standards require expert witness opinion to be *reliable*. *See State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981)(expert opinion must be reliable to be admissible); *Hirchak*, 980 F.3d 605, 608 (8th Cir. 2020) ("Under Federal Rule of Evidence 702, testimony in the form of an expert opinion must be based on. . . reliable principles and methods.") When an expert fails to account for obvious alternative explanations, then the opinion is unreliable.

Hirchak fits within a well-established line of *Daubert* cases in the Eighth Circuit where expert witness testimony has been excluded and a subsequent dismissal on summary judgment has been affirmed on appeal. This renders federal court removal a key initial consideration in responding to any lawsuit filed in Iowa district court. The removal decision must be made early, and within 30 days of service. *See* 28 U.S.C. § 1446(b). In addition, if multiple defendants are involved, they all must consent to removal. *See* 28 U.S.C. § 1446(b)(2)(A). Even if the case appears to be non-removable at the inception, defense counsel should consider: 1) fraudulent joinder; or 2) subsequent removability.

4. FRAUDULENT JOINDER

Under the doctrine of fraudulent joinder, a non-diverse party who is fraudulently joined is not considered in determining whether diversity of citizenship jurisdiction exists for purposes of removal. *See, e.g., Block v. Toyota Motor Corp.,* 665 F.3d 944 (8th Cir. 2011) (retail seller of motor vehicle was "fraudulently joined" into crashworthiness case where dealer was not strictly liable under Minnesota statute; denial of remand to state court affirmed); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806 (8th Cir. 2003). Thus, if a non-diverse party is fraudulently joined in the case, that party will not prevent the case from being removed to federal court.

An example of fraudulent joinder in Iowa might be this: assume plaintiff files a products liability suit against a foreign motor vehicle manufacturer over which the court has jurisdiction. Assume further that in order to defeat diversity, plaintiff joins in the suit the local selling retail dealer of the vehicle. If plaintiff sued the dealer for strict liability in tort or breach of implied warranty, this joinder would be fraudulent based on Iowa Code § 613.18, the "retailer immunity" statute.

5. SUBSEQUENT REMOVABILITY

If a non-diverse party is dismissed from the case within one year of the commencement of the action, or an impediment to complete diversity among the parties is otherwise removed, the case at that point becomes removable and can be removed to federal court. *See* 28 U.S.C. § 1446(c)(1); *Berbig v. Sears Roebuck & Co., Inc.,* 568 F.Supp.2d 1033 (D. Minn. 2008). This tactic can be used to move the case to federal court where other parties to the case who are non-diverse are dismissed on pre-answer motions or dispositive motions, such as summary judgment. A case that is initially not removeable can subsequently become removeable and can be moved to federal court so long as the one-year deadline is honored. If this may be an issue in your case, you should docket the one-year deadline for subsequent removal at the time suit is initially filed.

6. SUCCESSFUL *DAUBERT* CHALLENGES AND SUMMARY JUDGMENT FOR DEFENDANTS IN FEDERAL COURT

Several Eighth Circuit cases have affirmed a summary judgment of dismissal in the trial court after a plaintiff's expert's opinion was excluded based on the principles of *Daubert* or application of Federal Rule of Evidence 702. These cases provide precedent for federal court cases situated in Iowa. *See, e.g.*, *Bland v. Verizon Wireless (VAW), LLC*, 538 F.3d 893 (8th Cir. 2008); *Giles v. Miners, Inc.*, 242 F.3d 810 (8th Cir. 2001); *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202 (8th Cir. 2000); *Weisgram v. Marley*, 169 F.3d 514 (8th Cir. 1999); *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076

(8th Cir. 1999); *Dancy v. Hyster*, 127 F.3d 649 (8th Cir. 1997); and *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996). The earliest four cases were decided before Rule 702 was amended to conform with *Daubert* in 2000. A review of these cases illustrates the wide variety of issues that *Daubert* or its analysis under Rule 702 can be applied to.

In *Bland v. Verizon Wireless (VAW), LLC*, 538 F.3d 893 (8th Cir. 2008), plaintiff ingested freon after a store employee had sprayed it into her water bottle as a prank. She then brought an action claiming she had developed exercise-induced asthma. Her physician's causation opinion was not supported by a proper medical differential diagnosis, and the doctor had no knowledge regarding plaintiff's degree of exposure to freon. The physician's lack of knowledge in *Bland* is no different than *Hirchak's* expert's lack of knowledge; they both resulted in an unreliable opinion. Based on this insufficient factual basis, her claim was dismissed and the dismissal was affirmed on appeal.

In *Giles v. Miners, Inc.*, 242 F.3d 810 (8th Cir. 2001), a child's hand became frozen to a freezer, resulting in injury. A products liability case was filed against the freezer manufacturer. After excluding the plaintiff's expert's opinion, summary judgment was granted for the manufacturer and this was affirmed on appeal. In *Giles*, plaintiff's expert had not analyzed how his alternative design would interact with the operation of the freezer, and his mesh guard would violate governmental and industry standards. 242 F.3d 810, at 813. As was true in *Hirchak*, the underlying basis for the proffered opinion was unreliable and thus, the opinion was inadmissible. *Giles* is a strong *Daubert* case that originated in an Iowa federal district court. The defense counsel in *Giles* was Richard J. Sapp, former President of the Iowa Defense Counsel Association.

In *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202 (8th Cir. 2000), plaintiff was diagnosed with a respiratory disorder after her exposure to the discharge of a fire extinguisher. Plaintiff submitted the testimony of her treating physician in attempting to prove causation. However, her doctor testified that he did a differential diagnosis to determine her *condition*, and not its *cause*. He further admitted that he made no attempt to consider the other possible causes, or to exclude each potential cause until only one remained. *Id.* at 1208. Excluding other causes is a key component of a proper medical differential diagnosis. Since there was no other evidence to prove the causation element, the opinion was deemed unreliable and inadmissible, and summary judgment was granted and affirmed on appeal.

Weisgram v. Marley, 169 F.3d 514 (8th Cir. 1999), was a wrongful death action against the manufacturer of an allegedly defective baseboard heater that caused a fire. In that case, the court excluded opinion testimony by three different plaintiff's experts based on their failure to meet the standards set forth in Rule 702 and *Daubert*. The first expert, a city fire captain, could not opine as to the cause of the fire, absent any factual foundation for such opinions. As was true in *Hirchak*, critical underlying facts were missing. The second expert, a fire investigator, did not have a sufficient foundation for any opinion that the heater was defective because he did no testing to prove his theory, and his causation opinion was based on pure speculation. Finally, the testimony of the third expert, a metallurgist, that the contacts on a thermostat were defectively designed did not have a sufficient foundation where the expert had little knowledge of the product itself and little knowledge of heaters in general. As a result, a plaintiff's verdict after a trial was reversed and judgment was entered for defendant. *Weisgram* is similar to *Hirchak* in that in both cases, the experts' conclusory opinions were found to be inadmissible for lack of reliability, due to the absence of an underlying factual basis.

In *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999), a product liability suit was brought against the manufacturer of a corn head for a combine. The Plaintiff had come into contact with the operating corn head and was seriously injured. In the trial court, the defendant filed a motion to exclude the opinion testimony of two of plaintiff's experts and also moved for summary judgment. The first expert, a mechanical engineer, had never seen a corn head on a combine while it was running. He proposed a different design but had no drawings and could point to no other manufacturer with a design similar to his suggested design. *Id.* This expert also proposed different warnings, which he claimed would not have been painted over like the original warning signs were, although "he admitted in deposition that he had no basis for this belief." *Id.* at 1080. The other expert was a "human factors engineer" who wanted to say that the corn head was "defective" because the original signs were too small, were too far from the point of danger, and their angle made them difficult to read. The expert admitted, however, that he had never seen the original warnings on the corn head and did not know what they said. As was true with Plaintiff's expert in *Hirchak*, both experts lacked a sufficient factual basis for their opinions; thus, any opinions would be unreliable and, therefore, inadmissible. Based on the record the trial court in *Jaurequi* granted the motion to exclude their testimony, and thereafter granted the defendant summary judgment. This disposition was affirmed on appeal.

In *Dancy v. Hyster*, 127 F.3d 649 (8th Cir. 1997), a forklift operator was injured in an accident and brought suit against the manufacturer. Plaintiff claimed that the forklift was defective because it had no cage or guard around the operator compartment to prevent the operator from being pinned under the truck. The manufacturer filed a motion to strike plaintiff's expert witness, a mechanical engineer, who had presented a theory but did not test that theory in any way, had not seen that type of device on any forklift or similar machine, and had not designed

such a device. The basis underlying his opinion of defect was found to be lacking. The trial court granted the motion to strike and thereafter entered summary judgment for the defendant, and this was affirmed on appeal.

In *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996), a mechanic was injured while using a tire changing machine. He sued the manufacturer of the tire changer. The plaintiff was injured while trying to mount a 16.5-inch tire on a 16-inch wheel and overinflated it while trying to seat the bead. Plaintiff's expert had some "rough sketches" of an alternative design but had performed no testing. He did not have any engineering drawings or prototypes. The court concluded: "Milner [the expert] *has shown no factual basis to support an opinion* that his design changes are feasible or that they would not hinder the efficacy of Hennessy's present tire changing model." *Id.* at 297 (emphasis added). The trial court held that the opinions of plaintiff's expert in *Peitzmeier* regarding alleged defects in the tire changer were not admissible under *Daubert*, and the trial court's grant of summary judgment for the defendant was affirmed on appeal.

7. UNSUCCESSFUL *DAUBERT* CHALLENGES IN FEDERAL COURT

Some Eighth Circuit cases have denied a *Daubert* challenge. The most well-known and oft-cited decision is *Lauzon v. Senco Prods., Inc.,* 270 F.3d 681 (8th Cir. 2001). In *Lauzon*, a summary judgment for defendant in the trial court was reversed. On appeal, the court found the trial court had abused its discretion in finding that Lauzon's expert had not accounted for other possible casues of the accident. *Lauzon* was a personal injury, products liability case where a worker inadvertently discharged a pneumatic nailer or "nail gun," injuring a co-worker. The "reasonable alternative design" advocated by plaintiff's expert was a sequential trip design, where the nose of the tool has to be pressed against the work surface first, before the trigger is pulled. This "sequential" option was offered by the manufacturer. The subject nailer was designed whereby the trigger could be pulled all the time, and the worker could "bump" the nose of the tool against the work surface and fire a nail. The trial court found that plaintiff's expert had not excluded other possible causes of a nail gun accident, when in fact, the expert had done so in his opinion advocating the sequential trip design. *Lauzon* can be viewed as a case where the trial court made a factual error in understanding the expert's opinion rather than finding any error in its *Daubert* analysis. It is noteworthy that *Lauzon* actually supports opponents of questionable expert witness testimony, when it held that expert opinion "must account for obvious alternatives." *Id.* at 693 (citing *Claar v. Burlington N. R. R.*, 29 F.3d 499, 502-03 (9th Cir. 1994); *see also Packgen v. Berry Plastics Corp.*, 847 F.3d 80, 87 (1st Cir. 2017) ("An expert should adequately account for obvious alternative explanations."). This was the basis of the recent decision in *Hirchak*.

Given the strength of Eighth Circuit precedent on the application of *Daubert*, especially in products liability cases where the proffered expert opinion is conclusory, weak, or without a sufficient factual basis, federal court removal cannot be overestimated as an effective defense litigation strategy. But what if the action is filed in state court, non-diverse parties are joined in the case, and federal court removal jurisdiction is unavailable? Can the *Daubert* factors or its analytical framework be applied in a state court case in Iowa to limit or exclude expert witness testimony, entitling the defendant to summary judgment? As it turns out, the answer is an unequivocal "yes." In state court, defense counsel should employ the strategy used in *Ranes v. Adams Laboratories,* 778 N. W.2d 677 (Iowa 2010), discussed in more detail *infra*.

8. IOWA LAW GOVERNING THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

Before discussing *Ranes*, a brief review of Iowa evidentiary law may be helpful. Although most jurisdictions follow either *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923) or *Daubert,* apart from cases involving "scientific" issues, Iowa follows *neither*. *See State v. Hall*, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981). *Hall* was a criminal[2] case that involved the admissibility of an analysis of bloodstain evidence. In *Hall*, the court noted:

> We believe that the rationale of *Frye* should apply insofar as it bears upon the reliability of the proffered evidence. Accordingly, we do not believe that "general scientific acceptance" is a prerequisite to admission of evidence, scientific or otherwise, if the reliability of the evidence is otherwise established.

Id. at 85. *Hall* went on to outline the factors in that case which indicated that the subject evidence, a bloodstain analysis, was reliable. *Id.* at 85. Although *Frye's* "general acceptance" test was not adopted in *Hall*, the Court emphasized that expert opinion evidence must be *reliable* in order to be admissible. "General scientific acceptance" under the *Frye* rule may be proof of evidentiary reliability.

Contrary to conventional wisdom, courts have recognized that the *Frye* standard is arguably more restrictive than even *Daubert*. Under *Frye*, "general acceptance in the relevant scientific community" is the test and must be demonstrated before the evidence is admissible. Under *Daubert*, "general acceptance" is merely one of several, non-exclusive factors to be considered. Under *Daubert,* new or cutting-edge techniques or technology might be admissible, whereas under *Frye*, they might not be if the evidence does not meet the "general acceptance" standard.

A. IOWA RULE OF EVIDENCE 5.702 V. FEDERAL RULE OF EVIDENCE 702.

Iowa Rule of Evidence 5.702 is the rule-based standard governing the admissibility of expert witness testimony in state court. Rule 5.702 was based on the former Federal Rule of Evidence 702, and adopted its exact language in 1983. The language of the Iowa rule has remained the same from its inception. In 2017 the rule was renumbered Rule "5.702." The federal rule's language was amended effective December 1, 2000 in light of *Daubert* and its progeny. Although the language of the Iowa rule has never been amended to remain consistent with the federal rule, based on caselaw it is doubtful that any principled distinction exists between the federal and Iowa rules.

Iowa Rule of Evidence 5.702 provides as follows:

> **Rule 5.702 Testimony by expert witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Federal Rule of Evidence 702 (as amended) provides as follows:

> **Rule 702 Testimony by Expert Witnesses**
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> a. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> b. The testimony is based on sufficient facts or data;
>
> c. The testimony is the product of reliable principles and methods; and
>
> d. The expert has reliably applied the principles and methods to the facts of the case.

The only difference between the federal rule and the Iowa rule are the additional subparagraphs (b), (c) and (d) in the amended federal rule. However, Iowa common law supports the existence of these "unstated" requirements under Iowa evidentiary standards as set forth in the cases.

In Iowa, expert witness testimony, just as in federal court, must be based in sufficient facts or data. If sufficient data or facts do not support an expert's opinion, that opinion is incompetent and inadmissible. *Mermigis v. Servicemaster Industries, Inc.*, 437 N.W.2d 242, 247 (Iowa 1989); *compare* Fed. R. Evid 702(b). Expert testimony also must be reliable. To be admissible, expert testimony must aid the jury in resolving a disputed issue and be reliable. *Johnson v. Knoxville Community School Dist.*, 570 N.W.2d 633 (Iowa 1997). Expert witness opinion must be both relevant and reliable. Unreliable opinions do not assist the fact-finder and are inadmissible. *State v. Brown*, 470 N.W.2d 30, 32-33 (Iowa 1991). The requirement that expert witness opinion in Iowa must be *relevant* and *reliable* in order to be admissible is required by a veritable legion of case law interpreting Iowa Rule of Evidence 5.702, and is distinct from the application of any *Daubert*-based analysis.

B. *LEAF* AND *KUMHO* TIRE: DOES *DAUBERT* ONLY APPLY TO NOVEL, COMPLEX OR SCIENTIFIC ISSUES, OR DOES IT ALSO APPLY TO CASES INVOLVING "SPECIALIZED" OR "TECHNICAL KNOWLEDGE?"

One area where state and federal law currently diverge is whether the *Daubert* analysis applies to all types of expert witness testimony, or only those involving "novel," "complex" or "scientific" testimony. Both evidence rules explicitly govern the admissibility of "scientific, technical or other specialized knowledge." In federal court the *Daubert* factors apply to *all* issues regarding the admissibility of expert witness testimony. *See Kumho Tire v. Carmichael*, 526 U.S. 137, 141 (1999) (*Daubert* analysis applies to engineering testimony regarding the cause of a tire blowout and subsequent accident). In Iowa, the test applies only to "novel," "complex" or "scientific" testimony, and does not apply to matters of "technical or other specialized knowledge." *See Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677 (Iowa 2010) (application of *Daubert* considerations is not appropriate in cases that involve technical or other specialized knowledge, because such nonscientific testimony is not as complex); *see also Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999); *Mensink v. American Grain et. al.*, 564 N.W.2d 376, 381 (Iowa 1997) (*Daubert* not applied in a case not involving "a highly complex matter of scientific evidence"); *Johnson v. Knoxville Community Sch. Dist.*, 570 N.W.2d 633 (Iowa 1997)(*Daubert* analysis only applies to matters of a novel, scientific nature).

The *Kumho Tire* rule makes sense. Expert testimony, by its nature, involves matters beyond the ken of an ordinary lay person juror. Otherwise, such testimony would not be "helpful" to the jury and would not be admissible into evidence. The rule's language makes no distinction between "scientific," "technical" or "other specialized knowledge." All three types of knowledge are governed by the rule. *Daubert* applied its analysis to "scientific" testimony, but that is only because *those* were the facts of *that* case. The *Kumho Tire* rule also eliminates having to determine what is "scientific," "complex" or "novel," as compared to "technical" or "other specialized knowledge" expert testimony.

If *Leaf* is narrowly applied, the *Daubert* factors may be used as persuasive elements only in cases involving "scientific," "complex" or "novel" evidence. This more restrictive rule adopted by the Iowa Supreme Court in *Leaf* might be ripe for reconsideration in a future case with *Daubert* issues heard by the Court.

C. USING *DAUBERT* IN STATE-COURT CASES IN IOWA: *RANES V. ADAMS LABS.*

Daubert was a federal case that would not otherwise be controlling precedent for cases venued in Iowa state court. Yet, it has been adopted as precedent by the Iowa Supreme Court in "scientific" or "complex" cases and one of the best examples of its application can be found in *Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677 (Iowa 2010).*

In *Ranes*, a plaintiff's expert's medical causation opinion in a pharmaceutical drug products liability case was excluded by the trial court, and defendants were granted summary judgment. The exclusion of the expert's opinion and dismissal was affirmed on appeal by the Iowa Supreme Court in a well-written opinion with a detailed *Daubert* analysis authored by Chief Justice Cady. In *Ranes*, the Iowa Supreme Court specifically found that applying the *Daubert* test to a complex medical causation opinion in Iowa was correct. The court found that the application of the relevant *Daubert* considerations in preliminarily assessing the reliability of a physician-expert's methodology was an appropriate exercise of the court's gatekeeping function.

Ranes stands for several propositions that are helpful to defendants:

1. A *Daubert* analysis can be applied in state court as the controlling rule of decision in a case involving scientific or complex issues. *Id.* at 687.

2. Iowa district courts play a "gatekeeping" function in analyzing the admissibility of expert opinion evidence. *Id.* at 687; *see also* Iowa R. Evid. 5.104(a).

3. In a pharmaceutical drug or toxic tort case, plaintiff is required to prove both general and specific causation. *Id.* at 687-88.

4. An appellate court will reverse a trial court denial of the admissibility of expert opinions only when the record shows the court exercised its discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. *Id.* at 685.

5. A *Daubert* analysis applies where the case involves complex medical issues, such as the effect of a prescription drug on the human body. *Id.* at 687.

6. Use of the *Daubert* factors help the court assess the reliability of expert evidence by evaluating the scientific validity of the reasoning and methodology as applied to the facts of the case. *Id.* at 685-86.

7. In all cases involving expert testimony, the proponent of the evidence has the burden of demonstrating the preliminary question of law the witness's qualifications and the reliability of the witness's opinions. *Id.* at 686-87.

8. Case-control study involving effect of drug on women was not relevant to the effect of the drug on men, where study found effect in women but no effect in men. *Id.* at 692.

9. Anecdotal case reports, on their own, are not enough for an expert to demonstrate a causal link. *Id.* at 692-93.

10. In order the qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. *Id.* at 697.

Every Iowa defense lawyer should be familiar with *Ranes*. If a carefully prepared *Ranes* a/k/a *Daubert* motion were filed against a plaintiff's expert espousing medical causation opinions, or scientific principles, with an insufficient basis, the expert's opinions might well be limited or excluded. Depending upon the facts of the case and the nature of the issue, this might get the case dismissed or settled for a reasonable amount.

Ranes' use of the *Daubert* analysis and its holding is supported by an earlier Iowa case, *Williams v. Hedican,* 561 N.W.2d 817 (Iowa 1997). *Williams* was a medical malpractice case. The expert witness issue involved the cause of a birth defect allegedly as a result of the pregnant mother's failure to be inoculated for chicken pox. In *Williams*, a summary judgment for defendant in the trial court was reversed on appeal. Even though the defense judgment was reversed, the trial court had implemented the *Daubert* test in considering a complex issue of medical causation. Since the use of this test was not challenged on appeal, the appellate court used the same test. Even though the application of *Daubert* was not asserted as error on appeal, there was no suggestion in *Williams,* in a lengthy opinion authored by Justice Louis Lavorato, that the use of *Daubert* was wrong or that the result would have been different had the court found the application of *Daubert* to the issues in that case to be legally erroneous. Instead, *Daubert* was analyzed at length and was the rule of decision in the case.

Hutchison v. American Family Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994) was the first Iowa case to discuss *Daubert* and to adopt it as persuasive precedent. In *Hutchison*, a clinical psychologist, who was a *defense* expert, was allowed to opine as to the causation and existence of an alleged brain injury in a suit for underinsured motorist benefits. The issue in the case was whether plaintiff's injury claim was severe, such that it was worth

more than the underlying policy limits. *Hutchison* was decided in 1994, one year after *Daubert* was decided. The court noted: "[W]e refuse to impose barriers to expert testimony other than the basic requirements of Iowa Rule of Evidence 702 and those described by the Supreme Court in *Daubert*." *Id.* at 887. Thus, *Hutchison* expressly adopted *Daubert* as controlling precedent.

D. IOWA CASES DENYING A *DAUBERT* CHALLENGE.

Several Iowa cases have denied a *Daubert* challenge depending upon the facts of the case. One case, *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999) is instructive. In *Schlader*, the Iowa Supreme Court held that expert testimony was not required in order to engender a jury issue on liability in a dairy cow operation that was allegedly damaged by "stray voltage." In *Schlader*, the Plaintiffs, operators of a dairy cow farm, sued a utility company claiming that milk production was adversely affected due to "stray voltage." The trial court granted Defendant's motion for summary judgment and dismissed the case. The basis for the dismissal was the exclusion of plaintiff's expert's opinion that stray voltage caused Plaintiff's damages. Plaintiffs appealed and ultimately the plaintiff's verdict was upheld on appeal. The court found that the expert's testimony was unnecessary, as "stray voltage" is a matter within the ken of an ordinary lay-person juror.

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952).

The case's outcome in *Schlader* is subject to dispute. Finding that "stray voltage" and the effects of electricity on dairy herd milk production is a matter within a layperson's knowledge seems to be a stretch. This finding, and the plaintiff's verdict, may be explained by the fact that during the events in question, the utility company installed a device called an "isolator" and did other electrical work on the farm. After this work, the stray voltage subsided, the court noting the effects of this work was "immediate and significant." *Id.* at 11. Interestingly, the opinion does not explain why these changes were not excluded from evidence as "subsequent remedial measures" under Iowa Rule of Evidence 5.407.

Another Iowa case that denied a *Daubert* challenge was *Mensink v. American Grain et.al.,* 564 N.W.2d 376 (Iowa 1997). *Mensink* involved a claim that a grain storage facility was not properly protected against lightning strikes. A truck driver delivering grain to the facility was injured when a lightning strike ignited grain dust and caused an explosion. He sued the facility, alleging it was not properly protected against lightning strikes. Plaintiff's expert was allowed to testify and a plaintiff's verdict resulted. On appeal the court found that the trial court had not abused its discretion in permitting the testimony and denying a motion for directed verdict and post-trial JNOV. A key aspect of the ruling was that the Court found the case did not involve scientific, novel, or complex testimony, as required by *Leaf.*

9. 100 SAMPLE *DAUBERT* QUESTIONS FOR PLAINTIFF'S EXPERT

Set forth here is a non-exhaustive list of potential questions for a plaintiff's expert, to help lay the evidentiary foundation for a *Daubert* or *Ranes* challenge. As you can see, some of these questions are specific to certain types of cases, but they can be adapted to other applications depending upon the nature of the issue.

A. GENERAL QUESTIONS.

1. Has the expert ever had an opinion in a case excluded or limited by any court or judge? *See, e.g., Pillow v. General Motors Corp*., 184 F.R.D. 304 (E. D. Mo. 1998).
2. Has the expert ever been subject to a "*Daubert*" attack? What was the result?
3. Is the expert's opinion reliable? How do you know this?
4. What objective evidence does the expert have to prove that the opinion at issue is reliable? What is your test for reliability?
5. What witness testimony in the case supports your opinions?
6. What documents in the case support your opinions?

B. *DAUBERT* FACTORS.

7. Has the expert's technique or theory been tested? Please give all particulars.
8. Can the expert's opinion be challenged in some objective fashion, or is it simply a subjective, conclusory approach that cannot be assessed for reliability? List each and every subjective component of your opinion.
9. Has the technique or theory been subject to peer review and publication? *See, e.g., Peitzmeier v. Hennessey Industries, Inc.,* 97 F.3d 293 (8th Cir. 1996).
10. Have you published in peer reviewed journals in this area of science? Please produce copies of all such publications.
11. Have your opinions *in this case* been subjected to peer review? If not, why not?

12. What is the known or potential rate of error of the technique or theory when applied? What is this based on?

13. Do any controlling standards exist for use of the technique or theory? Are these standards published? Please produce.

14. Has the technique or theory been generally accepted in the scientific community? What is your basis?

C. POST-*DAUBERT* FACTORS.

15. Is the expert "proposing to testify about matters growing naturally and directly out of research [he/she] has conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)(*Daubert* "on remand").

16. Has the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)(noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

17. Has the expert adequately accounted for obvious alternative explanations? Is that "ruling out" analysis set forth in your report? Please list all other alternative explanations. *See, e.g., Hirchak v. W.W. Grainger*, 980 F.3d 605 (8th Cir. 2020)(expert's product identification opinion was correctly excluded where he failed to account for an obvious alternative explanation, that manufacturer made the same product for other suppliers); *Claar v. Burlington N. R. R.*, 29 F.3d 499 (9th Cir. 1994)(testimony excluded where expert failed to consider other obvious causes for the plaintiff's condition); *compare Ambrosini v. Labarraque*, 101 F.3d 129 (D. C. Cir. 1996)(the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

18. "Is the expert being as careful as he would be in his regular professional work outside his paid litigation consulting?" *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir. 1997). *See also Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1175 (1999)(*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

19. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1175 (1999)(*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998)(en banc)(clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988)(rejecting testimony based on "clinical ecology" as unfounded and unreliable).

D. APPLICATION OF THE SCIENTIFIC METHOD.

20. Is your opinion based on "science?" *See Housley v. Orteck Intern., Inc.*, 488 F.Supp.2d 819 (S. D. Ia. 2007) (insurance adjuster not permitted to opine about tire defect).

21. Are you familiar with the scientific method?

22. List the steps of the scientific method.

23. Did you use the steps of the scientific method in arriving at your opinion? Is this documented anywhere in your notes?

24. Do you admit that use of good science uses all the steps of the scientific method?

25. Did you form a hypothesis?

26. Did you collect data?

27. Is all of this data set forth in your expert report?

28. Did you use the data to test the hypothesis?

29. Is the testing of your hypothesis set forth in your expert report?

30. What were the results of the testing of your hypothesis?

31. Was there any data that did *not* support your hypothesis? Please identify all such data.

E. PRODUCT LIABILITY CASES.

32. Has the expert ever operated the product? *See Jaurequi v. Carter Mfg. Co.,* 173 F.3d 1076 (8th Cir. 1999).

33. Has the expert designed any product that was mass produced or commercially sold?

34. What is the expert's "reasonable alternative design?" Has the expert tested the design that he/she advocates? *See* Restatement (Third) of Torts, Products Liability, Section 2(b).

35. Has the expert ever designed a warning that was put on a product that was mass produced or commercially sold? What is the basis for your opinion that the product is not

reasonably safe without your warning? *See* Restatement (Third) of Torts, Products Liability Section 2(c).

36. Has the expert ever written an operator's manual for a product that was mass produced or commercially sold?

37. Has the expert ever tested the effectiveness of an on-product warning for a product that was mass produced or commercially sold?

38. Has the expert tested the warning or instruction that he/she advocates in this case? Why this test? What basis do you have that this test is accurate? What is the error rate of this test? How often is it right, and how often is it wrong?

39. Has the expert ever tested the effectiveness of written instructions for a product that was mass produced or commercially sold?

40. Does the expert contend that there is a manufacturing defect? *See* Restatement (Third) of Torts, Products Liability, Section 2(a).

41. How does the expert define a manufacturing defect?

42. How does Iowa law define a manufacturing defect?

43. Does the expert contend there is a design defect? *See* Restatement (Third) of Torts, Products Liability, Section 2(b).

44. How does the expert define a design defect?

45. How does Iowa law define a design defect?

46. Does the expert contend there is a warnings or instructions defect?

47. How does the expert define a warnings or instructions defect?

48. How does Iowa law define a warnings or instruction defect?

49. Is the expert critical of any warnings or instructions in the operator's manual?

50. Does the expert have any causation opinions?

51. Does the expert have any accident reconstruction opinions?

52. Does the expert have any human factors opinions?

53. Does the expert have any mechanism of injury opinions?

54. Do you claim the defendant violated any engineering standards? *See, e.g., Giles v. Miners, Inc.*, 242 F.3d 810 (8th Cir. 2001).

F. PHARMACEUTICAL DRUG OR TOXIC TORT CASES.

55. Regarding causation, did the expert exclude all other obvious possibilities? If not, why not? *See, e.g., Hirchak v. Grainger*, 980 F.3d 605, 608 (8th Cir. 2020).

56. Has the expert proven general causation? *See, e.g., Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 688 (Iowa 2010) ("The relevant expert or experts on causation in toxic tort cases must be qualified to testify competently to both general and specific causation").

57. Has the expert proven specific causation? *Id.*

G. MEDICAL CAUSATION.

58. Did the expert do a proper differential diagnosis? *See, e.g., Glastetter v. Novartis Pharmaceuticals Corp.*, 252 F.3d 986 (8th Cir. 2001); *Turner v. Iowa Fire Equip.*, 229 F.3d 1202 (8th Cir. 2000).

59. What conditions or diagnoses did the expert exclude as a part of the differential?

60. Is the differential analysis documented in writing?

61. Has the expert proven general causation? *See Ranes*, at 688.

62. Are there double-blind studies, case-control trials or clinical studies on this subject that support the opinion? *Glastetter,* cited *supra*; *see also Penney v. Praxair, Inc.,* 116 F.3d 330 (8th Cir. 1997).

63. Are there peer-reviewed medical journal articles that support the expert's opinion?

64. Has the expert authored any reports or articles on the subject he/she is opining about?

65. If the expert is giving a diagnosis, has he/she ever seen or treated the Plaintiff?

66. Has the expert proven specific causation?

67. Did the expert consider the range of diseases or conditions that mimic the symptoms of the asserted condition in this case?

H. TRAUMATIC BRAIN INJURY (TBI) QUESTIONS.

68. Has the expert's DTI (Diffuse Tensor Imaging) analysis been limited or excluded by any court or judge? Has it been permitted? *See, e.g., Ruppel v. Kucanin,* No. 3:08 CV 591, 2011 WL 2470621 (N.D. Ind. June 20, 2011) (also cited at 85 Fed. R. Evid. Serv. 859).

69. Is the expert board certified in radiology or neuroradiology?
70. Does the expert use DTI to treat patients?
71. Does the expert treat patients? When is the last time the expert treated a patient?
72. What imaging studies did the expert utilize to support the diagnosis?
73. Did the expert do a differential medical diagnosis for Plaintiff?
74. What were the elements of that differential?
75. What medical conditions did the expert exclude as a part of his differential diagnosis?
76. How were they excluded?
77. What is the rate of error for the expert's diagnosis? What is this based on?
78. Does the expert admit that in order to do a proper differential diagnosis, he/she would have to exclude other causes of Plaintiff's condition?
79. Is the use of DTI "generally accepted" in the medical community? Please identify all resources that support this. Is it used to diagnose and treat patients? If not, then how can it be "generally accepted" in the medical community?
80. What standards control the proper use of the DTI technique?
81. Are there written standards?
82. Do the expert's opinions regarding DTI come from his/her work on litigated cases?
83. Has the expert done any peer reviewed, published research on DTI outside of the litigation context?
84. Does the expert use DTI to treat patients clinically? Is this approved?
85. What diagnostic tests did the expert give to Plaintiff?
86. Did the expert administer any neuropsychological tests?
87. What is the rate of error for those tests?
88. Did he/she issue a "standard battery" of tests?
89. What does the expert cite to support the claim this is a "standard battery?"
90. What was the raw data he/she got from testing Plaintiff?
91. Did the expert "score" this data in some form or fashion? What was used to score it with? Did you keep the score sheets?
92. Was the expert's scoring of the test data subjective?
93. How does this raw data compare to the normative data the expert used?
94. What was the normative data the expert used? Where did it come from?
95. Does the expert admit that if norms or normative data is not available, then it is impossible to determine whether a condition is "abnormal" or not?
96. Does the expert admit that Plaintiff presented a variety of symptomatology?
97. Did any of these symptoms pre-date the accident? Which ones? Please list.
98. What *objective* tests did the expert administer to Plaintiff to try to measure "cognitive deficit?" Were any *subjective* tests given?
99. What was the rate of error for these tests? What is the basis for this?
100. Does the expert admit that without normative data, it is impossible to measure deficit?

10. CONCLUSION

Daubert v. Merrell Dow Pharmaceuticals was decided nearly 30 years ago, in 1993. There is well-established *Daubert* precedent in both state and federal court applicable to Iowa cases. Effective use of a *Daubert* analysis can limit or exclude unreliable expert witness testimony, which may in turn result in dismissal of the case. This is true even if it cannot be removed to federal court. As a famous British philosopher once said:

> "You can't always get what you want. But if you try sometime, you might just find, you get what you need."
>
> —Mick Jagger, *The Rolling Stones*

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2 The Iowa Rules of Evidence apply "to proceedings in the courts of this state," i.e., both civil and criminal cases. *See* Iowa Rule of Evidence 5.101. Application of Iowa Rule of Evidence 5.702 to *civil* cases is the focus of this article, as most members of the Iowa Defense Counsel Association practice civil, rather than criminal, law.

Recent Iowa Supreme Court Opinion Provides Opportunity to Discuss "Civility"

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Susan Hess

On January 8, 2021, the Iowa Supreme Court issued its decision in *Iowa Supreme Court Disciplinary Board v. Richard Scott Rhinehart* (No.20-0824).

The Case: The complaint to the Iowa Supreme Court Grievance Commission against Mr. Rhinehart arose out of his conduct in two separate litigation matters. The Supreme Court held that the Board failed to prove the alleged violations and dismissed the complaint. All justices joined in the opinion, with Chief Justice Christensen filing a special concurrence, in which Justice Waterman joined.

Why It matters: After reading this case, and given the world in which we are living and practicing, it presents the opportunity to revisit a discussion on civility. The word "civility" comes from the word "civis," which in Latin means "citizen." Civility is defined as "civilized conduct or a polite act or expression." Seems simple, right? I found in reviewing sources and articles on this topic that what it is to 'be civil' is actually a much broader concept than being polite. Civility involves a demonstration of respect for others, not just those we know and love, but *strangers* too. Civility involves doing the right thing, whether that's an email to opposing counsel, a statement in open court, or a private post on a social media platform.

Summary: Why is it important to be civil in our profession? Chief Justice Christensen states that "in addition to demanding that attorneys maintain ethical behavior as outlined in our rules of professional conduct, we also expect attorneys to behave with civility and professionalism." (Opinion, at p. 23) She warns that when attorneys engage in uncivil and unprofessional behavior, they lower the bar for our profession and open the door for ethics complaints against them. (Id.)

During the heat of the battle in litigation, it can be easy to forget to be civil, especially as you zealously advocate for your client. That's important too, right? However, as the decision in *Rhinehart* reminds us, words matter. Word choice can turn zealous advocacy into a referral to the disciplinary board. There are several scholarly articles cited in the opinion that provide guidance or lessons on civility and the dangers of allowing zealous advocacy to cross the line to sanctionable conduct. The Gonzaga Law Review article cited in the opinion by Donald E. Campbell highlights examples of cases where courts have sanctioned attorneys for lack of civility, and stating that district courts have inherent authority to police lawyer conduct to guard and promote civility and collegiality among members of the bar. (*Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99, 100-101 (2011-2012)) The article presents a theory that the law firm culture itself may unknowingly foster incivility.[1] Underlying this rationale is the belief that law firms create culture where finding and retaining work, billing , and collecting fees result in a narrow focus on winning at all costs, and thus, the sacrifice of civility.[2] Lawyers who view their duties as primarily to the client-as opposed to the integrity of the legal system as a whole-increase incivility in the bar.[3]

We could all use these case examples as a reminder of our obligation to not only our clients and other members of the bar, but to the legal system as a whole. Civility is no longer simply an aspirational goal, but as suggested in this opinion and other articles, is increasingly becoming a required component of our ethical obligation as attorneys.

Please mark your calendars and plan to join IDCA for continued discussion of this topic, along with our guest panel on civility, as part of our annual meeting and seminar on September 16—17.

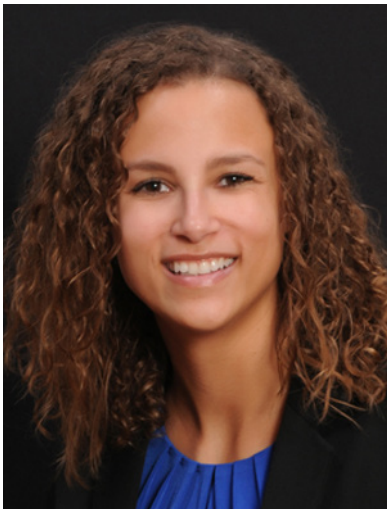
1 Marvin E. Aspen, A response to the Civility Naysayers, 28 Stetson L. Rev. 253, 255 (1998)

2 Mark D. Nozette & Robert A. Creamer, Professionalism: The Next Level, 79 Tul. L. Rev. 1539, 1547-48 (2005)

3 *Id.*

Case Law Update

Crystal Pound, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, IA



Crystal Pound

Terry v. Dorothy, 950 N.W.2d 246 (Iowa 2020) (7-0 vacating Court of Appeals decision and affirming district court's grant of summary judgment)

WHY IT MATTERS: The Iowa Supreme Court determined that while gross negligence against a co-employee is a common law claim that is generally outside the scope of workers' compensation statutes, if a release is broad enough, such claims may be extinguished.

SUMMARY: In *Terry*, Plaintiff Brian Terry worked for Lutheran Services in Iowa (LSI), when an LSI client attacked and injured Brian. After initiating a workers' compensation claim, Brian entered into two documents—a "Compromise Settlement" which expressly incorporated an "Additional Terms of Settlement," both of which the commissioner later approved.

The Compromise Settlement released the "above employer and insurance carrier from all liability under the Iowa Workers' Compensation Law" for the claim. The Additional Terms of Settlement, in consideration of $45,000 new money, released "Lutheran Services of Iowa, Inc., West Bend Mutual Insurance Company, and any of their . . . employees . . . by reason of his employment and by reason of all injuries or damages sustained by Claimant on or about October 14, 2015, through his association with the Released Parties," while releasing all liability for known and unknown injuries. *Terry*, 950 N.W.2d at 248.

Later, Plaintiff and his wife brought suit against his LSI supervisor, Dorothy, on a gross negligence theory and loss of consortium. Dorothy moved for summary judgment and the district court granted on both contract and statutory grounds. In light of dismissing the underlying gross negligence claim, the district court also dismissed the consortium claim. Plaintiff appealed.

The Court of Appeals reversed by reasoning that gross negligence, as a common law claim, is distinct and apart from a workers' compensation claim. Therefore, it held the settlement agreement did not extinguish common law gross negligence. The Appeals Court also held that the contractual theory was not properly before the court.

The Iowa Supreme Court upheld the Court of Appeals determination that gross negligence against a co-employee is a common claw claim outside the scope of the workers' compensation statutes, Iowa Code Chapters 85A and 85B. Iowa Code section 85.20 establishes chapter 85A and 85B as employees' exclusive remedies for recovery for such "injury, occupational disease, or occupational hearing loss" against one's employer, co-employee, or student involved in a work-based learning opportunity. *See* Iowa Code § 85.20.

After reviewing the record and determining that contract theory was properly submitted, the Court turned to the merits of contract theory. A release and its validity are governed by the same rules relating to other contracts. "The intent of the parties controls, and unless the contract is ambiguous, intent is determined by the plain language of the contract." *Verne R. Houghton Ins. Agency v. Orr Drywall Co.*, 470 N.W.2d 39, 42 (Iowa 1991).

Looking solely at the Compromise Settlement's release language, summary judgement would be inappropriate. However, after incorporating the Additional Terms of Settlement's broad release language, it "certainly extinguishes common law claims." *Terry*, 950 N.W.2d at 250–51.

Mallavarapu v. City of Cedar Falls, 19-1792, 2020 WL 7383115 (Iowa App. Dec. 16, 2020) (affirming district court ruling, but on different grounds)

WHY IT MATTERS: The Iowa Court of Appeals held that the intent of the contracting parties controls in creating an intended third-party beneficiary and an unintended third-party beneficiary does not have standing to compel specific performance under the contract.

SUMMARY: In *Mallavarapu*, seven homeowners christened themselves the "pond scum neighbors" and sued the City of Cedar Falls, requesting specific performance under an easement. Living next to a detention basin subject to a storm water drainage and detention easement ("storm water easement"), Plaintiffs also relied on a separate recreation easement also impacting the detention basin.

In 1997, Thunder Ridge West Owners Association ("Thunder Ridge"), while looking to develop a commercial subdivision, entered into the storm water easement with the City of Cedar Falls. Under the storm water easement, Thunder Ridge obtained

a "perpetual easement to construct and maintain a storm water detention and drainage facility" for the business property owner's benefit. The storm water easement was later amended in 1999 to include the duties of "installation, maintenance, repair, reconstruction, and replacement of the drainage facility in compliance with city standards." *Mallavarapu*, 2020 WL 7383115, at *2. Thunder Ridge fully came into being when a business owners association and a residential housing developer entered into a secondary easement for "recreation and beautification purposes." The parties to the easement agreed that the property's dominant purpose was for the storm water detention and drainage facility.

Under the storm water easement, Thunder Ridge was obligated to perform maintenance on the detention basin, including the "removal of trees and brush, dredging of silt from the pond, mowing of weeds, repairing banks and slopes of the detention basin, maintenance, repair, reconstruction and replacement of the storm water detention structures, spillways, and piping." *Id.* In the event Thunder Ridge did not maintain the detention basin, the City reserved the right to enforce the maintenance, and if needed, "may install said improvements, perform said maintenance and assess the total costs thereof as a lien against the Benefited Estate." *Id.* at *3.

Over time, Plaintiffs noticed an overall decline in quality. Algae and vegetation growth spiked, silt increased, the water level decreased and began to emit an odor. Plaintiffs hired an engineering firm to investigate the detention basin. Plaintiff's engineer opined that the water level had reduced by 40%, which made the basin unfit for recreation purposes. They recommended the basin be drained, sediment removed, and the bottom and sides restored. Plaintiffs requested the City take action related to the basin. When the City took no action, Plaintiffs filed suit against the City and Thunder Ridge. Defendants resisted, partially on the grounds that Plaintiffs were not in contractual privity with Defendants and were not real parties in interest.

At trial, the City challenged all testimony related to the recreation easement as the suit did not concern Plaintiffs' recreational use of the basin and challenged Plaintiffs' standing to compel specific performance. Thunder Ridge challenged all testimony regarding a 2010 ordinance, arguing it would be improper to "scrutinize the homeowners' claim for specific performance under an ordinance that generally did not apply to pre-existing detention basins."

The district court rejected both the City's and Thunder Ridge's arguments and held Plaintiffs were entitled to relief as an incidental beneficiary that "obviously obtained a benefit from the easements" and the ordinance retroactively applied to remedy public safety threats. *Id.* at *4. However, the court ultimately denied Plaintiffs relief, holding that the "city engineer has exercised the discretion given to him and determined that additional maintenance on the detention basin is not required." *Id.* All parties appealed.

As a law action, the Court of Appeals reviewed for correction of legal error. The Appeals Court analyzed the district court utilization of section 302 of the Restatement (First) of Contracts, where the Iowa Supreme Court has adopted the Restatement (Second) of Contracts approach in third-party beneficiary cases. Ultimately, citing to the Restatement (First) was not the issue as Iowa courts have not abandoned the rationale from the Restatement (First) and both Restatements "focus on the intent of the contracting parties, rather than the benefit received." *Id.* at 5. Therefore, the district court "overlooked the importance of 'intent' in its analysis." *Id.*

The City, and later the Court, relied on *Uhl v. City of Sioux City*, 490 N.W.2d 69 (Iowa Ct. App. 1992). In *Uhl*, Plaintiffs owned farmland they anticipated benefitting from a highway bypass project. When the benefit did not materialize, the Uhl's sued, demanding specific performance and claiming to be "intended third-party beneficiaries." *Uhl*, 490 N.W.2d at 71.

The *Uhl* Court held Plaintiffs "failed to carry the burden of showing the agreement was made for their express benefit." *Id.* at 73. Recognizing the intent of the promisee generally controls, the court here held Plaintiffs failed to show that the City and Thunder Ridge entered the storm water easement for their express benefit. *Mallavarapu*, 2020 WL 7383115 at *6.

The Court found the record evidenced the parties' concern was uncontrolled storm water runoff, not the aesthetic expectations of neighboring homeowners. Plaintiffs claimed threats to their health via the algae buildup, which the Court found outside the scope of the storm water easement. However, the Court specifically noted that "we do not rule out the prospect that under different circumstances a third party might have standing to enforce the storm water easement agreement." *Id.* at 7. While Plaintiffs did not suffer the harm contemplated by the contracting parties, the Court makes clear that a case with similar facts but a different claimed harm could be decided differently.

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