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Defense Techniques for Arguing Damages

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A. INTRODUCTION

The Iowa business, insurance and defense community has experienced an unusual number of huge damages verdicts over the past few years. Bad faith, personal injury and employment cases have led the charge. Here are some of the headlines: $25,000,000 for worker's compensation bad faith in Pottawattamie County (fortunately, the case was reversed on appeal and a new trial was ordered); $4,000,000 for a garden-variety broken leg in Polk County, where a young driver had been drinking; over $5,000,000 in a wrongful termination case in Poweshiek County (most of the award was for emotional distress with little, if any, medical bills or testimony; the case is currently on appeal); $4,000,000 for a broken ankle in a slip and fall on a snowy sidewalk

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WHAT'S INSIDE

IDCA President's Letter

Michael M[illegible]d
IDCA President

MENTOR YOUNG ATTORNEYS: MANDATORY, NOT OPTIONAL

I recently attended the retirement party for Judge Randy DeGeest in Oskaloosa. I was introduced to two recent Drake graduates, Justin Choate and Maddy Warder. Justin and Maddy were beginning their legal careers in Oskaloosa as a result of an incubator program called the "Rural Access to Justice Initiative" (RAJI). The program is designed to offer recent Drake Law graduates a pathway to solo or small firm practice in rural Iowa towns. While there are many benefits from starting this program, the most striking support comes from the mentorship from a local Drake Law alumnus. Joe Crookham and Diane Crookham-Johnson donated the office space and retired Judge DeGeest is serving as their mentor.

While this program helps address barriers for new attorneys in rural Iowa, the mentorship aspect should be implemented by law firms around the entire state. Some law firms have elaborate and detailed succession plans in place which include assigned mentors matching seasoned trial attorneys with new associates in their firms. As an association, we have an obligation to train the next generation of insurance defense attorneys. Long gone are the days of picking up a file and "heading over to the courthouse to see what this case is all about." Before the advent of our discovery process, young lawyers learned how to try a case by getting their butt kicked in the courtroom. While this was an effective way to prevent future trial mistakes, there is no substitute for good mentoring in today's trial practice.

Many insurance companies have guidelines to follow when assigning a case to defend. The attorney "on the file" must have completed certain requirements regarding the number of depositions and number of cases tried to a jury. So, how do we get experience for our young attorneys when they need jury trial experience under their belt before trying a case?

Do's:

1. Have the associate prepare deposition outlines from plaintiff's Petition, Initial Disclosures and discovery responses. This includes depositions of the parties, witnesses, and experts. The associate can sit in on the depositions to learn the ins and outs of making a record that will set up the case for trial.

2. Have the associate second chair several of your jury trials to gain a comfort level for trial work.

3. You can then parse out different portions of the trial to allow the associate to examine a few witnesses, possibly make the opening statement, and eventually conduct jury selection. Just remember that if the associate is conducting the cross examination, you cannot object during that witness' testimony. Believe me, it is easier said than done.

4. You can second chair a trial and allow the associate attorney to first chair before letting them fly solo.

Don'ts:

1. Under no circumstance allow an associate to perform trial work without the consent of your client's insurer. Many claim representatives will agree to your request for a young lawyer to participate in the trial, but they need to agree prior to the trial.

2. Gloss over the good and bad presentations made by the associate. Set aside some time during and after trial to discuss techniques that worked well at trial and those that did not keep the jurors' interest. Car rides to and from the courthouse are perfect times to praise good work and point out how to improve upon less effective choices by the associate.

Is there financial investment into these training experiences? Absolutely. Since attorneys cannot double bill for attendance at depositions and attendance at trials, the firm needs to understand the importance of these training techniques, even though these assignments will not produce income. Your firm benefits from having well-trained trial attorneys. Insurance companies want firms to have succession plans in place so that already

experienced attorneys take over files after the retirement of seasoned attorneys.

Despite the number of cases which are mediated, the jury trial is not going away. We have the best system of justice in the world and we will always need good defense attorneys to try our cases.

Iowa Defense Counsel Association has many excellent working relationships with the insurance industry nationwide. It is our obligation to properly train the new members of our organization to become excellent trial attorneys. Some day we will need to replace trial legends like David Phipps and Mark Tripp when they decide to step away from the trial practice. It is important that we train these attorneys, not merely by sharing little nuggets of information or entertaining war stories, but by mentoring them through the litigation process. It is incumbent on all of our members to take on this mandatory task in the insurance defense practice.

Michael J. Moreland
2018 IDCA President

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in Scott County (the case had been retried after appeal; in the initial trial, the jury had awarded over $1 million); $10,000,000 for medical malpractice in Dubuque County (the case involved an 80-year old man with fatal cancer); and this past summer, a shocking $29,500,000 medical malpractice verdict in what was previously thought to be a conservative county, Sioux County. In most of these cases claims for emotional distress or pain and suffering, or "non-economic damages," were at issue. In other cases punitive damage claims have been made, although the near "runaway" verdicts for non-economic damages untethered to the facts of the case seem to be more prevalent. Many of these verdicts can be explained by the meteoric rise of the "Reptile" litigation strategy that appears to be the norm among many plaintiff's counsel. The authors believe that the cause of some of these enormous verdicts is the patently improper, yet effective, jury argument by plaintiff's counsel with high emotional impact, and the absence of an effective defense response.

Two Iowa appellate court decisions filed this past summer, however, may signal an end to egregious reptile conduct and a return to the real world. A recent Iowa Court of Appeals case, *Bronner v. Reicks Farms, Inc.,* 2018 WL 2731618 (Iowa Ct. App. June 6, 2018) and an Iowa Supreme Court case, *Kinseth v. Weil-McClain,* 913 N.W.2d 55 (Iowa 2018), clearly indicate that Iowa trial and appellate court judges will not hesitate to control the courtroom and prevent attorney misconduct in argument, where warranted. Nevertheless, the problem reflected in the ease in which a claimant can argue the issue of damages to a layperson jury, and the practical difficulty that defense counsel has in rebutting those emotional and sympathy-provoking arguments, remains.

The purpose of this article is to discuss potential defense techniques in arguing compensatory and punitive damages. Defense counsel are practiced at arguing liability, negligence, defect and causation. Damages, however, is inherently a more difficult concept to address. Juries are given very little guidance, other than to be "fair and reasonable." In a strong liability defense case, damages may not even be argued at all by defense counsel. Defense attorneys may be less comfortable when standing in front of a jury and seeking to convince them, with a straight face and without blushing, that what plaintiff's counsel is asking for in a verdict makes no sense under the facts or the law. But in many of these cases what the juries are awarding makes no sense, and is simply too much money given what happened and the nature of the actual, provable injury.

B. COMPENSATORY DAMAGES

Damages arguments can be segregated into two types: a) compensatory damages; and b) punitive damages. We will first address compensatory damages. This article discusses some of the techniques used by plaintiffs to enhance the amount of damages awarded, and identifies some potential defense tactics and responses.

1. FILE PRETRIAL MOTIONS *IN LIMINE* WELL IN ADVANCE OF TRIAL

In any case where a reptile or hyper-aggressive plaintiff's lawyer is involved, pretrial Motions *in Limine* will be a critical stage in the trial. It is critical to inform and educate the trial judge regarding the anticipated use of these tactics well in advance of trial. If you do it too late, chances are the court will not have time to afford you a meaningful hearing. If these strategies are not stopped at the outset, they will infect the case, any plaintiff's verdict will likely be exponentially larger and in the end, there will be no practical remedy. Even if some of your motions are overruled based on lack of record, lack of specificity or prematurity, at least you will have sensitized the trial judge to the problems that are forthcoming.

Your pretrial Motion *in Limine* "to-do" list should consider the following motions:

i. Not allowing any opinions from any experts that were not disclosed in discovery. Iowa R. Civ. P. 1.500(2)(b), 1.508(4) and 1.517(3); *see also Hagenow v. Schmidt*, 842 N.W.2d 661, 672 (Iowa 2014), *overruled on other grounds by Alcala v. Marriot Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016).

ii. Not permitting "[N]eedless endangerment" questions. *See Bigelow v. Eidenberg*, 369 P.3d 341 (table), 2016 WL 1545777, at *14–15 (Kan. Ct. App. Apr. 15, 2016).

iii. Not permitting the [Y]ou are the conscience of the community" arguments. *See State v. Willis*, 218 N.W.2d 921, 924 (Iowa 1974) (condemning the use of such language by a party as tantamount to jury nullification).

iv. Not permitting "[S]end a message" arguments. *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 71 (Iowa 2018). One plaintiff's verdict in 2017, *Anderson*, involved a female worker for the Republican caucus at the statehouse, who was terminated immediately after filing a sexual harassment complaint. After a nearly $2 million jury verdict in Polk County, the case was settled for over $1 million in lieu of an appeal. Nearly all of the verdict was for emotional distress, as the Plaintiff had found replacement work elsewhere for more pay. One of the appeal issues involved Plaintiff's counsel's argument in summation that the jury should "send a message" with its verdict. In that case there was no claim for punitive damages. The settlement mooted out an appellate decision on this issue.

v. Not permitting the "[A]lthough Plaintiff only had a minor injury, they could have been killed" argument. *See* Iowa R. Evid. 403 (evidence that is confusing to the jury is not admissible).

vi. Preventing plaintiff's counsel from injecting personal beliefs into arguments. *Rosenberger Enters. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995).

vii. Not allowing plaintiff's counsel to vouch for witnesses' credibility. *Bronner v. Reicks Farms, Inc.*, 2018 WL 2731618 (Iowa Ct. App. June 6, 2018). This was one of the reasons for the trial court's JNOV in *Reicks Farms* that was affirmed on appeal.

Preventing appeals to the passions or prejudices of jurors. See Iowa Uniform Civil Jury Instruction No. 100.3.

Using the "Golden Rule" argument or multiple variations thereof. *Oldsen v. Jarvis*, 159 N.W.2d 431, 435 (Iowa 1968).

Efforts in *voir dire* to get potential jurors to "commit" to a number for damages.

A more fulsome discussion of these *in limine* arguments, as well as citations to authority, can be found in *"Defense Techniques for Combating Plaintiff's Reptile Strategy,"* Reynolds and Hermsen, Defense Update, Winter 2018 Vol. XX, No. 1 (2018).

2. *VOIR DIRE*

i. *STATE V. FEDERAL COURT*

The proper defense techniques for dealing with damages starts at the very beginning of the trial, in *voir dire*. In Iowa state courts, most judges allow counsel a fair amount of freedom in questioning the jurors. This is defense counsel's only chance to have a give-and-take discussion and to talk directly with prospective jurors. This is a golden opportunity and it should not be wasted.

Voir dire in federal court in Iowa is typically much more limited and controlled. As a practical matter there is little chance that plaintiff's counsel will be abusive in *voir dire* if the case is venued in federal court. In the typical case, the federal judge will do most, if not all of, the jury questioning. The court will usually permit limited follow up questions from counsel. The federal court's tighter control over the jury selection process might be a good reason for a defendant to remove a case filed in state court to federal court, if removal jurisdiction exists. *See* 28 U.S.C. § 1332 (federal court jurisdiction based on diversity of citizenship); 28 U.S.C. § 1441 (removal of civil actions).

ii. *HAVE* VOIR DIRE *REPORTED*

Jury selection is usually not reported in state court. If an opponent has engaged in improper tactics throughout the course of the litigation, or you suspect they will do so at trial, ask to have *voir dire* reported. Make sure you give the court and court reporter advanced notice; this is not the typical procedure and they will appreciate the "head's up." Get over any notion that you will make the trial judge "mad" if you request that jury selection be put on the record. In our experience, merely the fact that *voir dire* is being reported causes many plaintiff's counsel to moderate their tactics. Unless *voir dire* is reported, you will have no record for purposes of appeal if you object to your opponent's questions. In *Kinseth*, the Iowa Court of Appeals specifically referenced the fact that closing arguments were *reported* (note, this is usually not the case as well), and the appellate court had a good record upon which to make a ruling in favor of the defendant. Without this record it would have been difficult, if not impossible, to fashion a remedy for plaintiff's misconduct and improper tactics.

iii. *GET OFF TO A STRONG START*

In *voir dire* it is critically important to make sure that plaintiff does not gain an advantage by going first and by doing an aggressive *voir dire* of the jury panel. The "runaway freight train-plaintiff's case" needs to be avoided at all costs. Do not let the other side seize the advantage from the start. The plaintiff goes first and recognize the fact that this gives them an initial "leg up." As defense counsel, take advantage of the fact that you go second, you have seen what opposing counsel has done, and you are in a perfect position to directly respond and counteract everything that plaintiff's counsel has done, bringing the case back to an even playing field.

iv. *BE INTERESTING*

Defense counsel must work hard to be as dynamic, engaging and interesting as plaintiff's counsel in all presentations to the court and jurors. Standing board-stiff at the podium, having no eye contact with the jurors, and reading verbatim from a yellow legal pad is not only ineffective, it is the death knell to your case. While you shouldn't act like a used car salesman, try to be engaging, at the very least. If the plaintiff's *voir dire* is strong and defendant's is weak, the potential jurors may form preliminary opinions in favor of the plaintiff. These initial impressions can be difficult, if not impossible, to reverse. "You have only one chance to make a first impression." Some studies have shown that jurors make up their minds early in a case, in terms of who they feel should win, and thereafter cubbyhole evidence and information into that pre-existing framework. You must get off to a strong start, and *voir dire* is the very start of the case! Use *voir dire* to your advantage.

Think of some interesting questions to ask and provoke a meaningful discussion among the jurors.

v. IF YOU ARE GOING TO MAKE A LOT OF OBJECTIONS, CONDITION THE JURY FOR IT

One subject to cover in jury selection is the likelihood of defense objections to argument and testimony during trial. If plaintiff's counsel is well known for Reptile tactics or has been overly aggressive, you can prepare the jurors for this eventuality. If you foresee a situation where you may be required to object a lot to plaintiff's trial presentation, it is probably a good idea to warn the potential jurors about that in *voir dire*. You may need to desensitize the jurors to the fact that you may be objecting a lot, and that you are not objecting to "cover anything up," but you are objecting to make sure that the proper procedure is followed.

You might consider doing something like this:

Q. There is another subject I would like to cover. That is objections. Has anyone on the panel here ever watched some of the law shows?

A. (Several hands raise).

Q. Ms. Johnson, what shows did you watch?

A. LA Law was one that I remember. Also, I remember the movie "The Verdict" with Paul Newman.

Q. In those shows and movies did you watch some of the courtroom scenes?

A. Yes.

Q. They were pretty dramatic, correct? In some of those scenes, would an attorney ask a question, a lawyer would object, and then the judge or court would make a ruling?

A. Yes, I guess.

Q. And that is how the trial process occurs; a question is posed, an objection is made, and the court rules on the objection. You see, under the law, if opposing counsel does something that is not proper, it is up to me to object. And, an objection is kind of an interruption, you know? And, can you understand how I don't want to interrupt? But in some cases I may have to do that to protect the legal interests of my client? Does that make sense?

Q. Have you all heard of the phrase "speak now or forever hold your piece? Well, that saying applies to legal objections; if I don't speak up, then I have no right to complain later. Is everyone generally familiar with that?

Q. Now, in this case, we have some strong objections to some of the evidence and arguments of the other side. Does anyone here have any problem with that?

A. (no one raises their hand; all shake their heads no.)

Q. That is how the process works. That is part of the lawyer's job, to object to matters that we feel are improper. Will anyone on the jury be offended if we object to some things?

A. (all shake their heads 'no').

Q. If you do, please speak up, everyone here will respect you for your candor.

A. (no one responds).

Q. Will anyone here hold it against my client, or hold it against me, if we feel, in our professional judgment, that in order to properly represent our client, we have to object?

A. (All jurors shake their heads no).

It is only human nature for a defense counsel to be concerned that if they object too much, the jury (or judge for that matter) will "hold that against them." As a result, defense counsel may forgo making objections it would otherwise make, in order to be "more likable." Resist this urge at all costs; do not fall into this trap! You are correct to be concerned, but it is far more preferable to "condition" the jury to the fact that you may be making a lot of objections, as opposed to deciding to not object. The bottom line is this: if you don't object (or if you don't have *voir dire,* opening statements or summation reported) you won't have any record for appeal in the event of an adverse verdict. The reporters are full of cases where error has likely occurred, but the appellant failed to preserve error and no legal remedy is possible. Proper error preservation is the first issue an appellate court examines, and the failure to preserve error may preclude consideration of a valid legal issue.

vi. BE READY TO OBJECT TO THE "REPTILE" QUESTIONS

A lot has been written about objections to Reptile questions to defense witnesses in deposition and trial. But you should also be ready to object to the same types of questions if posed by plaintiff's counsel in *voir dire*. This is where aggressive plaintiffs start trying their cases and using their "themes." Have a defense theme and start trotting it out there in jury selection!

Here are some of the questions that plaintiff might be pose, along with potential defense objections:

Use of the "would you agree with me" form of question.

DEFENSE OBJECTION: Counsel is asking the potential juror to commit to specific issues in this case; Plaintiff's counsel is improperly arguing her case; this is not proper *voir dire*.

"On a scale of 1 to 10, where would you list 'safety' as a priority?"

DEFENSE OBJECTION: Counsel is asking the potential juror to commit on specific issues in this case; in addition, this question sets up the wrong standard. The proper standard is not to make a product as safe as possible, but rather, to make a product reasonably safe. "Reasonable" is the key!

"Would you agree with me that a manufacturer should do everything possible to make a product safe?"

DEFENSE OBJECTION: Counsel is asking the potential juror to commit on specific issues in this case; in addition, this question sets up the wrong standard. The proper standard is not to make a product as safe as possible, but rather, to make a product reasonably safe.

"You are the conscience of the community."

DEFENSE OBJECTION: This is an improper question; the jury is to decide this case based on the evidence and the law; counsel is asking the jury to consider outside matters, and this is improper.

"Send a message."

DEFENSE OBJECTION: This is an improper argument in a compensatory damages case. This is even an improper question in a case involving a claim for punitive damages, prior to the time the court has determined that a ***prima facie*** case for punitive damages has been presented. The purpose of compensatory damages is to reimburse a plaintiff for his losses, not to punish the defendant or deter like conduct in the future. A punitive damage claim must be bifurcated, as discussed *infra*.

Violations of the proscriptions against the "Golden Rule" argument.

DEFENSE OBJECTION: This question is improper; it is the Golden Rule argument. Keep in mind that the argument being used may be a very subtle, and less-than-obvious, Golden Rule argument.

"My clients are telling the truth."

DEFENSE OBJECTION: It is improper for counsel to vouch for the credibility of a witness or client. Plaintiff's counsel did this in *Bronner* and it was (at least in part) a proper basis for the trial court's granting of a new trial, based on attorney misconduct in argument.

"People in this town are watching this case."

DEFENSE OBJECTION: This is an improper question; the jury is to decide this case based on the evidence and the law; counsel is asking the jury to consider outside matters, and this is improper. Would this have been a proper argument for the prosecutor in "To Kill a Mockingbird?"

The use of astronomically-high "anchors:" $5 million, $15 million, etc.

DEFENSE OBJECTION: Counsel is asking the potential juror to commit to specific issues in this case; this is not proper *voir dire*. Counsel is throwing large numbers out there, and none of the jurors have heard any evidence in this case to this point in time. This is patently improper.

vii. FIGHT FIRE WITH FIRE; "FOR EVERY THRUST, A PARRY"

Defense counsel should meet the issues addressed in plaintiff's *voir dire*, point for point. "For every thrust, there should be a parry." Fight fire with fire. Do not leave any argument or mode of attack unanswered. We all know the "evil sought to be avoided:" a plaintiff's case that is steamrolling downhill, on an inexorable march to a huge verdict of damages!

If the court overrules your objection to plaintiff's use of high anchor damages numbers, you may want to consider using a low "anchor," or damages number, or discussing the likelihood of a defense verdict when rebutting a high anchor by plaintiff. In *voir dire*, your "tit for tat" rebuttal might go something like this:

Q. In Plaintiff's questions to you, he asked you if you would commit to returning a verdict for $15 million if he proved his case. I objected to that statement but the court overruled my objection. Do you remember those questions?

Q. I think that kind of number is, quite frankly, ridiculous and out of line, since you haven't yet heard any evidence presented by any of the parties to this case. Would you agree that it is difficult, if not impossible, to give Plaintiff's attorney such a commitment, without having heard any of the evidence in the case?

Q. So, let me ask you the flip-side of that question. It is our position in this case, that [there is no liability, or, Plaintiff's damages are worth approximately $100,000] [NOTE: use a number here that is well less than your highest settlement offer!] and that if the evidence proves what we think it will prove, that your verdict will be [for Defendant, or, will be in the amount of $100,000]. Is everyone here OK with that? Is there

anyone here that thinks that, just because Plaintiff's counsel has mentioned the sum of $15 million, that Plaintiff is entitled to such an astronomical amount?

[For jurors that say "yes," follow up with questions to get them stricken for cause.]

Or, you might try this:

Q. Remember when Plaintiff's attorney was asking you questions, and he was asking you about returning a verdict in this case for $15 million. Do you remember that? Hearing a huge number like that makes an impression on one's mind, would you agree? It is hard to forget that, do you agree?

Q. When he said the number $15 million, quite frankly, did that turn any of you "off?" Please be honest, everyone will respect you for it.

Q. Actually what Plaintiff's attorney is doing there, is he using a well-known psychological technique, known as "anchoring." The purpose of this technique is to mention that high number enough times, over and over and over again, that you will be de-sensitized to it, and it will no longer be a "turn off" to you.

Q. Are any of you trained in jury psychology? Are any of you trained in the subject of psychology? Have any of you heard of "anchoring" before?

Q. Have any of you heard of the saying: "If a lie or untruth is told over, and over, and over again, eventually, some people will come to believe it." Has anyone heard of that phrase?

Q. Well, this is a similar concept. Does anyone here believe that Plaintiff should recover $15 million simply because Plaintiff's counsel mentions $15 million over, and over, and over again? Does everyone here agree that that makes no sense? But instead, your verdict should be based on the facts and the law?

viii. WATCH FOR PLAINTIFFS ASKING THE JURORS TO GIVE A COMMITMENT TO AN ASTRONOMICALLY-HIGH VERDICT NUMBER

Most plaintiff's counsel in personal injury cases (or employment cases with emotional distress damage claims) will address the subject of money damages at length and *ad nauseum*. These days it is a rare occasions where a plaintiff's attorney will *not* give a specific "number" to the jury. Historically, defense counsel do not give a specific number to the jury for damages, for the fear that they will be viewed as conceding liability, or creating a "floor." However, as evidenced by some of the recent jury verdicts, this tactic is no longer working; we, as defense counsel, need to find a different way!

Plaintiffs will also argue that the only "justice" that the jury can do, for plaintiff, is to award a judgment of money damages. Some hyper-aggressive plaintiff's lawyers even go so far as to ask the potential jurors for a commitment that they will return a judgment of damages in a certain amount, if plaintiff proves his case. This takes some serious vigilance on the part of defense counsel to make sure this does not occur, or if it does occur, it is over defendant's objection on the record. As previously mentioned, this is typically done as part of a concerted effort to create a psychological "anchor" on the amount of damages. *See, e.g., "Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments,"* John Campbell, Bernard Chao, Christopher Robertson & David V. Yokum, 101 Iowa L. Rev. 543 (2016) (mentioned *supra* and discussed further *infra*). This is improper, it is very damaging to the defense, and should always be the subject of an objection. This is objectionable since it asks a potential juror to give an opinion and to commit on a certain issue before any evidence has been heard, and prior to deliberations. One way to prevent this from happening is to address it up-front in your pretrial Motions *in Limine* and to object in *voir dire* if plaintiff's counsel attempts to obtain a commitment of this nature.

ix. ALWAYS HAVE A "PLAN B"

What if your pretrial or *voir dire* objection is overruled? Defense counsel must prepared to squarely address this issue if the court won't prohibit it. This requires a carefully planned, considered and effective defense response.

For example, it is common for plaintiff's counsel to do something like this:

Q. Do you understand that if I win my client's case, there will be a money judgment?

Q. Do you understand that is how our justice system works, in this type of case, that my clients gets a judgment for a money or dollar amount?

Q. And that this is the only 'remedy' that can be ordered in this case, and that is a judgment for a monetary or dollar amount.

Q. Does anyone here have any problem with that?

Q. Does anyone here think that jury verdicts are sometimes too high? Has everyone heard of the McDonald's "hot coffee" case? Did you know that although there was a large verdict at trial, that verdict was set aside on appeal? Did you know that

several other people had been seriously burned by hot coffee served at McDonald's?

Q. Now, in this case, we believe that the Plaintiff has sustained a very serious injury. We are seeking "full justice" for my client in this case. Not ¼ justice, or ½ justice, but FULL JUSTICE. As a result, we will be asking the jury for a judgment for more than a million dollars. In fact, we will be asking you for a verdict of $5 million. Now, if we meet our burden of proof, and prove our case, is there anyone here that would not return a verdict of $5 million dollars if we prove our case?

Plaintiff's purpose is to get the jurors comfortable with the prospects of a large, multi-million dollar verdict. Also, plaintiff's attorney is seeking a commitment and promise. Alternatively, if a juror responds that they could not return such a verdict, then the plaintiff will follow up with further, leading questions and will try to get that juror excused for cause, thus saving one of their peremptory strikes. This is a fundamental theme of many plaintiff's counsel these days: they use the psychological technique of anchoring and keep repeating "15 million dollars," "15 million dollars," "15 million dollars" (or some other insane amount of money) and before long, it doesn't seem so bad and the jurors are not so turned off by it. This tactic must be addressed and stopped immediately!

x. THE DEFENDANT NEEDS TO COUNTERACT PLAINTIFF'S "HIGH ANCHOR" ON DAMAGES

In a recent case, a Polk County jury awarded over $4 million for a broken leg in a city-street-type-of-speed collision. It should be noted that there was also a punitive damages claim involved, since the defendant driver, a law student, had been drinking. Apparently the high anchor worked. In post-trial juror interviews, the jurors noted that some members wanted to return a verdict of $16 million, but ultimately concluded they thought they were being *conservative* in their $4 million award. They thought they were being "conservative" when compared to Plaintiff's request for $16 million. This is almost unbelievable, but it happened, and it happened with an honest-to-goodness Iowa jury. It is defense counsel's challenge to get things back on track and restore sanity to the judicial process.

To counteract this approach, you might consider the following:

Q. Do you remember plaintiff's counsel's questions about a $15 million dollar verdict? I would like to ask some questions about that, from our perspective.

Q. Now, I represent the women and men of ABC Corporation. I will be very blunt with you. We are defending this case because we firmly believe that our industrial truck, commonly known as a "forklift," was not defective in design or manufacture. Thousands of these forklifts have been made and sold with no defects of the type they are alleging here. Instead, the plaintiff was negligent in his operation of the forklift, and his negligence caused the accident. If it is not being operated in a safe manner, then a forklift is not safe. Do you understand what our position is?

Q. Since we firmly believe that under the facts and under the law we are not liable, it will be our position that at the end of this case, the plaintiff will receive a verdict of $0, zero, nothing, a defense verdict. Do you understand that's what our position is?

Q. Is there anyone here that would have any problem with awarding the plaintiff zero damages, if they believe, at the end of the day, that plaintiff has not proven their case, and that my client is not liable for a defectively designed or manufactured forklift?

Q. If that gives anyone a problem here, please speak up, we will all appreciate your honesty.

Q. Is there anyone on this jury panel that honestly feels that they could not send the plaintiff away with no money, if they haven't proved their case of product defect, even though they may have sustained a serious injury?

PRACTICE POINTER: if you find with this questioning that there is a juror or jurors who cannot make this "fairness" pledge to you, then "turn the tables" and do what the plaintiff's attorney would do: try to get the juror(s) stricken for cause, eliminating potential "poison apple" jurors and saving your precious peremptory challenges.

Alternatively, suppose you have a case where liability is established, or at the very least it is likely that the jury will return a verdict for plaintiff. In some cases stipulating to liability may be the best strategy. In such a case the only real issue is, how much? This was actually the case in *Bronner v. Riecks Farms*, where the defendant turned left in front of an approaching vehicle, i.e., failed to yield to oncoming traffic with no evidence of speeding by plaintiff's vehicle. The defendant in *Bronner* stipulated to liability. Depending on the facts, this may be a better option than arguing a bad liability case and running the risk of invoking the jury's wrath on your client.

If a psychological anchor technique can be used by plaintiffs to return high jury verdict awards, can the same technique be used by defense counsel to temper the verdict? We are not clinical psychologists, but we do have significant "scar tissue" as a result of experience (some good, some bad, and some, downright *ugly*)

in the courtroom. The only point being, in the right situation where plaintiff has a good liability case, a "low anchor" approach is worthy of consideration.

The *voir dire* might go something like this:

Q. Let me speak for a few minutes on the subject of damages. Now, do you all recall when plaintiff's counsel was talking with you about a verdict of $5 million, and whether or not you thought you could return a verdict in that amount? Do you recall those questions?

Q. Does anyone here think it's a little bit unfair, talking about such numbers as $5 million, when you haven't even heard any of the evidence yet? In other words, you can't answer a question like that in the abstract. Instead, it has to be based on the facts and the law? Do you all agree?

Q. By the way, the judge at the end of the case will instruct you, and will read some instructions to you, and as a part of those instructions, will tell you that you must decide your verdict based on the facts and the law as presented in this trial.

Q. Now, in this case, we believe that plaintiff's injury was limited; it was of short duration; and she was left with no permanent injury. In light of this we will be asking you to return a verdict of no more than $50,000. We believe that a verdict of $50,000 would be more appropriate, and more consistent with the facts and the law in this case. And that the evidence will show that plaintiff's medical bills in this case were $15,000. That there was no surgery. She had no complications in her recovery. But she did have pain and suffering, and so we have given her over two times her medical bills for her pain and suffering. She has a legal right to recover for that. Now here is my question: would each of you pledge to me to approach this case with an open mind? To not automatically think: well, if plaintiff wins, its $5 million. Instead, we believe a number more like $50,000 is appropriate under the facts and the law. Now, that final number, your verdict, is up to you to decide. Does everyone understand that? Thank you.

The use of an alternative, lower damages number, in this example $50,000, could be viewed as a "defense," "counter" or "low anchor." This technique might be used to temper the effects of Plaintiff's unreasonably high anchor.

xi. SYMPATHY: THE "PINK ELEPHANT" IN THE COURTROOM

There is a natural, human tendency to feel sympathy and be empathetic for anyone that has been seriously injured in an accident, or claims damage as a result of an adverse employment decision. In this author's view, failing to recognize human nature, and failing to address the sympathy issue is courting disaster in a jury trial.

Uniform Civil Jury Instruction No. 100.2 states as follows:

> **100.2 Duties Of Judge And Jury, Instructions As Whole.** My duty is to tell you what the law is. Your duty is to accept and apply this law.
>
> You must consider all of the instructions together because no one instruction includes all of the applicable law.
>
> The order in which I give these instructions is not important.
>
> Your duty is to decide all fact questions.
>
> **As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases.** The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.
>
> (emphasis added)

The subject of sympathy *must* be addressed in jury selection in any case involving claims for pain and suffering or emotional distress. In the authors' view, sympathy and emotion is a key component and likely driver of some of the exorbitant jury verdicts seen lately in Iowa. It could go something like this:

Q. Now, as you have heard, this case involves a serious personal injury.

Q. The Plaintiff, Mr. Smith, unfortunately, sustained an amputation injury to his hand.

Q. In this accident, the proof will be that he lost the tips of his ring, long and index fingers on his right hand. Mr. Smith had what was described by the doctors as a severe degloving injury, where all of the skin, muscle, tendons are ligaments are disrupted and damaged. And the evidence will be that Mr. Smith was right handed. He had three different surgeries on his hand and fingers, and that the injury was quite painful. You may even see some bloody photographs of his injury. [NOTE: You will know this because by the time of trial the court will have ruled on your Rule 403 motion to keep the bad injury photographs out of evidence.]

Q. Is anyone on the panel queasy about such things? Does anyone here faint at the site of blood? I used to do that when I was a little kid, it happened to me a couple of times, I couldn't control it.

Q. All of us, in this courtroom, feel bad for Mr. Smith. We all wish that this had never happened. We are all, every single person in this courtroom, very empathetic towards his plight.

Q. And that brings up the topic of: bias, sympathy, passion and prejudice.

Q. At the very end of this case, before you go to jury deliberations, if you are chosen to be a juror in this case. I believe that the court will give you an instruction that every court in Iowa gives in every personal injury case. And that instruction says, and I quote:

> "As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions."

Q. Ms. Jones, what if during jury deliberations, Mr. Smith makes this statement: "I think we should award the Plaintiff a judgment, because I feel sorry for him." Would you be willing to tell him: "Wait a minute; we can't do that. The judge told us we cannot consider sympathy in our verdict?"

Q. Is there anyone on the panel that feels that, for whatever reason, they could not follow that instruction? We would all understand if you had a problem with that, it's only a natural, human reaction. Please speak up and everyone will respect you for your candor.

PRACTICE POINTER: If any juror(s) cannot pledge to you that they will follow the jury instruction to set aside sympathy, ask follow up questions and you may be able to establish the basis for a challenge for cause.

In addressing the subject of sympathy, consider going into a fair amount of detail with respect to plaintiff's injury. You might even read verbatim from some of the worse medical records, if they have been stipulated into evidence (as they often are). If there are some unusually gory, post-injury accident scene photographs that the court has ruled will come into evidence, either show the photographs (if permitted by the court) or describe in detail what the photographs depict. You can then gauge the reactions of potential jurors. You will immediately see which jurors will be overly swayed by this emotion-laden and sympathy-provoking evidence. But in some form or fashion, the issue of sympathy and the severe and gruesome (if applicable) nature of the injury should be addressed, up front, in detail with no apologies and no excuses. This is true even in cases where the defense is based solely on liability or causation. This technique may be even more necessary in such cases, since the evil sought to be avoided is having the jury decide the case based on sympathy or emotion, as opposed to the facts or the law.

3. CLOSING ARGUMENT/SUMMATION

i. THE PER DIEM *ARGUMENT*

The *per diem* argument is a simple one, and lurking deep within its simplicity lies its mortal danger. Assume that opposing counsel argues that plaintiff sustained a permanent injury, and is entitled to $500 per day for her pain and suffering. When this *per diem* amount is multiplied by the number of days remaining in that person's life expectancy, some astounding numbers can be realized. For example, if the plaintiff is 25 years old and her life expectancy is to age 82, then by using simple arithmetic, $500 per day can be multiplied by 365 days a year, for 57 years, and the resulting sum is $10,402,500! The *per diem* argument is a method by which a plaintiff's attorney can get to some huge numbers in cases that involve even modest injuries.

Another technique is for plaintiff's counsel to run the numbers as above, but to then demonstrate their "conservative" approach by suggesting to the jury an alternative number, for example, 50% of the huge numbers realized. In the example set forth above, this would result in an "ask" for $5,201,250, not an insignificant number by itself. As a defendant we would point out that "50% of an astronomical number is still as astronomical number!"

Although the *per diem* argument is not permitted in some jurisdictions (this is something to keep in mind if you have a multi-jurisdictional practice), Iowa is not one of them. *See, e.g., Cardamon v. Iowa Lutheran Hospital,* 256 Iowa 506, 128 N.W.2d 226 (1964) (per diem argument is permitted, but counsel is not to ask the jury if they would take $(X) in exchange for plaintiff's injury; that is an improper violation of the Golden Rule argument); *Corkery v. Greenberg*, 253 Iowa 846, 114 N.W.2d 327 (1962). The state of the law on this issue is not likely to change anytime soon. Since this argument is legally permitted, how can or should the defense respond?

ii. THE DEFENSE RESPONSE: THE "TIME VALUE OF MONEY"

We can think of a few possibilities, among them: 1. Take plaintiff's astronomical number ($10,402,500 in the above example) and demonstrate for the jury the time value of money 2. Argue the utter ridiculousness of the whole exercise, because no one in the real world gets paid money to experience pain; 3. In a strong liability case for plaintiff, or a case of stipulated liability, offer a low "counter" to plaintiff's *per diem* number by using an alternative

analysis, e.g., a multiple of the medical bills paid. There are no doubt other possible arguments, but we will discuss these three.

Your damages argument in summation might go something like this:

> "Let me talk with you for a few moments about the subject of damages. I must admit that damages can be difficult to talk about. People do not discuss such things on a daily basis. No one would pay "x" amount of money in exchange for suffering an injury. No one. But nevertheless, in order to do a full and complete job for my client, and meet my ethical responsibilities to be a zealous advocate, I must address the issue of damages.
>
> In considering damages, one thing I would like to talk about with you, is the "time value of money." This is the simple concept that an amount of money invested today, can earn interest over a period of time, and can pay out larger amounts of money in the future. As you go further and further out into the future, you can earn surprisingly vast sums of money.
>
> For example, Plaintiff's counsel in this case has just given his closing argument. In that summation he asked you for a verdict of damages in the amount of $10 million. 10 million dollars is a huge sum of money! For example, we all know that Plaintiff earned, on average, $50,000 per year in his job. He would have to work that job for 20 years in order to earn $1 million! 10 million dollars is 200 times this amount. Mr. Jones would have to work his job for 200 years in order to earn $10 million working at his job.
>
> But let's stop for a second, and consider how much money $10 million is.
>
> We all know that since the time of the 2016 election, the stock market is up approximately 30 per cent. Now, that kind of positive return is very unusual, and will not, unfortunately last forever. So, as a starting point, let's take a more reasonable rate of return over a longer period of time. Let's be fair. Let's be conservative. For example, and for ease of computation, assume an annual rate of return of 10%. Over the past 20 or 30 years, persons who are invested in the stock market have averaged more than a 10% annual rate of return. That is a proven fact. But let's take an annual rate of return of 10%.
>
> Now, in this case, let's suppose you award the Plaintiff $10 million. $10 million invested at 10% would yield an income of $1,000,000 per year. $1,000,000 per year—that is a lot of money and a person living in Iowa, with a low cost of living, could easily make a living off of an investment earning $1,000,000 per year.
>
> Now, let's further assume, as is true of the Plaintiff in this case, a life expectancy of 82 years. She is 25 years old now. So, she has 57 more years to live. Hopefully, she will live even longer than that. But let's take what the actuaries tell us.
>
> So, if you award $10 million to Plaintiff, she will earn $1,000,000 per year, for the next 57 years. 57 times $1,000,000 = $57,000,000.
>
> Now, let's suppose the Plaintiff lives off of the income each year, the $1,000,000. That would mean that at the end of Plaintiff's life, her estate would still be worth the full original amount of the judgment, $10 million, because none of the principal had been spent, only the interest.
>
> $10,000,000 in principal plus $57,000.000 in income = $67,000,000. $67,000.000 is an astronomical amount of money.
>
> Now, these numbers are conservative in that I am talking simple interest. If compounded interest were used, her principal amount would double every seven (7) years. It's simple arithmetic. If the Plaintiff lived on something less than $1,000,000 per year for the rest of her life, which would be very possible in Iowa, then these numbers would grow even higher, because the money that is not spent could be invested and could earn interest.
>
> This simple example illustrates how much money Plaintiff's counsel is talking about."

iii. "ANCHORING"

In recent verdicts plaintiffs have conditioned the jury to a very high *ad damnum* (prayer for damages) number in an obvious attempt to increase and inflate jury verdicts. This psychological technique is known as "anchoring." *See "Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments,"* 101 Iowa L. Rev. 543 (2016). This article well-illustrates the nature of the challenge confronting the defense bar and our clients.

The "anchoring" technique has been used in many of the cases involving recent high verdicts in Iowa. For example, in the recent *Bronner* decision the court noted:

> ". . . it was not disingenuous for defense counsel to state in its closing that Bronner sought thirteen million dollars in damages. The thirteen-million-dollar figure

was discussed extensively in jury selection, opening statement, and Bronner's closing argument."

Bronner v. Riecks Farms, Inc., ___N.W.2d ___ (Iowa Ct. App. June 6, 2018), slip op. p. 1

In *Bronner*, the plaintiff sought $13 million and continuously stated this to the jury throughout the trial. The resulting verdict was for over $1.5 million for a personal injury with a little over $50,000 in medical bills. Anchoring was used in *Bronner* and to a significant extent, it was apparently effective.

1. Counter-anchoring or rebutting the "anchor."

The "anchoring" law review article presents the results of a mock jury trial experiment, focusing on the effect of a plaintiff's counsel using a very high damages demand. This study and resultant article is particularly relevant to recent jury verdicts in Iowa. In the study, mock jurors were presented a shortened medical malpractice trial. Six different damages arguments were used. The plaintiff's counsel either demanded $250,000 or $5,000,000 in non-economic, i.e., pain and suffering/emotional distress damages. In the experiment, the defense counsel responded in one of three ways: by offering a counter-anchor of $50,000; by ignoring plaintiff's demand; or by attacking plaintiff's demand as outrageous. After hearing the case the mock jury deliberated and rendered a decision on liability and damages. Both individual juror and collective jury responses were studied.

A few highlights are noteworthy. The anchoring article noted:

> "Numerous studies establish that the jury's damages decision is strongly affected by the number suggested by 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."*
>
> (emphasis added)

The anchoring study continued:

> "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?"

Every defense lawyer should read and study this article on "anchoring" and draw their own conclusions. In order to do an effective rebuttal, we must first understand what it is that plaintiffs are doing.

In summary, I would list the following "takeaways" from the article:

1. **Anchoring has a powerful effect on damages.**

   We have plenty of recent examples in Iowa that tend to prove this. The defense needs to employ strategies to counteract the effects of "anchoring." This technique to manipulate a jury verdict cannot go unchallenged or unrebutted.

2. **Anchoring has a small negative effect on liability determinations.**

   The defense should not automatically assume that if you address or argue damages, the jury will think that you are conceding liability and causation. If the defense does not argue damages at all, then the juror will only have the "plaintiff's numbers" and analysis to make reference to. The jury must not adopt plaintiff's damages analysis by "default." There are ways in which the defense can argue damages. For example, tell the jurors in summation that you have to cover the topic of damages, in order to do a complete and thorough job for your client; and state in no uncertain terms that you are absolutely not conceding liability!

3. **"Credibility effects" are overwhelmed by "anchoring effects."**

   Do not automatically assume that plaintiff's ridiculously huge number will torpedo his or her credibility. It may or it may not depending upon the facts of the case and the nature of the damages sought. Experienced trial lawyers and judges know what a high number is, but lay-person jurors do not. Lay person jurors are exposed to high damages numbers all the time in the press and in newspaper headlines.

4. **No defense strategies were an effective antidote to a "high" anchor.**

   This finding is subject to dispute. Perhaps a more correct statement might be: "*This particular study* did not identify any specific defense antidotes to a high anchor." This is not necessarily true in every case, with every defense lawyer. Not all defense strategies, which is an infinite universe, were tested or could be tested. Creating an effective rebuttal to a plaintiff's high anchor is a challenge for defense counsel to be sure, but nothing says it cannot be overcome! Here I would defer and put my money on the ability of an experienced

defense trial lawyers and IDCA members to be creative and come up with the right solution for the particular situation.

5. **Defendant's choice to offer a lower counter-anchor award did not adversely affect liability determinations.**

   If true, this proves that it is possible for a defense lawyer to argue damages, yet win the case on liability or causation.

6. **Making a counter-anchor in a strong defense case is a bad idea.**

   This makes sense. If your liability or causation defense is exceedingly strong, it may be actually harmful for the defense to provide an alternative damages number from plaintiff's damages number.

7. **In close cases or strong plaintiff's cases it is less likely to hurt.**

   In a strong plaintiff's case, it may well border on malpractice to neglect to present some argument or analysis of damages from the defense perspective. Do not allow the jury to accept plaintiff's suggested number, simply because the defense has not offered an alternative damages analysis!

iv. EMOTIONAL DISTRESS CLAIMS WITH LITTLE OR NO MEDICAL BILLS

There have also been some large verdicts in wrongful termination/employment cases that were comprised primarily of emotional distress damages. For example, in *Hawkins v. Grinnell Regional Medical Center*, of the $4,500,000 awarded to the plaintiff, $4,280,000 was for past and future emotional distress, with virtually no medical treatment bills and no medical expert witness testimony. Many plaintiff's counsel have adopted this tactic: if there is little or no medical treatment, and little or no bills for such treatment, don't put the small bills into evidence, but instead, just "argue" "emotional distress." In some cases this tactic appears to be working. It appears that the plaintiff's bar in employment matters have co-opted reptile techniques originally used by the plaintiff's personal injury lawyers. *Hawkins* is currently on appeal and the Iowa Defense Counsel Association is filing an *amicus curiae* brief on certain issues in that case involving the bounds of proper jury argument.

1. Put on evidence of minimal medical treatment bills

If plaintiff's medical bills are so small that plaintiff chooses to forego admitting the medical bills into evidence, *defense counsel should consider admitting the bills as proof of the insignificant nature of plaintiff's claim*. We admit it is counter-intuitive for a defendant to prove up plaintiff's medical bills; however, it may be warranted and helpful to the defense in this situation. At least defense counsel should consider this strategy. Once the bills are in evidence, the defense can point to something concrete, the bills themselves, and argue in summation that the injury sustained was slight and inconsequential, and that's the reason why the medical bills are so small. After all, it stands to reason that if the injury were significant or permanent, the medical bills would be much higher. The amount of medical treatment bills is a good proxy for how severely injured a person is. As an injury increases in severity, the medical bills increase. In an appropriate case, the defense might even call out plaintiff's tactic of refusing to put into evidence proof of the medical bills, in an attempt to try to "hide" this aspect of the case from the jury. The defense could also argue that it put the bills into evidence so that the jury would have the "full picture" of the case, and not just the partial, incomplete and misleading picture advanced by plaintiff. We have never actually done this in a case, but it is worthy of consideration. As defense counsel we need to start thinking "outside the box!"

2. "Billed" v. "paid" medical bills

When dealing with medical bills, use *Pexa v. Auto Owner's Insurance* 686 N.W.2d 150 (Iowa 2004) to full advantage. *Pexa* allows a defendant to adduce proof of not only the *billed* amount of medicals, but the actual *paid* amount, which is oftentimes many orders of magnitude less. It will then be up to the jury to decide what a fair and reasonable amount of medical bills is, for purposes of plaintiff's recovery. The defense can argue common sense: what was actually *paid*, as opposed to theoretically charged or billed, for the service is the true indicator of the "worth" or value of the services rendered.

The following example might be used: suppose someone is selling a car or house. What is the true value of the car or house, the *asking* price, or the price at which the car or house is actually *sold*? The selling price truly reflects what a willing buyer is willing to pay to a willing seller, under no compulsion. Thus, the defense can argue that the actual paid amount of medical bills is the most relevant and pertinent number. If this number is low or insignificant, then plaintiff's claim for pain and suffering or emotional distress is likewise low or insignificant.

v. EXCLUDE EMOTIONAL DISTRESS EVIDENCE IN WRONGFUL DEATH ACTIONS BY SURVIVORS WITH LOSS OF CONSORTIUM CLAIMS, AND PROHIBIT PLAINTIFF'S COUNSEL FROM ARGUING "THE VALUE OF A LIFE"

Wrongful death actions are often permeated with emotion-laden, tear-jerking testimony from surviving family members and close relatives. But emotional distress damages are not recoverable by a surviving spouse or children of a decedent with a claim for loss

of consortium. *See, e.g.,* Iowa Uniform Civil Jury Instruction No. 200.19, Services–Spousal Consortium ("It does not include loss of financial support from the injured spouse, *nor mental anguish caused by the spouses' death*")(emphasis added). This issue should also be covered in your pretrial motions *in limine*.

In addition, in the trial of any wrongful death claim, the proper measure of damages is the present value of the decedent's accumulated estate. See Iowa Uniform Civil Jury Instruction No. 200.15; Iowa Des Moines National Bank v. Schwerman Trucking Co., 288 N.W.2d 198 (Iowa 1980). It is not "what was the person's life worth," which is commonly argued by plaintiff's counsel. Such an argument is legally improper and is subject to objection and a motion in limine.

vi. APPEAL OF AWARDS THAT "SHOCK THE CONSCIENCE OF THE COURT"

As a last resort, an out-of-control jury verdict can be reversed on the "shocking to the conscience of the court" standard. But is this a real remedy? Is this test a useful limitation on large jury awards? The cases suggest that it is not a practical check on large jury verdicts. Since the amount of damages is uniquely a jury issue, the standard of review is understandably deferential. The time to "fix" an out-of-control jury verdict for compensatory damages is not after it has happened. Thus, the absolute necessity for defense counsel to win the case in front of the jury is even more important.

A trial court's denial of a motion for new trial based on a jury's award of excessive damages is based on the abuse of discretion standard of review. *State v. Taylor,* 689 N.W.2d 116, 133-34 (Iowa 2004). "Normally, we accord weight to the facts that the trial judge saw and heard the witnesses, observed the jury, and had before it all the incidents of trial before ruling on a motion for new trial." *Estate of Pearson ex rel. Latta v. Interstate Power and Light Co.*, 700 N.W.2d 333, at 345 (Iowa 2005). In reviewing a motion for new trial, "[w]e view the evidence in the light most favorable to plaintiff whether it is contradicted or not." *Olsen v. Drahos*, 229 N.W.2d 741, 742-43 (Iowa 1975).

"The determination of damages is traditionally a jury function. A jury's assessment of damages should be disturbed "only for the most compelling reasons." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990).

> "We will set aside or reduce a jury award only if it: (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support."

Estate of Pearson ex rel. Latta, at 345.

vii. USE GORDON V. NOEL *TO YOUR ADVANTAGE*

In every case where plaintiff seeks a recovery for so-called "non-economic" damages (pain and suffering, or emotional distress), defense counsel should propound a *Gordon v. Noel* interrogatory. *Gordon* is a case that is helpful to defendants, especially in cases involving vague and undefined damage claims.

Iowa Rule of Civil Procedure 1.503(4) requires parties to supplement their discovery responses in a "timely" manner when the request "bears materially upon a claim or defense asserted by a party to the action." In *Gordon*, the Iowa Supreme Court stated: "[A] party defending a claim is clearly entitled upon appropriate pretrial request to be informed of the amount of the claim." 356 N.W.2d 559, 564 (Iowa 1984). The Court held that a trial court abused its discretion by "refusing to compel [the plaintiff] to state the amount of his claim for pain and suffering" in response to a timely discovery request from the defendant. *Id.* The Court expanded on the rule in *Lawson v. Kurtzhals*, when it held that the district court has the inherent authority to exclude a plaintiff's damage claim when the plaintiff fails to quantify his damages in response to an interrogatory requesting that he "detail the losses he incurred and the damages he was seeking." 792 N.W.2d 252, 254, 258 (Iowa 2010); *see also Stycket ex rel. Stycket v. Vanorsdel,* No. 99-11447, 2000 WL 1289016 (Iowa Ct. App. Sept. 13, 2000) (affirming district court's decision to exclude the plaintiffs from presenting damage claims they failed to itemize in response to an interrogatory); *Wade v. Grunden*, No. 06-1948, 2007 WL 4322226 (Iowa Ct. App. Dec. 12, 2007)(affirming district court's ruling granting motion *in limine* to exclude damages not itemized in response to an interrogatory); *T.D. II v. Des Moines Independent Community School Dist.*, No. 14-2166, 2016 WL 351516 (Iowa Ct. App. Jan. 27, 2016)(rejecting the argument that the defendant "should have requested supplementation of [the plaintiff's] discovery answer before trial instead of 'waiting in the weeds' to exclude the evidence," because "the duty to supplement discovery rests with the answering party, not with the requesting party").

As a matter of strategy, consider whether it may be better to "lay in the weeds" (as the defendant did in *T.D. II, supra*) and move for summary judgment on the entire case, or for partial summary judgment on the affected claims (or for an exclusionary order at trial) if the *Gordon v. Noel* interrogatory goes unanswered. This may be preferable to filing a motion to compel discovery or request for supplementation, which may do nothing more than give plaintiff a "helpful reminder" that they have missed something. If the motion to compel is granted, plaintiff will have more time to fashion some kind of response to the damages interrogatory. On the other hand, if trial is fast approaching and

plaintiff has not specified what their damages are, the court might grant summary judgment, dismissing the entire case, or might rule *in limine* that such damage claims are excluded from the trial.

Finally, if plaintiff answers the *Gordon v. Noel* interrogatory with an astronomical number, there might be chance to parade this number in front of the jury, to show how greedy the plaintiff is, and how utterly unreasonable they are in stating their claim.

C. PUNITIVE DAMAGE CLAIMS.

1. PLAINTIFF'S TACTICS AND THE DEFENSE RESPONSE.

i. USE IOWA'S HIGH STANDARD FOR RECOVERY OF PUNITIVE DAMAGES TO YOUR ADVANTAGE.

Claims for punitive damages are often used and abused by plaintiffs. One plaintiff's tactic is to argue that punitive damages in Iowa are recoverable for "gross negligence," "malice," "evil intent" or some other amorphous and undefined standard. But a strong argument can be made that since 1986, this has not been the case. Iowa Code Chapter 668A provides the exclusive test for recovery of punitive damages in Iowa, and that basis is by statute, only. Section 668A.1 provides as follows:

668A.1. Punitive or exemplary damages

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

    a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

    b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer or finding is affirmative, the jury, or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damages shall be ordered paid as follows:

    a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

    b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

3. The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed until such time as the claimant has established that sufficient admissible evidence exists to support a prima facie case establishing the requirements of subsection 1, paragraph "a".

A close review of Iowa's punitive damage statute provides the basis for several defense strategies, some of which will be discussed below.

ii. THE STANDARD OF PROOF FOR RECOVERY OF PUNITIVE DAMAGES IS HEIGHTENED

Punitive damages in Iowa can only be recovered pursuant to a *heightened standard* of proof. That standard is: "by a preponderance of clear, convincing and satisfactory evidence." This standard is more than a mere preponderance of the evidence, *see* Iowa Uniform Civil Jury Instruction 100.3, but less than proof beyond a reasonable doubt. *See* Iowa Uniform Civil Jury Instruction No. 100.19; *Holt v. Quality Egg, L.L.C.*, 777 F. Supp.2d 1160 (N. D. Iowa 2011).

Further, unless the conduct at issue was specifically directed toward the plaintiff, then only 25% of any recovery of punitive damages will actually go to the plaintiff. *See* Iowa Code section 668A.1(2)(b). This aspect of the Iowa punitive damages statute is constitutional. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612 (Iowa 1991). This fact can sometimes be used to persuade opposing counsel to forego a punitive damages claim.

Punitive damage claims have been the subject of constitutional litigation in the U. S. Supreme Court. The constitutional arguments that may apply to a punitive damage claim are somewhat esoteric and the attorneys that make a living at this are highly specialized. This fact can sometimes be used to convince opposing counsel that litigating a constitutional issue inherent in a punitive damage

claim is full of "traps for the unwary" and may not be worth the trouble. This is especially true where plaintiff's injuries are significant. Opposing counsel might be receptive to the argument "why mess up your case with a punitive damage claim, which might only add potential appeal arguments or invite error?

Finally, a claim for punitive damages may be excluded by the applicable liability insurance policy. This might be another reason to use to convince opposing counsel that pursuing a punitive damage claim will not be fruitful, if the defendant ultimately proves to be judgment proof beyond the coverage afforded by the liability insurance policy.

iii. ARGUE THAT "WILLFUL" MEANS INTENTIONAL

The substantive standard for the recovery of punitive damages in Iowa is "the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." A careful analysis of these words is vital to an understanding of how to defend a punitive damage claim in Iowa.

First, the basis for the punitive damage claim must be "the conduct of the defendant from which the claim arose." This is an important part of the standard that is often ignored by the defense. For example, in a products case a plaintiff may adduce proof of other accidents, claims or lawsuits, to rebut the argument that the product is not unreasonably dangerous, not defective or did not cause the accident. However, the defendant in that case cannot be "punished" by an award of punitive damages based on its conduct in the other matters. *See Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751 (Iowa 1999)(only evidence that is relevant to the underlying wrong for which liability is imposed can support an award of punitive damages).

Second, "willful and wanton" means "the defendant intentionally committed an unreasonable act in disregard of a known or obvious risk so as to make it highly probable harm would follow, and which is usually accompanied by a conscious indifference to the consequences." *Schooley v. Orkin Extermination, Co., Inc.*, 502 F.3d 759, *rehearing and rehearing en banc denied* (8th Cir. 2007). For purposes of the appropriateness of punitive damages, recklessness may include willfulness or wantonness, but if the conduct is more than negligence it may be reckless without being willful and wanton. *Miranda v. Said*, 836 N.W.2d 8 (Iowa 2013). The terms "willful" and "wanton" are explicitly used in the Iowa punitive damages statute, and both are clearly required, since they are stated in the conjunctive. "Willful" means "voluntary and intentional, but not necessarily malicious." Black's Law Dictionary, p. 1630 (8th ed. 2004). "Wanton" means "unreasonably or maliciously risking harm while being utterly indifferent to the consequences." Black's Law Dictionary, p. 1613 (8th ed. 2004). The defense should argue that the proof must be that the defendant *intended* to hurt the plaintiff, in order to be "willful" conduct. Defendant's conduct must be both intentional and malicious; anything less does not support a claim for or recovery of punitive damages.

iv. FILE MOTIONS IN LIMINE *TO KEEP OUT "WEALTH OF THE DEFENDANT" EVIDENCE UNTIL PLAINTIFF HAS PROVEN A* PRIMA FACIE *CASE FOR PUNITIVE DAMAGES*

Subsection (3) of Chapter 668A.1 provides an evidentiary or procedural standard which establishes that evidence of a punitive damage claim or Defendants' financial status is not discoverable until a *prima facie* claim for punitive damages has been demonstrated. Other jurisdictions are in accord. *See, e.g., Cramer v. Powder River Coal, LLC*, 204 P.3d 974, 980 (Wyo. 2009); *Fisher v. Grove Farm Co., Inc.*, ___P.3d ___, Nos. 28626, 28772, 2009 WL 5117005, at *42 (Haw. Ct. App. Dec. 29, 2009). Since wealth is not discoverable, it is also not admissible into evidence until such time as the court has ruled that a submissible case for punitive damages has been presented.

1. The Iowa Rules of Civil Procedure provide for bifurcation of claims and separate trials where warranted.

Iowa Rule of Civil Procedure 1.914 provides for the bifurcation of a trial into separate, logical components or the severance of specific issues for the jury's separate consideration.

> **RULE 1.914 SEPARATE TRIALS**
>
> In any action the court may, for convenience or *to avoid prejudice*, order a separate trial of any claim, counterclaim, cross-claim, cross-petition, or of *any separate issue*, or any number of any of them. Any claim against a party may thus be *severed* and proceeded with separately.

Iowa R. Civ. P. 1.914 (emphasis added). The trial court's decision to bifurcate this matter into two components for trial, phase one governing liability/damages and phase two governing punitive damages is a "procedural" matter, governed by Iowa law. *See Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2nd Cir. 1990) (noting that bifurcation of a punitive damage claim is a "procedural" matter); *Sellers v. Baisier*, 792 F.2d 690, 694 (7th Cir. 1986) (noting that a trial court's decision to bifurcate issues at trial is a procedural, rather than substantive, issue); *see also* Iowa R. Civ. P. 1.101 (stating that the rules govern "practice and procedure" in Iowa state courts).

Any punitive damage claim advanced by a plaintiff is logically subject to bifurcation for separate consideration by the jury.

Bifurcation avoids the prejudice which may attend references to punitive damages or the disclosure of financial information and the resulting potential for reversible error arising from consideration of improper evidence while determining the threshold issue of liability.

2. Punitive damage claims (and the evidence that is relevant thereto) unfairly prejudices consideration of a compensatory damages claim.

The existence of a punitive damage claim and a defendant's financial status are wholly irrelevant and unfairly prejudicial to the defense of a compensatory damage claims.

> A jury may not consider a defendant's wealth in setting compensatory damages. It is "improper, irrelevant, prejudicial, and clearly beyond the legally established boundaries."

Burke v. Deere & Co., 6 F.3d 497, 513 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994). Moreover, admitting evidence respecting a defendant's assets, prior to a determination that plaintiff is entitled to exemplary damages, creates an atmosphere wherein financial information may improperly influence the jury's liability determination, increase the amount of a compensatory damage award or the jury may interpret the presentation of that evidence as this Court's determination that defendant is responsible for the allegations raised in plaintiff's Petition. *See Las Palmas Assoc. v. Las Palmas Center Assoc.*, 235 Cal.App.3d 1220, 1241 (Cal. Ct. App. 1991) (recognizing that receiving evidence regarding a defendant's financial status prior to determining that punitive damages are appropriate encourages the jury to render a verdict based on improper grounds); *Varriale v Saratoga Harness Racing, Inc.*, 429 N.Y.S.2d 302 (N.Y. App. 1980) (noting that because evidence of defendant's financial standing can influence a compensatory damage award, such evidence should not be admitted until the jury has found for the claimant on a punitive damage claim); *Campen v. Stone*, 635 P.2d 1121, 1128-30 (Wyo. 1981) (concluding that because a defendant would be prejudiced, evidence of a defendant's wealth should not be permitted until jury has concluded that the claimant is entitled to punitive damages); *see also Burke*, 6 F.3d at 513 (setting aside punitive damage award and finding that compensatory damage award was also defective because awards were "inextricably intertwined" and jury may have improperly considered the defendant's wealth in setting amount of compensatory damages).

Because of the dangers attending the premature proffer of financial evidence or referencing punitive damage claims prior to the jury finding for Plaintiffs on a punitive damage claim, courts have adopted procedures wherein the jury first renders a determination on liability and compensatory damage issues and responds to a special interrogatory respecting a claimant's entitlement to punitive damages. *E.g., Brink's Inc. v. New York*, 717 F.2d 700, 707 (2nd Cir. 1983); *Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 723 (2nd Cir. 1977); *Hanners v. Balfour Guthrie, Inc.*, 589 So.2d 684, 686 (Ala. 1991); *Las Palmas*, 235 Cal. App.3d at 1241; *Varriale*, 429 N.Y.S.2d at 303; *James D. Vollertsen Assoc. v. John T. Nothnagle, Inc.*, 369 N.Y.S.2d 267, 268 (N.Y. App. 1975); *Rupert v. Sellers*, 368 N.Y.S.2d 904, 912-13 (N.Y. App. 1975); *Campen*, 635 P.2d at 1129-31; *see also* Iowa R. Civ. P. 1.914.

> Defendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice, thus entitling plaintiff to punitive damages. To avoid such possible abuse, we conclude that the split trial procedure should be used, and that the court should take a special verdict as to whether defendant was guilty of such conduct that plaintiff is entitled to punitive damages. Not until plaintiff obtains such a special verdict that he is entitled to punitive damages is it necessary or important for him to know defendant's wealth.

Rupert, 368 N.Y.S.2d at 912.

After the jury has answered special interrogatories on liability, compensatory damages and plaintiff's entitlement to exemplary damages, if it is determined that the plaintiff is entitled to an exemplary damage award, the jury receives additional evidence respecting the defendant's wealth and receives a second set of special interrogatories tailored to the punitive damage issue. Through this procedure, because financial evidence is neither presented nor mentioned prior to the jury's determination respecting liability, compensatory damages and plaintiff's right to receive punitive damages, there is no danger that the defendant's wealth will improperly influence a liability finding, the amount of compensatory damages awarded or the determination whether punitive damages are appropriate under the circumstances.

> It must be noted that Rupert [v. Sellers, 368 N.Y.S.2d 904 (N.Y. App. 1975)], while allowing evidence of the defendant's wealth to serve as a consideration in the assessment of punitive damages, does not allow such evidence into the trial indiscriminately. Rather a *split trial procedure* is utilized—no evidence of wealth is allowed unless and until the jury has returned a special verdict authorizing an award of punitive damages. This *two-phase requirement* makes it possible for the defendant's conduct to be evaluated free from the influence of his financial status. *Splitting the trial into two phases thus effectively balances the interests of the defendant with*

> *those of society by insuring that liability in the first instance will be based solely on the presence of a tortious wrong*, while at the same time allowing the jury to assess a meaningful punishment when the defendant's conduct merits the imposition of punitive damages.

[This] approach makes good sense. The plaintiff receives an appropriate redress for the wrongs he has suffered, the defendant is provided a prejudicefree atmosphere in which his liability may be assessed, and our society's interest in effecting punishment and deterrence for socially outrageous conduct is preserved. *There is no need for a jury to know of defendant's resources while it is determining the amount of compensatory damages*.

Campen, 635 P.2d at 1129-31 (citations omitted)(emphasis added). This two-part or bifurcated approach is supported by the mandate of section 668A.1 which prevents plaintiffs from referencing their claims for punitive damages or presenting evidence of any defendant's financial status unless, and until, a *prima facie* claim for punitive damages has been demonstrated. As a result, if a plaintiff is permitted to proceed with its punitive damage claim, the trial of that part of the case should be bifurcated. This determination is supported by Iowa Rule of Civil Procedure 1.914 (separate trials) and the requisites of chapter 668A. Bifurcation was used by the trial court in *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 71 (Iowa 2018). The two stages of trial are: (1) liability/causation/compensatory damages; and (2) punitive damages. Any other procedure would potentially result in reversible error as recognized by the Eighth Circuit in *Burke*. 6 F.3d at 513 (mandating reversal of entire matter when punitive damage claim and financial evidence were erroneously submitted to the jury). Evidence of a defendant's wealth is inappropriate and highly prejudicial if only compensatory damage claims are properly before the jury. *Id*. (noting that, because evidence of a defendant's wealth is only relevant to and admissible for a punitive damage award, a compensatory damage award could not stand because it was possible that the jury improperly considered the defendant's wealth when awarding compensatory damages).

v. CONSTITUTIONAL ARGUMENTS AGAINST PUNITIVE DAMAGES

The United States Supreme Court has expressed concern over punitive damage awards. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)(bars courts from using punitive damage awards to punish a defendant for having injured nonparties to the litigation); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)(the due process clause ordinarily limits punitive damage awards to less than ten times the size of the compensatory damages awarded, and punitive damage awards of four times the compensatory damage award "is close to the line of constitutional impropriety"); *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996)(regarding punitive damages, three guideposts must be applied: 1. The degree of reprehensibility of the defendant's misconduct; 2. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and 3. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases). The various constitutional arguments against punitive damage claims has been the subject of much scholarship and is well beyond the scope of this article. Our focus here is on trial strategy as opposed to the state of the substantive law. A few constitutional arguments have also been addressed by the Iowa Supreme Court and Iowa Court of Appeals. *See Lakin v. Richards Farm Ltd.*, 862 N.W.2d 414 (Table)(Ct. App. 2015); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994). Interestingly, the United States Supreme Court held in *State Farm* that the maximum constitutionally permissible ratio is lower when much of the compensatory damages are for emotional distress, because emotional distress damages, which compensate for humiliation or indignation aroused by the defendant's act, "likely were based on a component which was duplicated in the punitive award." 538 U.S. 408, at 426. *See also* Restatement (Second) of Torts § 908, Comment c, p. 466 (1977)("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both"). Thus, any case that involves claims for pain and suffering or emotional distress, as well as a punitive damage claim, bears special scrutiny.

For purposes of trial strategy, we have developed the following list of potential constitutional affirmative defenses to any punitive damage claim:

PUNITIVE DAMAGE AFFIRMATIVE DEFENSES AND ARGUMENTS

1. Any award of punitive damages based on conduct that did not occur within this state would violate the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Iowa Constitution, and would be improper under the common law and public policies of the State of Iowa, because the court in the instant case does not have jurisdiction over Defendant's conduct in other states or other jurisdictions, and any judgment in this case cannot protect Defendant against impermissible punishment for the same wrong in those other states or jurisdictions. In addition, any such award would violate the Commerce Clause of the United States Constitution and

principles of comity under the laws of the State of Iowa. *See McClure v. Walgreen Co.,* 613 N.W.2d 225 (Iowa 2000) (jury may only award punitive damages to punish conduct occurring within the jurisdiction of a particular state and may not award such damages to punish or deter conduct that is lawful in other jurisdictions and which had no impact on the state or its citizens); *see also State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003)(the jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred).

2. Plaintiff's claim for punitive damages against the Defendant cannot be sustained, because any award of punitive damages under Iowa law without bifurcating the trial and trying all punitive damages issues only if an after liability on the merits has been found, would violate the Defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Iowa Constitution, and would be improper under the common law and public policies of the State of Iowa and under Chapter 668A.1 Code of Iowa (2018).

3. The claim of Plaintiff for punitive damages against the Defendant
cannot be sustained, because an award of punitive damages under Iowa law is subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount, on the amount of punitive damages that a jury may impose would violate Defendant's due process rights guaranteed by the Article I, Section 9 of the Iowa Constitution, and would be improper under the common law and public policies of the State of Iowa.

4. The claim of Plaintiff for punitive damages against the Defendant cannot be sustained, because an award of punitive damages under Iowa law by a jury that (1) is not provided standards of sufficient clarity for determining the appropriateness, and the size, of a punitive damages award, (2) is not adequately instructed on the limits on punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award of punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the residence, wealth, and corporate status of Defendant, (4) is permitted to award punitive damages under a standard for determining liability for punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes punitive damages permissible, and (5) is not subject to trial court and appellate judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards, would violate the Defendant's due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 9, (due process of the law), and Article I, Section 6 (equal protection of the laws) of the Iowa Constitution, would be improper under the common law and public policies of the State of Iowa.

5. Any award of punitive damages based on anything other than Defendant's conduct in connection with the incident that is the subject of this lawsuit would violate the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Iowa Constitution, and would be improper under the common law and public policies of the State of Iowa, because any other judgment for punitive damages in this case cannot protect the Defendant against impermissible multiple punishment for the same wrong. In addition, any such award would violate the Commerce Clause of the United States Constitution and principles of comity under the laws of the State of Iowa.

6. Any award of punitive damages based on conduct that did not occur within this state would violate the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Iowa Constitution, and would be improper under the common law and public policies of the State of Iowa, because the court in the instant case does not have jurisdiction over Defendant's conduct in other states or other jurisdictions, and any judgment in this case cannot protect Defendant against impermissible punishment for the same wrong in those other states or jurisdictions. In addition, any such award would violate the Commerce Clause of the United States Constitution and principles of comity under the laws of the State of Iowa.

D. CONCLUSION

Recent large jury verdicts in Iowa may suggest that the defense bar has some work to do to develop persuasive arguments on the issue of damages, both compensatory and punitive. Hopefully this article has provided some food for thought. It should no longer be assumed that an unreasonably large demand by a plaintiff's counsel, in terms of an award for pain and suffering or emotional distress damages, will be automatically rejected by a conservative Iowa jury as ridiculous, astronomical or greedy. A lay person jury should not be forced to choose plaintiff's suggested verdict number as a "default" simply because defense

counsel was unwilling, incapable or quite frankly "too scared" to argue damages. As the defense bar develops strategies to better confront the challenge of defending against pain and suffering or emotional distress claims, whether serious or slight, we can expect that Iowa jury verdicts will fall back in line and be more consistent with the facts, the law and common sense.

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The Public Duty Doctrine and Maintenance of Traffic Control Devices

By Brent Ruther, Aspelmeier, Fisch, Power, Engberg & Helling, PLC, Burlington, Iowa

Brent Ruther

In the latest rendition of obscure topics[1] the question is raised—does the public duty doctrine trump the exception to governmental immunity contained in Iowa Code § 321.255 for "failure to maintain" traffic control devices?

> "Under the public-duty doctrine, >if a duty is owed to the public generally, there is no liability to an individual member of that group.=@ *Id.* at 58 (quoting *Kolbe v. State*, 625 N.W.2d 721, 729 (Iowa 2001)). A[A] breach of duty *owed to the public at large* is not actionable *unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [governmental entity] and the injured plaintiff . . ..@ Kolbe*, 625 N.W.2d at 729. We have applied this doctrine on various occasions to preclude tort claims by individuals against the government.@ *Johnson v. Humboldt County, Iowa*, 913 N.W.2d 256 (Iowa 2018).

Known as the "duty to all duty to no one" doctrine the public-duty doctrine is rooted in the concept of protecting the limited resources of governmental entities by shielding them from suits where a duty may exist, but that duty is to the general public and not to an individual. *See e.g. Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986). In *Johnson* the Iowa Supreme Court states "[w]e believe the limited resources of governmental entities—combined with the many demands on those entities—provides a sound justification for the public-duty doctrine." *Johnson*, 913 N.W.2d at 266 (Iowa 2018), *citing* Restatement (Third) of Torts § 37, cmt. *i*; 18 McQuillin § 3:18, at 253-254.

However, Iowa law imposes a duty on governmental entities to regulate traffic through signage, requires governmental entities to maintain those traffic-control devices and in fact, provides an exception to governmental immunity and allows a percentage of fault to be imposed on the governmental entity when the duty to maintain is breached. *See.* Iowa Code § 321.255 and 668.10(a). This appears to conflict with the public-duty doctrine in certain situations.

The factual situation in a recent case decided in Louisa County involved a property damage claim by a citizen of the Town of Wapello. Plaintiff was driving in downtown Wapello when she struck a bare traffic sign post that was placed, for all intents and purposes, in the right-of-way. The traffic sign post was at the corner of a four-way stop intersection but "a couple of weeks" prior to the incident in question, the stop sign had either fallen off of the pole or been removed. The City of Wapello had yet to replace the stop sign at that particular intersection and had placed no warning signs on or around the bare pole. There were similar stop signs on each corner, in the right of way at this particular intersection. On the day of the incident, Plaintiff, a longtime resident of Wapello, was making a right hand turn and hit the pole causing damage to her automobile.

Plaintiff sued the City of Wapello and its insurance company for the damages her insurance carrier paid to repair the car as well as her deductible. While the associate court magistrate found for Plaintiff, he did not address an affirmative defense based upon the long standing public duty doctrine which was raised by defense counsel and fully briefed. Comparative fault was also raised as an affirmative defense due to Plaintiff's knowledge of and experience with the intersection, knowledge that the pole was still at the intersection without a sign, and her recent troubles with eyesight.

The magistrate denied Defendant's motion for directed verdict based upon the public duty doctrine. The magistrate then based the duty of the City of Wapello on, and cited and addressed Iowa Code § 321.255 which states:

> "Local authorities in their respective jurisdiction shall place *and maintain* such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications."

A similar codification of the State Code existed in Chapter 61 of the *Ordinances of the City of Wapello*.

In addressing the comparative fault argument by Defendant the magistrate then addressed the immunity granted to the state and municipalities pursuant to Iowa Code § 668.10(1)(a) which states that:

> In any actions brought pursuant to this Chapter, the state or municipality shall not be assigned of fault for any of the following: (a) the failure to place, erect, or install a stop sign . . . However, once a regulatory device has been placed, created or installed, the state or municipality may be assigned a percentage of fault for its failure to *maintain* the device. *Emphasis provided*.

The magistrate cited *Malloy v. Guthrie County*, 368 N.W.2d 121 (Iowa 1985) and *Estate of Oswald v. Dubuque County*, 511 N.W.2d 637 (Iowa App. 1993) for the propositions that the local authorities have discretion as to signage but that a claim for maintenance of any signs is an exception to the statutory immunity granted in Iowa Code § 321.255. The magistrate found that "this is in fact clearly a maintenance issue" and when on to enter judgment against Defendant and for Plaintiff–again refusing to even address the public duty doctrine.

Despite the relatively low judgment against the City of Wapello an appeal was filed with the District Court. Two important issues were addressed and properly analyzed by the District Court in reversing the magistrate's judgment.

First, as properly stated by the District Court, the violation of a statutory duty (in this case the alleged violation of Iowa Code § 321.255) only gives rise to a negligence claim when the statute provides for such a cause of action explicitly or implicitly. *Sanford v. Mantermach*, 601 N.W.2d 360, 371 (Iowa 1999). Without such a provision, the violation of a statutory duty does not give rise to a private cause of action. *Marcus v. Young*, 538 N.W.2d 285, 288-289 (Iowa 1995).

Obviously there is no explicit language in Iowa Code § 321.255 granting a private cause of action so the court applied the four factor test from *Kolbe v. State*, 625 N.W.2d 721, 726-727 (Iowa 2001) whereby all four factors must be met in order for the court to imply a private cause of action. Those factors are whether: (1) Plaintiff is a member of a class for whose benefit the statute was enacted; (2) whether there is any indication that the governmental body intended, explicitly or impliedly , to ether create or deny such a remedy; (3) would allowing such a cause of action be consistent with the underlying purpose of the legislation; and (4) would a private cause of action intrude into an area over which the federal government or a state administrative agency holds exclusive jurisdiction. Furthermore a court cannot, as it appears the magistrate did in Louisa County, imply a tort from the violation of a rule which a municipality has enacted to carry out statutory directives. *Kolbe, Id. at* 727.

Prior to the decision in *Kolbe* , numerous decisions recognized the right of motorists to bring negligence claims against counties based on dangerous roadways. *See e.g. Harryman v. Hayles*, 257 N.W.2d 631 (Iowa 1977) and *Symmonds v. Chicago Milwaukee St. Paul & Pacific Railroad*, 242 N.W.2d 262 (Iowa 1976). However, in *Kolbe* the court ruled that "if a duty is owed to the public generally, there is no liability to an individual member of that group; and a breach of duty to the public generally is not actionable without a showing by the Plaintiff that there is a special relationship between the governmental entity and the injured party. " *Kolbe*, 625 N.W.2d at 729; *Sankey v. Richenberger*, 456 N.W.2d 206, 208-209 (Iowa 1990); *Summy v. City of Des Moines*, 708 N.W.2d 333 (Iowa 2006), *overruled on other grounds by Alcala v. Marriot Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016) (public duty doctrine did not apply to claims made by plaintiff invitee onto public golf course because duty owed to each invitee rather than public at large). Stated another way, under the public duty doctrine "only when the duty is narrowed to the injured victim or a prescribed class of persons does a duty exist." *Estate of McFarland v. State*, 881 N.W.2d 51, 59 (Iowa 2016).

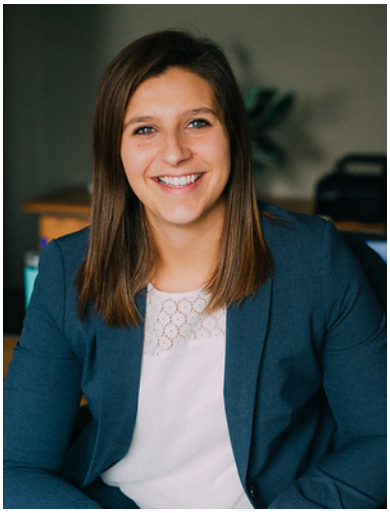
As noted above, the public duty doctrine was most recently applied to deny recovery to an injured plaintiff in *Johnson v. Humboldt County, Iowa*, 913 N.W.2d 256 (Iowa 2018). In *Johnson* the plaintiff sued Humbolt County for injuries sustained when the vehicle she was riding in left the roadway and struck a concrete embankment constructed by a landowner. Plaintiff claimed the county should have had, or caused, the concrete embankment to be removed and its failure to do so breached its statutory duty to cause all obstructions in a highway right-of-way under its jurisdiction to be removed pursuant to the Iowa Code. In that decision, the Iowa Supreme Court once again answered the question that disgruntled plaintiffs have asked over the years in a variety of forms. The Court in *Johnson* re-addressed and reaffirmed the law that despite statutory causes of action (or presumed statutory causes of action), the enactment of a state tort claims statute and the enactment of the Iowa Municipal Tort Claims Act, the public duty doctrine has not been supplanted and trumps those enactments which appear to create a cause of action, or which abrogate or partially abrogate sovereign immunity. *Johnson,* 913 N.W.2d 256, 263-265 (Iowa 2018) *citing Estate of McFarlin*, 881 N.W.2d at 59.

In the end, whether there be an explicit or implicit causes of action, a claim based in negligence, premises liability or nuisance, so long as the duty is owed by the governmental body to the general public rather than to an individual citizen (by statutory

enactment or otherwise) and the plaintiff does not have some special relationship with the governmental body, the public duty doctrine applies, the governmental body has no duty and is not liable for the alleged injuries. This includes claims made by plaintiff's for alleged failure to maintain traffic signals or signs despite the requirements of Iowa Code § 321.255 and exception to governmental immunity provided in Iowa Code §668.10(a).

1 See Defense Update, Fall 2017, Venue, Forum Shopping and the Case of the Split County

New Lawyer Profile



Shannon Powers

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Shannon Powers of Lederer Weston Craig PLC in Cedar Rapids.

Shannon is an associate with Lederer Weston Craig PLC in their Cedar Rapids office, where she primarily practices civil defense litigation. In addition to general civil defense, she also practices municipal law and assists cities in Eastern Iowa with a wide array of legal issues. Shannon grew up in West Point, Iowa and graduated from Iowa State University with a bachelor's degree in Psychology in 2013 before earning her law degree with high honors from Drake University Law School in 2016.

While in law school, Shannon was an active member of the AAJ Mock Trial team and served on the *Drake Law Review*. She was also named to the Order of the Barristers for her outstanding oral advocacy.

Shannon is an active member of the Iowa State Bar Association and the Young Lawyers' Division of Iowa where she serves as a District 6 Representative on the Executive Council. She is also an active member of the Linn County Bar Association and currently serves as the Vice President on the young lawyers' Linn Law Club Board. Most recently, she joined the Iowa Defense Counsel Association where she serves on the Board of Editors for this publication, the *Defense Update*.

Shannon and her husband Andrew live in Cedar Rapids, Iowa with their two dogs and one cat. They enjoy spending time outdoors with the dogs. They are avid Iowa State fans but especially love basketball and try to make it to at least a handful of games each season.

Case Law Update

By Alex C. Barnett, Lane & Waterman LLP, Davenport, Iowa

Alex C. Barnett

Andersen v. Khanna, 913 N.W.2d 526 (Iowa 2018)

Why it matters: *Khanna* puts Iowa health care providers on notice that they might be required to disclose personal information (*e.g.*, training, knowledge, disciplinary history, general practice history) to their patients in order to obtain valid informed consent. In *Khanna* the majority held, over three dissents, that a patient could bring a separate informed consent claim against a surgeon for failing to disclose he had never previously performed a particular medical procedure even though the jury found the surgeon had not acted negligently in connection with the surgery. Stated differently, if a physician fails to disclose his or her experience and a risk never materializes, the patient may be able to recover for this nonevent.

Summary: In 2004, Dr. Khanna, an employee of Iowa Heart Center, P.C., performed a Bentall heart procedure on Alan Anderson without any prior experience or training in the specific procedure. There were several complications with the procedure that left the patient in a coma, required a second heart surgery, and ultimately a heart transplant. The patient and his family sued the physician and his employer for medical negligence, alleging the physician failed to obtain informed consent by not advising the patient: (1) he had limited training and no experience in performing a Bentall heart procedure, and (2) the condition of the patient's heart increased the risk and dangers of the procedure.

The first trial court granted partial summary judgment in favor of the physician and employer as to the patient's first theory, finding that under Iowa's informed consent law, "a physician does not have a duty to disclose physician-specific characteristics or experience in obtaining informed consent." *Id.* at 531. After a series of mistrials, the third trial court did not allow the patient to present his second informed consent theory to the jury. The jury ultimately concluded that the physician and employer were not negligent in performing the procedure. The Iowa Court of Appeals affirmed, but the Supreme Court granted further review.

The Iowa Supreme Court addressed several issues, and ultimately held that a physician has a duty to disclose information about his or her inexperience or lack of training as a part of the informed consent process if a reasonable patient would consider such information material in deciding whether to undergo a procedure. The Court began its analysis by emphasizing Iowa's informed-consent law follows the "patient rule," which applies to both elective and non-elective medical procedures. Under the patient rule, "the physician's duty to disclose is measured by the patient's need to have access to all information material to making a truly informed and intelligent decision concerning the proposed medical procedure." *Id.* at 536.

Against this backdrop, the Supreme Court disagreed with the lower court's ruling that, as a matter of law, "a physician's lack of experience or training [was] never material to a patient's decision to submit to a medical procedure." *Id.* at 537. In doing so, the Court explained that: (1) materiality of information turns on whether a reasonable person in the patient's position would consider the information at issue to be material to the decision of whether to undergo the proposed procedure, and (2) Iowa law has never categorically excluded a particular type of information from the reasonable person analysis.

The majority also noted that negligence and informed consent are alternative methods of imposing liability on a health care practitioner. With respect to informed consent claims, the majority held the wrong done is not the negligent operation but a failure to respect the patient's choice. The damages analysis in an informed consent case involves a comparison between the condition a plaintiff would have been in had he or she been properly informed and not consented to the risk, with the plaintiff's impaired condition as a result of the risk's occurrence.

It is uncertain how plaintiff planned to articulate a theory of injury or damages for his informed consent claim given the trial court's rulings. However, the majority concluded "[plaintiff] should have the opportunity to develop his theory of injury and damages before we summarily dismiss those claims." *Id.* at 548. Notably, the majority illuminated a potential path for plaintiff's informed consent damages by needlessly citing a portion of plaintiff's expert's testimony in the factual background: "When I operate on somebody, I frequently tell them this: I can guarantee that I'll do my best job on the day that we're going to do this operation. And I can guarantee that I'll hurt them. I'll hurt them pretty significantly. It's a big incision. You've got to heal that up. And what we do

in our work hurts the heart. It injures the heart. Every time." *Id.* at 534.

Why the dissent matters: The dissent reaches the commonsense conclusion that "[a] surgeon who competently performs a procedure may still be liable to the patient under an informed-consent theory, but only if a known risk the surgeon failed to disclose in fact occurs and harms the patient." *Id.* at 550. In doing so, the dissent notes the majority asks more questions than it answers. Specifically, how far does the new disclosure obligation extend? Is it limited to extremely difficult procedures performed without prior experience? What about some prior experience or similar procedures? Success rates?

The dissent also points outs that *Khanna* opens the door for any patient with a bad outcome to bring an informed consent claim that must go to the jury when a physician fails to disclose his or her specific experience and success rate on the procedure, which will increase the costs of healthcare. The dissent encourages the legislature to "overrule this ill-advised decision." *Id.* at 554.

Kinseth v. Weil-McClain, 913 N.W.2d 55 (Iowa 2018)

Why it matters: *Kinseth* is a unanimous Supreme Court decision highlighting orders in limine can have teeth. In *Kinseth*, the Supreme Court of Iowa held the trial court abused its discretion when it denied defense counsel's motion for mistrial, after a nearly four-week jury trial, on account of plaintiff's repeated in-limine violations. *Kinseth* helps shape the contours of the trial court's discretion when deciding whether lawyers crossed the line during closing summation. The decision also helps define counsel's obligation to object during closing summation.

Summary: *Kinseth* arises out of asbestos litigation. There, the decedent worked for more than three decades assembling and installing boilers and, in the process, inhaled asbestos dust and fibers from products used to seal boiler components. He died in 2009 of a type of lung cancer caused by inhaling asbestos. A Wright County jury awarded the estate $4 million in compensatory damages and $2.5 million in punitive damages against boiler manufacturer Weil-McLain.

The trial judge ordered plaintiff's counsel at the outset not to make certain prejudicial statements to the jurors, including how much the defendant spent on lawyers and expert witnesses, the defendant's wealth or power relative to the plaintiff, or that the jury should "send defendant a message" in its verdict.

During plaintiff's closing argument, Defense counsel raised five objections, three of which were sustained, alleging plaintiff's counsel repeatedly violated the in-limine order. During rebuttal defense counsel objected to two statements, both of which were sustained. After rebuttal, the court stated it was 4:30, refused to read the jury instructions and adjourned. The next morning, defense counsel immediately moved for a mistrial, arguing repeated in-limine violations. The court denied the motion, and the jury returned a $4 million compensatory finding punitive damages were warranted. Both parties offered second closing arguments on punitive damages, after which Defense again moved for mistrial.

The defendant, in seeking a new trial, said Kinseth's attorney violated the in-limine order in her closing argument, but the judge ruled Weil-McLain waived the objection by making it too late in the process. The Supreme Court disagreed, finding the failure to make a contemporaneous objection does not necessarily waive the objection, and in this case the mistrial motion was timely because it was made before the case was submitted to the jury. Specifically, the Supreme Court held "[w]here the closing arguments are reported," a party's "objection to the remarks of counsel during final jury argument urged at the close of the argument in motion for mistrial made before submission to the jury is timely." *Id.* at 67. The trial court "therefore erred in requiring defense counsel to make numerous, contemporaneous objections during closing arguments." *Id.* at 67-68.

With respect to the orders in limine, the Supreme Court held some of the objections to plaintiff counsel's statements were warranted, while some were not. It was fair, for example, to attack the credibility of defense witnesses informed by studies sponsored by Weil-McLain, whereas counsel crossed the line by comparing the requested compensatory damages to the amount of money made by a defendant's expert witness. "Bought and paid for" with respect to self-funded studies refers to their reliability; however, counsel cannot communicate "to the jury that the requested award is reasonable *because* there are large sums of money involved in asbestos litigation." *Id.* at 70 (emphasis in original).

Plaintiff's counsel clearly went too far, "perhaps most jarringly" the Court said, in stating that a punitive damages award between $4 million and $20 million is within the realm of what Weil-McLain spent on this litigation. *Id.* at 70. "The sole purpose of these statements is to alert the jury that Weil-McLain has deep pockets and can afford a substantial award," Justice Cady wrote. *Id.* The Court found that plaintiff's counsel prejudiced the defendant with the theme that Weil-McLain spent exorbitant sums defending against asbestos suits rather than on victims, which the jury could address in its verdict. While the Supreme Court recognized attorneys may occasionally make an isolated misstep during closing arguments, "[i]t is a wholly distinct act of misconduct . . .to develop and present a theme for closing arguments that is premised upon improper jury considerations." *Id.* at 73. Because

the statements plaintiff's counsel made during closing fell into the latter category, the Supreme Court remanded for a new trial.

Bronner v. Reicks Farms, Inc., No. 17-0137 2018 WL 2731618 (Iowa Ct. App. June 6, 2018).

Why it matters: The Iowa Court of Appeals held Plaintiff's misconduct during closing argument rightly nixed a $1.6 million verdict. *Bronner* is important because it highlights the type of statements that exceed the bounds of proper closing argument. The decision also helps define counsel's obligation to preserve arguments for a motion for new trial.

Summary: A Howard County jury awarded nearly $1.6 million to Bronner, who was injured in a one-vehicle rollover accident in 2008, while a passenger in a vehicle owned and insured by Reicks Farms. Reicks Farms admitted liability, and the only issue for trial was damages. After the jury returned a verdict for Bronner, the trial court granted Reicks Farms' motion for a new trial based on improper argument.

In its ruling on the motion for new trial, the district court noted the following rebuttal statement made by plaintiff's counsel: "it never fails to surprise me when I see a defense lawyer get up in front of a jury and just say a number of things that are untrue . . . And I'm disappointed at what I just heard come out of the mouth of [defense counsel]." *Id.* at *2. The district court also pointed to Bronner's counsel's remark that "What should be disappointing to you is how you've been misled." *Id.* Bronner's counsel stated further that defense counsel had "travelled from Sioux City [to Howard County] to call the Bronner family liars." *Id.* Not stopping there, plaintiff's counsel proceeded to vouch for the truthfulness of Bronner and Bronner's witnesses and asserted personal knowledge of facts in issue by calling them "truth tellers" and representing "[e]verything *we* have said here is true . . ." *Id.* Another rebuttal remark pointed out was: "Please go back there and stand up for her. Somebody has gotta." *Id.* Bronner's counsel also implied that Reicks Farms would "give [Bronner] zero" if it could get away with it, and after an objection to the previous statement, argued Reicks Farms would give her a "goose egg" if it could. *Id.*

The Iowa Court of Appeals agreed with the trial court that plaintiff's counsel made inappropriate remarks during closing arguments about why the jury should generously compensate Bronner. The Iowa Court of Appeals characterized Bronner's counsel's statements as "severe and pervasive," noting Plaintiff's counsel made a number of improper statements, including vouching for the veracity of plaintiff and her witnesses, informing the jury they had been misled by defense counsel and asking the jury to stand up for plaintiff. *Id.* at *8. The Iowa Court of Appeals noted that "[f]or all practical purposes, plaintiff's counsel called defense counsel a liar when he claimed what defense counsel stated was untrue." *Id.* In addition, Bronner's suggestion that Reicks Farm would leave her a "goose egg," was disingenuous given Reicks Farms' admission of liability and stipulation to past medical expenses. *Id.* Worse yet, "[e]ven after defense counsel made proper objections and the objections were sustained, Bronner's counsel continued to repeat the offending statements." *Id.* at *7.

After finding the statements were improper, the Iowa Court of Appeals found the statements were prejudicial, stating: "Although the jury was instructed that the statements by the attorneys were not evidence, plaintiff's counsel strategically made the improper statements in the rebuttal closing argument in an effort to invoke the emotions of the jury, establish the credibility of Bronner and Bronner's witnesses, and to attack the credibility of the defense counsel." *Id.* at 9. The statements regarding the credibility of Bronner and Bronner's witnesses, and portraying Reicks Farms as untruthful and unwilling to compensate Bronner for her injuries went directly to the heart of the only issue at trial—Bronner's damages. Under these circumstances, the Iowa Court of Appeals found it probable the jury would have reached a different determination as to damages but for Bronner's counsel's misconduct.

Bronner also argued many of the statements made by her counsel at trial were not properly reviewed by the district court because timely objections were not made at trial. While defense counsel raised four objections during Bronner's rebuttal, defense counsel did not request cautionary instructions or admonishments from the court, nor did defense counsel move for a mistrial based on the misconduct.

The general rule is that "a party loses its right to a new trial if error is not timely preserved, but this does not necessarily bar a trial court from exercising discretion to grant a new trial." *Id.* at *6. Here, the Court of Appeals noted several circumstances that may have guided Reicks Farms' trial strategy; there was a previous mistrial, counsel had already objected four times during Bronner's closing, objections can invite disfavor from the jury, and cautionary instructions would have not cured Bronner's counsel's improper arguments.

"While the lack of specific objections should have been noted and weighed, it was not an abuse of discretion for the district court to consider the cumulative effect of counsel's improper statements." *Id.* Thus, where opposing counsel makes "a deliberate strategic choice to make emotionally-charged comments at the end of rebuttal closing argument, when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond," the likelihood of a new trial increases. *Id.* at *9.

IDCA Annual Meeting Recap

IDCA held its 54th Annual Meeting & Seminar, September 13–14, 2018, at the Embassy Suites Des Moines Downtown. More than 150 attendees heard from experts, networked and met with exhibitors. Planning is underway for the 2019 event, September 12–13, back at the Embassy Suites Des Moines Downtown.

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The IDCA Awards and Annual Business Meeting was an ideal time for attendees to celebrate IDCA's successes and honor members who have worked so hard to help IDCA continually move forward. Congratulations to this year's Award recipients!

OUTGOING BOARD MEMBER AWARDS

The following Board members were recognized for their years of service on the IDCA Board of Directors.

Joel Greer, Cartwright Druker & Ryden, Marshalltown, served two terms as District II Representative.

Theresa Davis, Shuttleworth & Ingersoll, PLC, in Cedar Rapids, served two terms as District VI Representative

PRESIDENT'S AWARD

The President's Award is in honor and recognition of superior commitment and service to IDCA. The following members have been advocates and teachers for the IDCA Bootcamps for the past several years. Bootcamps, a day-long seminar for new lawyers, bring together seasoned lawyers, judges and court reporters to provide New Lawyers with hands-on skills training. IDCA looks to host the next Bootcamp in 2019.

Sam Anderson, Swisher & Cohrt, P.L.C., Waterloo.

Jace Bisgard, Shuttleworth & Ingersoll, Cedar Rapids

Susan Hess, Hammer Law Firm, Dubuque

Michael Moreland, Harrison, Moreland, Webber, Simplot & Maxwell, Ottumwa

Amanda Richards, Betty Neuman & McMahon PLC, Davenport

A final President's Award was bestowed upon IDCA's lobbyist, Brad Eppertly, for his tireless commitment and representing IDCA at the Capitol.

ROBERT M. KREAMER AWARD

This Public Service Award is given to Senators, Representatives or Judges that have helped IDCA achieve their legislative goals for the year. In 2011, the IDCA voted unanimously to change the name of this award to the Robert M. Kreamer Award, in honor and recognition of IDCA's long-standing executive director and lobbyist. This year, the award was presented to Representative Chris Hagenow.

RISING STAR AWARD

The Rising Star Award is bestowed upon IDCA members who have shown outstanding commitment and leadership in the organization and who have been members of the organization for five years or less. Rising Star nominations are from committee chairs and voted on for approval by the Board of Directors.

Joshua Streif, Elverson Vasey & Abbott, LLP, Des Moines

EDDIE AWARD

In 1988, then president Patrick Roby proposed to the board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and first president and for his continuous, complete dedication to IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, which President Roby dubbed "The Eddie Award." Edward Seitzinger was an attorney with Farm Bureau and besides his family and work, IDCA was his life. This award is presented annually to the IDCA member who contributed most to the IDCA during the year. It is considered IDCA's most prestigious award.

Congratulations Lisa Simonetta at EMC Insurance for serving as the chair and champion of the Amicus Brief program.

MERITORIOUS SERVICE AWARDS

The Meritorious Service Award is bestowed upon IDCA members whose longstanding commitment and service to the Iowa Defense Counsel Association has helped to preserve and further the civil trial system in the State of Iowa.

This year, IDCA bestowed this award upon two individuals.

Sharon Greer, Cartwright Druker & Ryden, Marshalltown

Joel Greer, Cartwright Druker & Ryden, Marshalltown

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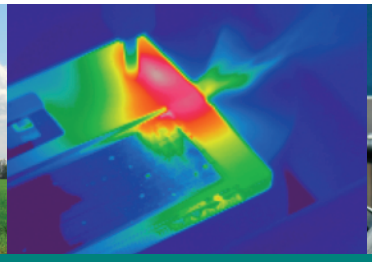


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