POLK COUNTY BAR ASSOCIATION
2017-18 CASE LAW REVIEW
IOWA SUPREME COURT DECISIONS

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Gestational Surrogacy Contracts

P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018)
P.M. and his spouse placed an advertisement on Craig's list, seeking a woman who was willing to act as a surrogate mother. P.M. and his spouse met T.B. and her spouse at a restaurant in Coralville and reached a general agreement. The fertility clinic were in vitro fertilization (IVF) and embryo transfers was to be performed required a written contract among the parties. The contract provided in relevant parts:

> The Intended Parents [the Ms] agree that after the Gestational Carrier [T.B.] has delivered a live child pursuant to this contract for the Intended Parents, the Intended Parents will pay for an IVF (In Vitro Fertilization) cycle for the Gestational Carrier and her husband up to the amount of $13,000.

P.M. v. T.B., 907 N.W.2d 522, 526 (Iowa 2018). The contract further provided that the Ms would pay T.B.'s medical expenses during gestation and that upon delivery the baby would be delivered to the Ms. Sperm provided by P.M. fertilized eggs from an unknown female donor. Two embryos were implanted into T.B.'s uterus and pregnancy was confirmed. The relationship among and between the parties deteriorated after it was confirmed that T.B. was carrying twins. Caustic text messages were exchanged; T.B. decided that the Ms were racists; T.B. wanted more money (about $30,000.00) for her own in vitro fertilization, and; T.B. eventually determined that she would not turn over the babies to the Ms.

The twin babies were delivered prematurely and were place in neonatal intensive care. One of the babies died eight days later. T.B. did not tell the Ms about the delivery nor the death.

Unaware that the babies had been delivered, the Ms filed a Petition for declaratory judgment as well as temporary and permanent injunction. A motion for an ex parte emergency injunction contending the babies had been delivered and requesting that the terms of the surrogacy agreement be enforced. The district court entered an order directing T.B. and her husband to deliver the surviving baby to the Ms and to take no actions inconsistent with the surrogacy agreement.

After another emergency hearing, the district court denied Motions by T.B. and her spouse, D.B.;

appointed a guardian ad litem for the baby, and directed that all parties obtain genetic testing.

The genetic tests showed that by a 99.99% probability P.M. was the baby's father; that D.B. was not the biological father, and that T.B. was not the biological mother.

Arguments by T.B. that she was the biological mother of the child and that the was unenforceable, because it violated the United States Constitution and Iowa law were rejected by the district court. The judge ordered the Department of Health to issue birth certificates showing that P.M. and his spouse were the parents of the twins (the one who survived, and the one who died). The district court noted that as the baby's biological father, P.M. had a superior constitutional right to raise the baby and was entitled to permanent custody. The Bs appealed. The Iowa Supreme Court retained jurisdiction.

In a unanimous opinion, the Supreme Court, Waterman, J., affirmed the district court decisions. The Court found no prohibition upon surrogacy agreements in Iowa:

> T.B. argues the Surrogacy Agreement is unenforceable under Iowa law as inconsistent with statutory provisions and public policy. We first examine whether this contract between consenting adults is "prohibited by statute, condemned by judicial decision, [or] contrary to the public morals." *Dier v. Peters*, 815 N.W.2d 1, 12 (Iowa 2012) (*quoting Claude v. Guar. Nat'l Ins.*, 679 N.W.2d 659, 663 (Iowa 2004)). We find no such statutory or judicial prohibition in our state. To the contrary, the Iowa legislature tacitly approved of surrogacy arrangements by exempting them from potential criminal liability for selling children. "Also, we need to consider the public policy implications of an opposite ruling." *Id.* Banning gestational surrogacy contracts would deprive infertile couples of perhaps the only way to raise their own biological children and would limit the contractual rights of willing surrogates. We join the better-reasoned cases from other jurisdictions rejecting arguments that gestational surrogacy contracts are void against public policy.

P.M. v. T.B., 907 N.W.2d 522, 533–34 (Iowa 2018). The Court adds that Iowa Code section 710.11 expressly exempts surrogacy arrangements from criminal liability for selling children. Arguments that the surrogacy contract violated Iowa public policy are rejected noting that consenting adults have freedom of contract, and that Iowa law presumes that a contract is binding upon the parties. Contentions by T.B. that the surrogacy contract exploited women were rejected, the Court noting that she entered into the agreement voluntarily, did not demonstrate that she entered into the agreement because of economic duress, and she did not contend that any of the terms of the agreement were unconscionable. The argument that the surrogacy agreement violated Iowa's public policy "'promoting the sanctity and stability of the family.' *Tyler v. Iowa Dep't of Revenue*, 904 N.W.2d 162, 168 (Iowa 2017) (*quoting Callender*, 591 N.W.2d at 191)." *P.M. v. T.B.*, 907 N.W.2d at 539 was also rejected:

> T.B. characterizes surrogacy agreements as deliberately destroying the surrogate mother–child relationship (a relationship, we note, that would not exist but for the Ms' contribution of their embryos in reliance on T.B.'s willingness to serve as a gestational

> carrier). We conclude that gestational surrogacy agreements promote families by enabling infertile couples to raise their own children and help bring new life into this world through willing surrogate mothers.

Id.[1] T.B. called into question that district court conclusion that she was not the legal and biological mother of baby H. The Court agreed that Iowa law "establishes a rebuttable presumption that the birth mother who delivered the infant and her spouse are the legal parents of the child. *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 344 (Iowa 2013); *see also* Iowa Code § 144.13(2), held unconstitutional in part on other grounds under *Gartner*, 830 N.W.2d at 354; Iowa Admin. Code r. 641—99.15(1)." *P.M.*, at 540. But in this case the genetic testing ordered by the district court found T.B. was not the genetic or biological mother of baby H and the presumption was overcome. The Court also looks at the rights of a surrogate mother.

> We hold the statutory definition of "biological parent" of Baby H does not include a surrogate birth mother who is not the genetic parent. The ordinary meaning of "biological parent" is a person who is the genetic father or mother of the child. That is also the established legal meaning of "biological parent." It makes sense that the legislature and department of health used the term "biological parent" in the commonly understood and established legal meaning of those terms.

P.M., at 541. T.B.'s constitutional claims are addressed with this observation: "Any constitutionally protected interest she may have as the surrogate birth mother is overcome by P.M.'s undisputed status as the biological and intended father of Baby H." *Id.*, at 542.

Medical Malpractice:

Wrongful Birth:
Plowman v. Fort Madison Community Hospital, 896 N.W.2d 393 (Iowa 2017)
The district court granted defendants' Motion for Summary Judgment, holding that Iowa did not recognize a claim for "wrongful birth". Plaintiffs contended that had defendants advised them about the abnormalities found on an ultrasound of the child, they would have terminated the pregnancy. The Supreme Court, Waterman, J., reversed and remanded.

A radiologist who reviewed the ultrasound at 22 weeks gestation and took at least three measurements found the head was abnormally small for the stage of development. This was not reported to the primary care doctor. The primary care doctor advised that everything was fine with development. The baby was delivered without incident. About two months following delivery, the baby boy was diagnosed with cerebral palsy, microcephaly, intellectual disability, cortical visual impairment, and seizure disorder. It is unlikely the child will ever walk or talk.

To determine whether the plaintiffs' claim is consistent with Iowa jurisprudence, the Court

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[1]"We do not foreclose the possibility that a surrogacy agreement in a particular case could be subject to specific contract defenses, such as fraud, duress, or unconscionability." *P.M.*, at 540.

performed a three part analysis: (1) whether the action is consistent with traditional concepts of common law, (2) whether there are prevailing policy reasons against recognizing such a cause of action, and (3) whether Iowa statutes speak to the issue. *See Dier v. Peters*, 815 N.W.2d 1, 4 (Iowa 2012). The Court answered that the cause of action can be maintained (The Court does note legislation adopted by the General Assembly regulating abortions past twenty weeks gestation, but that law is prospective in effect.).

Defendants argued that the father should not be entitled to a cause of action for wrongful birth because he does not have a doctor-patient relationship. The Court stated:

> We find particularly compelling the father's joint legal obligation to support a disabled child. The physician-patient relationship is with the mother, not the father, but doctors providing prenatal care can easily foresee harm to both parents who must raise a profoundly disabled child. Indeed, physicians who negligently injure a baby during delivery are already liable in tort to both parents. *See Asher*, 846 N.W.2d at 499 (concluding that physician's scope of liability for birth injury was established as a matter of law and affirming judgment on jury verdict awarding damages to both parents and child).

Plowman, at 413. The majority of the Court declined to address the issue of what damages the plaintiffs might recover because of a lack of a record. The case is remanded to district court for further proceedings.

Cady, C.J., filed a special concurrence. Mansfield, J., dissented, contending the cause of action should not be created:

> First, this cause of action did not exist at common law and is contrary to traditional common law concepts. Second, Iowa statutes, specifically Iowa Rule of Civil Procedure 1.206, foreclose this cause of action. Third, there are good public policy reasons not to recognize the claim. *See Dier v. Peters*, 815 N.W.2d 1, 3 (Iowa 2012) (citing and applying these three factors in determining whether Iowa tort law allows an action for paternity fraud).

Plowman, at 415.

<u>Discovery of Records/ Morbidity and Mortality Privilege:</u>
Willard v. State, 893 N.W.2d 52 (Iowa 2017)
After an injury occurred to Willard while he was being transported for a CT scan and while undergoing a CT scan at the University of Iowa Hospitals and Clinics, a Patient Safety Net (PSN) report was prepared . Willard filed a medical malpractice lawsuit against the state and requested PSN materials. The state refused to provide the information claiming that the PSN materials were protected by the morbidity and mortality privilege. See Iowa Code sections 135.40–.42.

> 135.40. Collection and distribution of information.
> Any person, hospital, sanatorium, nursing or rest home, or other organization may

provide information, interviews, reports, statements, memoranda, or other data relating to the condition and treatment of any person to the department, the Iowa medical society or any of its allied medical societies, the Iowa osteopathic medical association, any in-hospital staff committee, or the Iowa healthcare collaborative, to be used in the course of any study for the purpose of reducing morbidity or mortality, and no liability of any kind or character for damages or other relief shall arise or be enforced against any person or organization that has acted reasonably and in good faith, by reason of having provided such information or material, or by reason of having released or published the findings and conclusions of such groups to advance medical research and medical education, or by reason of having released or published generally a summary of such studies.
. . . .

135.41. Publication.
The department, the Iowa medical society or any of its allied medical societies, the Iowa osteopathic medical association, any in-hospital staff committee, or the Iowa healthcare collaborative shall use or publish said material only for the purpose of advancing medical research or medical education in the interest of reducing morbidity or mortality, except that a summary of such studies may be released by any such group for general publication. In all events the identity of any person whose condition or treatment has been studied shall be confidential and shall not be revealed under any circumstances. A violation of this section shall constitute a simple misdemeanor.

135.42. Unlawful use.
All information, interviews, reports, statements, memoranda, or other data furnished in accordance with this division and any findings or conclusions resulting from such studies shall not be used or offered or received in evidence in any legal proceedings of any kind or character, but nothing contained herein shall be construed as affecting the admissibility as evidence of the primary medical or hospital records pertaining to the patient or of any other writing, record or reproduction thereof not contemplated by this division.

The district court ordered the state to produce the materials (The state advised that it had one four page PSN and associated eight pages, along with a second four page PSN and eight associated pages.). The state requested interlocutory appeal. It was granted by the Iowa Supreme Court.

The Court, Zager, J., noted that morbidity and mortality are not defined in the statute. "Taken together with their common meanings, a morbidity and mortality study can be interpreted broadly to mean a collection of statistics or a study regarding the rates of illnesses, diseases, or death among a patient population." *Willard*, at 61. The Court noted that hospitals are required to have on-going quality improvement programs in place:

> A PSN clearly falls within the legislative intent of "any study for the purpose of reducing morbidity or mortality." Iowa Code § 135.40. The PSN system allows the UIHC to keep track of patient incidents and to route them to the appropriate department for resolution. The PSN system can also result in revised policies for the hospital as a whole or for use in studies, reports, and presentations. Similar to the purposes of the PSQIA, the purpose of

> section 135.40 is "to encourage the reporting and analysis of medical errors and health care systems by providing peer review protection of information reported to patient safety organizations for the purposes of quality improvement and patient safety." *Tibbs*, 448 S.W.3d at 801 (quoting H.R. Rep. No. 109–197 (2005)). We find that the PSN and related documents are afforded a privilege as morbidity and mortality information to be used in a study as defined in Iowa Code section 135.40.

Willard, at 61–62. The Court drew an analogy to peer review records which are protected from discovery. The public policy is to encourage reporting of incidents that occur so that corrections can be made. The decision of the district court is reversed as the statute protects the PSN materials.

Frivolous Court Filings

First American Bank v. Fobian Farms, 906 N.W.2d 736 (Iowa 2018)
The district court awarded attorney fees and expenses of $145,427 as a sanction for frivolous court filings in violation of Iowa Rule of Civil Procedure 1.413.by Fobian Farms. The rule provides in relevant part:

> 1.413(1) Pleadings need not be verified unless special statutes so require and, where a pleading is verified, it is not necessary that subsequent pleadings be verified unless special statutes so require.
> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. ***If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party.***

(Emphasis added). On review, the Iowa Supreme Court, Waterman, J., found that the district court abused its discretion by awarding attorney fees beyond those which were the result of violations of rule 1.413 or which were necessary to deter similar misconduct. The district court also improperly relied upon a letter from the sanctioned party's president which was sent to the Supreme Court after it denied further review of the first appellate decision in this case. The Court concluded the appropriate sanction was $30,000.

This case arises from a quite title action arising from scrivener's error. The error involved a plat for development land in Johnson County. C.J. Land Company (which built a restaurant in the development) thought that it had acquired the south unit of Building 2 (the restaurant cost about $1.1 million dollars); in reality the north and south units were reversed on a 2007 the plat (The original plan was created in 1999, and the building was on an east-west alignment with unit 2A west of unit 2B; the 2007 plat created a north-south alignment with unit 2A south of 2B; all other building a north-side alignment at the development had the units numbered alphabetically from north to south.). Fobian held a second mortgage on the unsold units and was aware of the scrivener's error, but he did not tell C.J. Land Company until after it had entered into a lease for overflow parking. Land surveyors who prepared the 2007 plat prepared and filed an affidavit acknowledging the scrivener's error and stating that the north unit should have been identified as unit 2A and the south unit 2B. First American Bank which held a mortgage from C.J. Land Company contacted Fobian about resolving the title issues; Fobian refused; Fobian sued the land surveyors for disparagement or slander of title. Fobian's lawsuit was dismissed after the land surveyors withdrew the affidavit.

First American Bank filed a quiet title action against Fobian and several other defendants. Trial testimony was that C.J. Land Company intended to buy the south unit and the developer intended to sell the south unit in Building 2. The developer also testified Fobian had approached him about 9 months before the quiet title trial; if the developer would cooperate with Fobian in efforts to obtain the restaurant building, he would forgive a significant portion of the developer's debt to Fobian. The developer testified that he declined to do so.

The district court entered an order finding title to the real estate in C.J. Land subject to First American's mortgage; legal documents were ordered to be reformed; Fobian was awarded $2,101.00 for encroachment by C.J. Land upon the unsold unit associated with Building 2 (An air conditioner and a smoker had been built outside the boundaries of C.J. Land's unit.). Attorneys for First American and C.J. Land were directed to submit costs and claims for fees and expenses; the bank and C.J. Land claimed $135,971 in attorney fees, $7,094.53 in expenses, and $2,636.44 in expert expenses. The district court held there should be a total sanction of $145,427 reduced by $36,643 in taxes owned by C.J. Land to Fobian. Fobian appealed. The court of appeals affirmed the quiet title decision and the encroachment award to Fobian; it also found that sanctions against Fobian were appropriate, but the district court was directed to make specific findings and allocations regarding the amount of sanctions. The Supreme Court denied a Petition for Further Review.

At this point Carl Fobian sent a letter to the Iowa Supreme Court on where to turn for real justice and rapid conclusion:

> I have three separate issues concerning Johnson County, the State, and our court operation or lack of it. This concerns an action we should never have been allowed to be named in as "defendants". We have lost in a bench court, an appeals court rubber-stamped it, and the Supreme Court has denied the review of the case or suggests any solution. We expected a decision on legal terms we did not get and asked it to be reviewed on this basis by the Supreme Court. They have refused.

> ....
> Can a determination by a lower court be allowed to stand on totally false facts, easily disapproved by available recorded data, then the Supreme Court denying it to be heard? Can a surveyed document, since recorded, approved by all seven offices in the county, after being requested and presented by the then owner and developer of same when thus recorded, then being used and accepted as security on a properly recorded mortgage be ignored and disposed of by a judge? I can't believe it can. The judge used false facts of record stating we owned property when we were only mortgage owners at that time and that we were obtaining "free property" that our money had financed and was our security on this mortgaged property. He simply did not understand real estate law and our attorney had his mind elsewhere on his own troubles.
> ....
> Can a court get by with, as it seems to me, assisting a person in creating a scam, using a shell-game, replacing, moving, removing, and selling recorded mortgaged property, not released, encroaching, ruining the value there of?
> ....
> Is this America? We positively did nothing wrong, yet we now face the loss of money we borrowed, loaned out, lawyer fees, receiving no damage awarded for a ruined lot, a life destroyed all with the assistance of the court.

First Am. Bank v. Fobian Farms, Inc., 906 N.W.2d 736, 743–44 (Iowa 2018). First American and C.J. Land Company filed a Motion to Strike the letter which was granted and procedendo was ordered to issue. The district court considered the Fobian letter when it awarded the full amount of sanctions as originally imposed; the court of appeals treated Fobian's appeal as a petition for writ of certiorari; no abuse was found by the court of appeals; the Iowa Supreme Court granted further review.

A majority of the Court, Waterman, J., held that the purpose of sanctions is to deter "bad" conduct. There is no precise formula to determine the amount necessary for deterrence. The court majority concluded that the misconduct was willful and not a mere isolated event; it was characterized by a "a pattern of activity causing protracted litigation spanning from 2011 to 2018 and included a series of court filings that violated rule 1.413." *First Am. Bank*, 906 N.W.2d at 748–49.

> Carl Fobian is not a lawyer, but he is a sophisticated real estate developer who was represented by lawyers, which cuts both ways. Fobian himself hatched the scheme to take unfair advantage of the scrivener's error. In affirming the district court ruling that Fobian violated rule 1.413, the court of appeals in the first appeal noted the district court's findings Carl Fobian personally bullied the surveyors into recanting their corrective affidavit and sought to entice Eyman [the developer] to "help him with his improper plan of claiming ownership of the restaurant." On remand, the district court reiterated those findings and others quoted by the court of appeals that Fobian "chose to pursue improper claims." These findings affirmed by the court of appeals permit an award of sanctions against the represented party personally, in the discretion of the district court. *See Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part sub*

> *nom. Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989); *see also Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) ("Although typically levied against an attorney, a court is authorized to issue Rule 11 sanctions against a party even though the party is neither an attorney nor the signor of the pleadings."), abrogated on other grounds by *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008); *Souran v. Travelers Ins.*, 982 F.2d 1497, 1508 n.14 (11th Cir. 1993) ("Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client." (quoting Fed. R. Civ. P. 11 advisory committee's note to the 1983 amendment)).

First Am. Bank, at 749–50. The Court noted that the purpose of a sanction is to deter such conduct in the future. The sanction also has to be large enough to motivate the victims of frivolous filings to seek sanctions. Relying upon *Runfola & Associates, Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 371–72, 375–76 (6th Cir. 1996), the majority of the Court found that $30,000.00 was the minimum amount sufficient to deter future conduct similar to that which occurred in this case ("the Sixth Circuit determined that a sanction of approximately $30,000 against both the represented party and counsel was appropriate and not too low to deter when the opposing party's attorney fees exceeded $100,000." *First Am. Bank*, at 751. In awarding attorney fees, the district court failed to consider that some of the fees requested were not related to the frivolous matters. The district court and court of appeals were incorrect when they relied in part upon the letter written by Carl Fobian:

> . . . The letter was not sent by an attorney, but rather by a disappointed litigant who vented his frustration after we denied further review of the first appeal. The appellate rules do not allow a motion to reconsider the denial of an application for further review. We granted the appellees' motion to strike the letter. On remand, the district court referred to this letter as further proof Carl Fobian "views himself as being above the law and outside of the applicability of well-founded legal principles."
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> Citizens have a First Amendment right to criticize court decisions. *See Brown v. Iowa Dist. Ct.*, 158 N.W.2d 744, 747 (Iowa 1968) (collecting cases and concluding a letter of criticism was not punishable in contempt proceeding), *overruled on other grounds by Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 707–09 (Iowa 1986); *cf. Iowa Supreme Ct. Att'y Disciplinary Bd. v. Attorney Doe No. 792*, 878 N.W.2d 189, 194–96 (Iowa 2016) (reviewing First Amendment protection for an attorney's *ex parte* email criticizing the presiding judge after an adverse ruling). We conclude the letter to our court from a nonlawyer, Carl Fobian, should not have been factored into the district court's revised sanctions decision on remand.

First Am. Bank, at 753. Wiggins in a dissent joined by Appel contended that it was the attorney who should have been sanctioned and not Fobian.

> . . . The basis of its decision seems to be rooted in punishment, not deterrence. The majority is punishing the Fobian parties for their position taken in this action. The record

> is devoid of any evidence that the Fobian parties were involved in any prior lawsuits that the court deemed frivolous or filed for an improper purpose. The record is also devoid of any evidence the Fobian parties will be involved in any lawsuits in the future that the court will deem frivolous or filed for an improper purpose. So what is the court deterring?

First Am. Bank, at 757. Justice Wiggins wrote further:

> A lawyer vetted the Fobian parties' claims. A lawyer brought the claims after he vetted them. The majority used the sanction law applicable to attorneys, who received legal training, not the law applicable to clients. I have been unable to find any Iowa cases sanctioning clients without sanctioning their attorney.

First Am. Bank, at 757–58. Justice Wiggins concluded:

> There is no evidence that the Fobian parties' attorney told them their claims were frivolous or filed for an improper purpose. There is no showing that the Fobian parties had actual knowledge that filing the lawsuit constituted wrongful conduct. If anything, the record reveals an attorney who failed to comply with rule 1.413.21
>
> So what is the majority's sanction deterring? Nothing. The Fobian parties are not going to file an action pro se. If they do file a future action, an attorney who is obligated to comply with rule 1.413 will probably file it. I am not arguing over whether the court of appeals in its first decision was correct in determining whether the Fobian parties should be sanctioned. The crux of my dissent is that imposing sanctions against the Fobian parties has no purpose because such sanctions would not deter similar misconduct by them. Again, nothing in the record shows the Fobian parties had actual knowledge that the lawsuit was frivolous or filed for an improper purpose. Imposing sanctions would also not deter other represented parties in the future. Courts should hold attorneys, not their clients, accountable for filing frivolous lawsuits. The only exception to this general rule is where clients have knowledge of their attorneys' wrongdoing.
>
> What I see happening in this case is the majority unnecessarily punishing the Fobian parties for pursuing claims their attorney thought were not frivolous or filed for an improper purpose. I also see the majority shifting the fees and expenses of this case above the limits set by section 649.5 rather than sanctioning a suspended attorney. Most importantly, I see the majority chilling the rights of citizens from filing actions through their attorneys for fear that their attorneys may have failed to inform them that the actions are improper under rule 1.413.
>
> For these reasons, no amount of money will deter the Fobian parties' future actions because there is nothing to deter. Thus, I would not award any sanctions or only a nominal amount under this record.

First Am. Bank, at 758–59.

Direct Action for Damages under the Iowa Constitution:

Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)
Godfrey was Iowa Workers' Compensation Commissioner. He was serving a six year term (2009 – 2015). When Terry Branstad was elected as Governor, he demanded Godfrey resign. Godfrey refused stating there was still time left on his term. Godfrey contended his salary was reduced in retaliation to the minimum authorized for the office, and he was subjected to other forms of discrimination and violation of his equal protection and due process rights.

At issue in an interlocutory appeal to the Iowa Supreme Court are four counts of Godfrey's Petition at Law. The district court entered summary judgment for the state on Counts VI, VII, VIII, and IX. Each of the Counts alleged violations of either Article I, section 6 (equal protection) or section 9 (due process) of the Iowa Constitution. The district court held that while Federal precedent appeared to support causes of action for due process and equal protection violations of the U.S. Constitution, *see Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971). The district court concluded that the Iowa Constitution does not permit a direct, private cause of action for equal protection and due process violations.

> Article I, section 6: Laws uniform. Section 6. All laws of a general nature shall have a uniform operation; **the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.**
>
> Article I, section 9: Right of trial by jury - due process of law. Section 9. The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but **no person shall be deprived of life, liberty, or property, without due process of law.**

In a majority opinion, Appel, J., joined by Hecht and Wiggins, JJ, and in part by Cady, C.J., concluded that direct, private causes of action under the equal protection and due process provisions of the Iowa Constitution can be maintained. Justice Appel observed that "The notion that unconstitutional actions by government officials could lead to compensatory and exemplary damages was well established in English common law." The majority held that sections 6 and 9 of Article I are self executing and do not require legislative action to allow such causes of action.

> The Iowa constitutional provision regarding due process of law is thus not a mere hortatory command, but it has been implemented, day in and day out, for many, many years. It has traditionally been self-executing without remedial legislation for equitable purposes, and there is no reason to think it is not selfexecuting for the purposes of damages at law.
>
> * * *

> Our cases clearly show that our equal protection clause has always been considered to be self-executing. We therefore reaffirm the equal protection clause of the Iowa Constitution is self-executing.

Appel, Hecht, and Wiggins, JJ., rejected a contention that the Iowa Civil Rights Act preempted Constitutional claims for violation of equal protection and due process premised upon Godfrey's sexual orientation. Cady, C.J., in his partial concurrence and partial dissent, departed from the position of Appel, Hecht, and Wiggins, JJ. The Chief Justice found that the Civil Rights Act provided Godfrey a remedy for his claims based upon sexual orientation.

Mansfield, J., in dissent joined by Waterman and Zager, JJ, wrote, "Until today, we have never recognized direct claims under the Iowa Constitution even for actual damages." The dissenters would have affirmed the district court grant of summary judgment.

As a result of the decision Counts VI and VII were returned to the district court for further proceedings.

Prohibited "sexual conduct" under Iowa Code section 709.15(3)(a) (2015)

State v. Wickes, _____ N.W.2d _____, 2018 WL 1559813 (Iowa 2018)
Bradley Wickes was found guilty in a bench trial by the district court on one count of sexual exploitation by a school employee in violation of Iowa Code sections 709.15(3)(a)(1) and 709.15(5)(a) (2015). Evidence showed that Wickes, a 36 year old licensed teacher in the Camanche School District, and a 17-year-old female student engaged in ongoing conduct, including hugs, which the district court found was for Wickes sexual gratification. The Supreme Court agreed in an opinion by Zager, J., which affirmed Wickes' conviction and sentence.

The pattern of conduct by Wickes according to the statement of facts started with a request by the student that he proofread a paper she had written. Wickes responded by Facebook Messenger. The paper included information about personal issues A.S. was facing. From there, the relationship was characterized by an escalating pattern of conduct which the Court found was intended to be something more than consoling her. Examples of the conduct of Wicks from the opinion which demonstrate that he was pursuing a relationship:

> I'm infatuated with your character and heart. The only reason I feel good these days is I see in you what I want in a woman. I found out there's a girl that gets me and I have hope someday I [will] find another age appropriate girl.
>
> Permission to be a pervy old man? . . . . Your eyes are amazing, freaking soulful and draws me in. Every face [you] make is freaking adorable. I told you a long time ago you look just like an actress from tv. Still do. And then the pervy stuff . . . you know you've got a great booty! Below that is some smoking legs [that] are beautiful and not the scrawny chicken legs like so many others. You've got a pin up girl build. An hour glass of curves. Read this then delete and I'll go turn myself in.

After the homecoming dance, where one of the photographs of Wickes and A.S are shown embracing, Wickes told A.S., "You're gorgeous" and "You're smoking." Their messaging continued into the early hours of the morning. Wickes told A.S. that she found him at the dance to take a picture with him "during the perfect song." That song was entitled "Hold Each Other," which Wickes said he played because it made him think of A.S. and their hugs. After A.S. told Wickes that she "would have done anything for a dance tonight," Wickes replied, "I think I would get completely lost if that happened, like everything would shut down around me and I would disappear into those eyes. If I was that someone." He proceeded to tell A.S., "You're hot obviously. But you're soulful. I don't know how to explain it[;] you're just captivating" and "you make me feel great."

> Of critical importance in our analysis is the context and circumstances that surrounded the physical contact—the hugs—that are at issue here. This context begins with Wickes initiating the Facebook messaging with A.S. It continues with the scenario of a 36–year–old teacher incessantly messaging a 17–year–old female student to describe intimate details of his marriage and his sexual frustrations. This context informs our analysis of what resulted in daily or more often hugs between Wickes and A.S. It is important to note that nothing should prohibit teachers from hugging students for reassurance, comfort, or in congratulation without putting themselves at risk of being charged with the crime of sexual exploitation. But on this record, it is clear from the voluminous messages and their content discussing the hugs and his attraction to A.S., Wickes's intention with these hugs went beyond mere reassurance and support for A.S. Rather, the abundance of messages to A.S. about how attractive he found her, his desire to be in a more intimate relationship with her, and how he was in love with her, linked his sexual desire toward A.S. with the hugs they exchanged.
>
> Likewise, the photos of A.S. and Wickes hugging at the school bonfire and homecoming dance show that these hugs went beyond simple, brief hugs for reassurance or comfort. These photos show the pair in a close embrace, not a mere hug. For example, in one of the homecoming photos, A.S. and Wickes are engaged in a full-frontal hug in which the pair are making chest-to-chest contact, A.S. has her arms wrapped around Wickes' neck, and Wickes has his arms fully wrapped around A.S.'s waist as they pose for the photo. Consequently, in the context of the multiple messages with A.S. as a whole, and in combination with the hugging, there is sufficient evidence that the hugs constituted sexual conduct with A.S. as opposed to an ordinary hug between a teacher and student intended to comfort and reassure the student.

The Court held that this evidence, coupled with other information, was sufficient to hold Wickes accountable under 709.15(3)(a)(1) and 709.15(5)(a) of the Code of Iowa (2015). The hugs, coupled with the other actions of Wicks, demonstrated that his conduct was for his own sexual gratification:

> Our holding in this case that hugs **<u>can</u>** constitute sexual conduct under Iowa Code section 709.15(3)(a)(2) aligns with our broad interpretation of "sexual conduct" under the statute in *Romer*. *See Romer*, 832 N.W.2d at 180–81.3 The legislature's decision not to limit

> sexual conduct to a specific list of acts underscores its concern for the welfare of children whose parents entrust them into the care of school employees. *See id.* The ever-changing technology that gives school employees the opportunity to easily communicate with students through mediums that allow for more discreet communications—like the use of Facebook Messenger in this case—presents school employees with a legion of evolving methods by which they can potentially sexually exploit students. The legislature rightly acknowledged as much by declining to limit its definition of "sexual conduct" to specific conduct and, instead, sought to include those ways in which a school employee sexually exploits a student by causing them physical or nonphysical harm. *See id.* at 181. As a result, we decline to narrow the scope of Iowa Code section 709.15(3)(a)(2) by finding that hugs alone cannot amount to sexual conduct under the statute. This is especially true in light of the substantial evidence in this case and our prior precedent interpreting the statute.

The sentence imposed by the district court: a five-year term of incarceration and a ten-year special sentence; Wickes was to register and be placed on the sex offender registry; to submit a DNA sample; to pay a $750 fine, a thirty-five percent surcharge, and a $250 civil penalty; a no-contact order preventing Wickes from contacting A.S. was entered

Wicks' challenged the sentence, contending that under the U.S. Constitution and the Iowa Constitution, it was cruel and unusual. The concurring opinion by Appel, J., joined by Hecht and Wiggins, JJ., focused on the unique nature of the Iowa Constitution and emphasized that Iowa Constitutional jurisprudence is not the same as Federal. In other words, the concurring justices want attorneys who think they have a constitutional claim under the Iowa Constitution to flesh out that argument. Don't just rely upon what the U.S. Supreme Court and other Federal Courts say. They do not interpret the Iowa Constitution; that is the job of the Iowa Supreme Court, but it cannot move forward without argument from the attorneys involved in a case.

Two things from the opinion: (1) Hugs are not outlawed, but a school employee needs to be very cognizant of his or her conduct, especially at the junior high and high school levels, and (2) attorneys need to do a better job of discussing the Iowa Constitution when claims that it has been violated are raised.

Negligent Empowerment:

Westco Agronomy Company, LLC v. Wollesen, _____ N.W.2d _____, 017 WL 6545853 (Iowa 2017)
Was section 706A.2(5) unconstitutional because it improperly shifted the burden of proof in a negligence matter to the defendant? The district court felt it was, and dismissed counterclaims by Wollesen based upon the statute. The Iowa court of appeals reversed finding the statute was constitutional. The Iowa Supreme Court granted further review on Westco's appeal of the court of appeals finding that a burden shifting provision of the statute was unconstitutional, but that it could be severed from the rest of the law.

The Court's opinion by Mansfield, J., noted that 706A.2(5) is a unique statute. No other state has

one similar to Iowa's. Section 706A.2(5) provides in relevant part:

> 5. Negligent empowerment of specified unlawful activity.
>
> a. It is unlawful for a person to negligently allow property owned or controlled by the person or services provided by the person, other than legal services, to be used to facilitate specified unlawful activity, whether by entrustment, loan, rent, lease, bailment, or otherwise.
>
> b. . . . .
>
> . . . .
>
> (4) The plaintiff shall carry the burden of proof by a preponderance of the evidence that the specified unlawful activity occurred and was facilitated by the property or services. The defendant shall have the burden of proof by a preponderance of the evidence as to circumstances constituting lack of negligence and on the limitations on damages in this subsection.

The statute provides for a variety of remedies:

> 7. Any person whose business or property is directly or indirectly injured by conduct constituting a violation of this chapter, by any person, may bring a civil action, subject to the in pari delicto defense, and shall recover threefold the actual damages sustained and the costs and expenses of the investigation and prosecution of the action including reasonable attorney fees in the trial and appellate courts. Damages shall not include pain and suffering.

Iowa Code § 706A.3(7). The district court may also:

> a. Ordering any defendant to divest the defendant of any interest in any enterprise, or in any real property.
>
> b. Imposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as any enterprise in which the defendant was engaged in a violation of this chapter.
>
> c. Ordering the dissolution or reorganization of any enterprise.
>
> d. Ordering the payment of all reasonable costs and expenses of the investigation and prosecution of any violation, civil or criminal, including reasonable attorney fees in the trial and appellate courts.

Iowa Code § 706A.3(3).

The Court's opinion holds that the burden of proof shift violated due process provisions of the United States and Iowa Constitutions. The presumption is not rebuttable by narrow, concrete proof relating to a specific time and place. But the Court found, using generally recognized rules of statutory construction ("Our constitutional duty requires us to preserve as much of the ordinance as possible within constitutional constraints." *Hensler*, 790 N.W.2d at 589.) that the presumption can be severed from the rest of the statute. "The statute therefore operates without

the presumption; the core of the statute — the cause of action for negligent empowerment — remains intact without the offending provision."

The Court rejected contentions by Westco that the jury's verdict was inconsistent and could not be reconciled: Hartzler, an employee of Westco, was found to have engaged in commercial bribery. Westco argued the bribery scheme must have involved Wollesen, but the jury found Wollesen did not engage in commercial bribery. Jury Instruction No. 29 allows the verdicts to reconciled. The Court noted, "A jury could have determined that the Wollesens bribed Hartzler to give them discounted products yet also determined that Westco was 'equally or more culpable' than the Wollesens. On this basis, the jury would have declined to find for Westco on its ongoing unlawful conduct claim against the Wollesens."

The case is remanded to district court for further proceedings consistent with the opinion.

Duty/Negligence:

Placement of a known sex offender in a nursing home:
Estate of Gottschalk by Gottschalk v. Pomeroy Development, Inc., 893 N.W.2d 579 (Iowa 2017)
William Cubbage, a convicted sex offender, was transferred from the State's civil commitment unit for sexual offenders (CCUSO) and was civilly committed to the Pomeroy Care Center. Prior to his transfer, nursing home personnel discussed Cubbage with staff from CCUSO about Cubbage's history as a sex offender and his diagnosis of pedophilia and dementia. The nursing home administrator did not know that CCUSO doctors had opined that Cubbage was a danger to others; the administrator understood that Cubbage was being transferred because his physical condition had deteriorated to the point where he could no longer participate in active treatment; while he was a child predator, he would be no risk at all to older folks. After his transfer to the Pomeroy Care Center, Cubbage was observed sexually assaulting Mercedes Gottschalk. After the incident Cubbage was transferred to the correctional facility in Newton.

Gottschalk sued the care facility and the state for negligence. When she died, her Estate was substituted as plaintiff. "Specifically, the estate alleged the State was negligent because (1) it had a duty to "prepare and approve a safety plan to protect the residents" of the care center after Cubbage was placed there and (2) it had a duty to "inspect and determine whether or not appropriate safety precautions were being followed by the Pomeroy Care Center." The estate also alleged the State decreased nursing home oversight thereby "intentionally causing an unacceptable risk of injury to the residents." *Estate of Gottschalk by Gottschalk*, at 583. The care center asserted a cross-claim against the state for contribution and indemnity. The state moved for summary judgment against the Estate and the care center, contending that once Cubbage was transferred, it had no duty either to the Estate or to the care center.

> The district court granted the State's motion, concluding that because Cubbage was unconditionally discharged from CCUSO, the State had no statutory or common law duty to supervise, monitor, or approve a safety plan, and that "[w]ithout the existence of a duty, any claim for negligence [by the Estate or the Pomeroy Care Center] must fail." Further, the court held the doctrine of sovereign immunity prevented any claim of

misrepresentation against the State pursuant to Iowa Code section 669.14(4).

Estate of Gottschalk by Gottschalk, at 584. The Iowa court of appeals affirmed the district court decision. The Iowa Supreme Court granted further review.

A majority of the Court in an opinion by Wiggins, J., affirms the district court and the court of appeals.

> The district courts made the ultimate decision to release Cubbage from CCUSO and commit him to the Pomeroy Care Center, not the State. The courts made their decisions after they considered the evidence before them. The courts reviewed the expert testimony and reports and decided the law required them to release Cubbage from CCUSO and commit him to the Pomeroy Care Center. The courts, in making their decisions, had the option of giving as much weight as they thought the expert testimony deserved. *Crouch v. Nat'l Livestock Remedy Co.*, 210 Iowa 849, 851–52, 231 N.W. 323, 324 (1930). The courts could have rejected or accepted the expert testimony. *Id.* Furthermore, Iowa Code chapter 229 and 229A place the responsibility on the court to examine the evidence and not merely act as a rubber stamp of the expert testimony. *See Jacobs v. Taylor*, 190 Ga.App. 520, 379 S.E.2d 563, 566 (1989) (stating "this court will not read the statutory responsibility placed on a committing court ... as consisting merely of 'rubberstamping' the opinions of expert witnesses"). Although the court had the authority to release Cubbage from CCUSO with supervision, it chose not to. Iowa Code § 229A.9A. Instead, one court discharged Cubbage from CCUSO and another committed him to the Pomeroy Care Center. Neither the director nor any staff member of CCUSO had the authority to release or discharge Cubbage. Our courts discharged Cubbage. Accordingly, we find there was no special relationship to invoke section 41 of the Restatement (Third). Consequently, the district court was correct in finding the State had no duty to warn the residents.

Estate of Gottschalk by Gottschalk, at 588. Cady, C.J., and Appel, J., joined in the opinion. Waterman and Mansfield, JJ., also joined in the opinion and filed a special concurrence. Justice Waterman wrote:

> Because the facts of this case cry out for a remedy, I begin by noting this appeal resolves only those claims by the plaintiffs and the nursing home against the State of Iowa. The plaintiffs will get their day in court on their tort claims against the nursing home operator, Pomeroy Development, Inc., which chose to accept a known sex offender as an in-patient resident and allegedly failed to properly monitor him to protect its vulnerable, elderly residents, including Mercedes Gottschalk.

Estate of Gottschalk by Gottschalk, at 590. Hecht, J., dissented. He was joined by Zager, J.

> I would hold in this case that a special relationship existed between the State and Cubbage supporting the imposition of a duty to warn Gottschalk. The relationship between CCUSO and Cubbage is closely analogous to a mental-health

professional–patient relationship. *See id.* § 41(b), at 65. Obvious and compelling policy reasons support the imposition of a duty of care on the State as it transferred an unsuccessfully treated—and therefore dangerous—sexual predator to a nursing home populated by a finite number of especially vulnerable residents. A reasonable fact finder could find on this record that Cubbage was an SVP whose persistent mental abnormality rendered him likely to reoffend sexually before and after the transfer to Pomeroy Care Center. He had been resistant to treatment at CCUSO during the five years prior to his discharge, and the evidence tending to prove he had not been meaningfully rehabilitated during his detention is overwhelming.

The duty I would recognize in this case is distinguishable from the one claimed but rejected by this court in *Leonard v. State*, 491 N.W.2d 508 (Iowa 1992). In *Leonard*, we held a state-employed psychiatrist who discharged a patient from a mental-health institute owed no duty to a person subsequently injured by the patient. *Id*. at 512. We reasoned that a no-duty rule was justified in that case because the plaintiff was a member of the public at large—not a reasonably foreseeable victim of the patient's dangerous and violent tendencies. *Id*. at 511–12. In this case, Gottschalk was not merely a member of the public at large. A reasonable fact finder could find she was among the discrete universe of known Pomeroy Care Center residents who would foreseeably be exposed to Cubbage's predatory behavior.

Estate of Gottschalk by Gottschalk, at 599.

Premises Liability:

Injuries at a High School Baseball Park:
Ludman v. Davenport Assumption High School, 895 N.W.2d 902 (Iowa 2017)
Ludman was injured while playing baseball for his high school team at the Davenport Assumption High School baseball park. A jury found that the high school was negligent and awarded damages. On appeal, the Iowa Supreme Court, Wiggins, J., held that there was substantial evidence to support the jury's verdict, but the district court committed error when it did not allow the high school to present evidence of custom and did not instruct the jury on the player's failure to maintain a lookout.

The Court adopted Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51, at 242 (Am. Law Inst. 2012), which provides:

> Subject to § 52, a land possessor owes a duty of reasonable care to entrants on the land with regard to:
>
> (a) conduct by the land possessor that creates risks to entrants on the land;
> (b) artificial conditions on the land that pose risks to entrants on the land;
> (c) natural conditions on the land that pose risks to entrants on the land; and
> (d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.

See also Koenig v. Koenig, 766 N.W.2d 635, 645 (Iowa 2009)(The factors identified in *Koenig* are also found in comment *i* to section 51.).

The defendant's contention that the contact-sports exception applied is rejected as the claims of Ludman are based upon premises liability of the owner and not upon the action of the participants in the baseball game.

The district court committed error when it did not allow Assumption to present evidence of custom (design of dugouts at other school's facilities in the conference in which Assumption participated). "Evidence of custom is not conclusive on Assumption's lack of negligence. *See Bradshaw v. Iowa Methodist Hosp.*, 251 Iowa 375, 385, 101 N.W.2d 167, 173 (1960). It is still up to the jury to weigh the evidence of custom against the other evidence in the record and ultimately determine the issue of negligence based on the facts and circumstances of the case. *Parsons*, 277 N.W.2d at 624." *Ludman*, at 919.

The Court concluded, based upon a review of Ludman's trial testimony, that the district court should have given defendant's requested instruction on proper lookout.

> Under the law of proper lookout, a jury could have decided Ludman was not "being watchful of the movements of one's self in relation to the things seen" by failing to follow the ball, and that constituted negligence. *See Coker*, 491 N.W.2d at 150. We also cannot say the court's failure to give this instruction did not prejudice Assumption. Accordingly, based on Ludman's testimony regarding his lookout, it was error for the court not to instruct the jury on proper lookout.

Ludman, at 920. The case was remanded to district court.

Contracts:

Breach of Express Warranty:
Cannon v. Bodensteiner Implement Company, 903 N.W.2d 322(Iowa 2017)
Cannon traded his John Deere tractor for a used Case IH tractor from Bodensteiner Implement to be used in his manure pumping business. The tractor turned out to be a "lemon". Cannon filed breach of warranty and other claims against Bodensteiner and other defendants. The district court dismissed the claims on summary judgment. The court of appeals affirmed the district court except on the issue of express warranty. The court of appeals found there was a fact issue generated by statements made by a Bodensteiner salesman that the tractor " was fit, field ready, and in good condition". The Iowa Supreme Court, Wiggins, J., held written disclaimers in a written purchase agreement negated any express warranties stated by the salesman. The court of appeals decision is reversed, and the district court is affirmed.

Contribution:
Shcharansky v. Shapiro, 905 N.W.2d 579 (Iowa 2017)
This decision results from complex business transactions and multiple contracts involving a company known as Continuous Control Solution, Inc. (CCS, Inc.), the Shapiro group of

stockholders, the Shcharansky group, personal guarantees made by each group to Wells Fargo, and repayment of a judgment on personal guarantees obtained by Wells Fargo in the amount of $909,338.27. Based upon a forbearance agreement with Wells Fargo entered in June 2009, CCS paid Wells Fargo $400,000.00. There were to be an additional eight quarterly payments to complete the agreement. CCS made three quarterly payments. The remaining payments were made by either Alexander or Tatiana Shcharansky using funds obtained from their parents (The nature of these funds, whether they were gifts or loans, is a key dispute.). After the last payment, Wells Fargo filed a satisfaction of judgment, releasing the personal guarantees of not only the Shcharansky group but also the Shapiro group members. Alexander and Tatiana Shcharansky filed suit against the five members of the Shapiro group seeking contribution for payment of the CCS/Wells Fargo personal guarantees. Shapiro group countered that the Shcharansky group breached a stock repurchase agreement involving CCS, that improper loans and payments were made by CCS to the Shcharansky group, that the Shcharansky group tortuously interfered with the stock repurchase agreement, and that there was fraudulent misrepresentation regarding best efforts by CCS to repay the Wells Fargo loan. Two district court trials (the second after an appeal to the Iowa court of appeals) resulted in a verdict for Shapiro group on the contribution claims by the Shcharansky group, but not recovery by Shapiro on its claims.

This case comes to the Iowa Supreme Court in equity. Appel, J., noted that review is *de novo*. The Court noted that the Shcharansky group argument that the district court's decision to "straddle" whether the money received from Alexander and Tatiana's parents was a gift or a loan was error. Either way, the Shcharansky group contended, contribution would have been appropriate. The Shcharansky group further argued that the key question was whether the party seeking contribution actually made the payments. The source of funds was not relevant. The purpose of contribution in this case, argued the Shcharanskys, was to prevent an unjust windfall by the Shapiro group. *See Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 772–73 (Iowa 2009).

Based upon review of the facts and relying upon *Hills Bank*, the Court concluded that the Shcharansky group was entitled to contribution from the Shapiro group. The case was remanded to district court for further proceedings on the Shapiro group claims.

Civil Service/Last-Chance Agreement:

Whitwer v. Civil Service Commission of the City of Sioux City, 897 N.W.2d 112 (Iowa 2017)

Whitwer was a fire fighter with the City of Sioux City. He pleaded guilty to domestic abuse assault. The City agreed to discipline Whitwer rather than terminate his employment, but in return Whitwer had to agree to allow the City within its discretion to terminate his employment immediately, without a right of appeal, if he violated the law or breached a no contact order. About one year later Whitwer violated a no contact order. He was immediately terminated. Whitwer attempted to appeal to the Civil Service Commission which declined to hear his appeal. The district court held the agreement was not valid because it had not been reviewed by the Civil Service Commission. The Iowa Supreme Court, Mansfield, J., reversed the district court finding that the agreement signed by Whitwer was valid and enforceable; that a civil service employee can waive future rights; Whitwer was not coerced or forced to sign the agreement.

Appel, J., joined by Hecht, J., dissented, contending that the parties cannot opt out of the civil service system just because they think their way is better than the statutory scheme adopted by the General Assembly.

Farm Tenancy:
Porter v. Harden, 891 N.W.2d 420 (Iowa 2017)
"[T]he keeping of one 38-year-old horse does not make this a farm tenancy." *Porter*, at 428, What is necessary to establish a farm tenancy under Iowa Code sections 562.5 through 562.7? For a number of years the Hardens lived in a house on six acres owned by the Porters. Hardens claimed that they had an oral contract to purchase the property from Porters, but the courts ruled against him. After the court decision became final, Porters served a thirty day notice to terminate the tenancy; this was followed by a three-day notice to quit, and a forcible entry and detainer action. Hardens resisted the forcible entry and detainer action, claiming they had a farm tenancy under chapter 562 of the Iowa Code and that they were entitled to the specific treatment outlined in that section of the Code. Hardens contended that the pasturing of one horse on the property was sufficient to establish a farm tenancy (Hardens also counterclaimed for improvements they claimed to have made to the property and to have the owner of three additional acres of land included in the action.). The district court disagreed with the Hardens, concluding that the keeping of one thirty-eight year old horse did not make farm tenancy. While the district court found the Porters were entitled to remove the Hardens from the property, action was stayed pending resolution of the counterclaim. Hardens appealed. The Iowa court of appeals found that one horse was livestock and that triggered chapter 562. The Iowa Supreme Court granted further review.

A majority of the Court, Mansfield, J., holds that the keeping of one horse on the property does not a farm tenancy make. The Court concluded that Porters following the appropriate law and should prevail.

Wiggins, J., dissented, arguing that the majority ignored the plain meaning of the statute.

Meeting of the Minds/Settlement Agreement:
Estate of Cox by Cox v. Dunakey & Klatt, P.C., 893 N.W.2d 295 (Iowa 2017)
Mediation in a legal malpractice case was not successful, but the parties continued talking. The major issue became a confidentiality agreement as part of the settlement agreement. Plaintiff's counsel proposed a confidentiality provision, but for a number of months the defendant law firm would not accept the proposal or suggested other language. Plaintiff's counsel moved to have a date set for trial; defendants sought an Order enforcing the settlement and sealing documents related to the mediation and settlement. Plaintiff asked the court to assign an out of district judge to the case. The district court entered an order sealing the documents and found there was an enforceable settlement. The request for out of district judge was denied. Plaintiff appealed.

The Iowa Supreme Court, Mansfield, J., reviewed the basics of contract formation. The opinion held that there was not a meeting of the minds and the district court committed error when it found there was an agreement. ". . . [W]e cannot find that the parties ever mutually assented to the same settlement agreement. The back-and-forth correspondence shows that the parties never

got on the same page as to the confidentiality provision to be included in that agreement." *Estate of Cox by Cox*, at 303. The fact that the law firm defendant was willing to accept language proposed by plaintiff's attorney months later does not establish that there was an agreement:

> We respectfully disagree with the district court's analysis, which we believe conflates three distinct concepts: (1) definiteness, (2) contract interpretation, and (3) offer and acceptance. The threshold issue that matters here is whether there was mutual assent, i.e., offer and acceptance. "For a contract to be valid, the parties must express mutual assent to the terms of the contract." *Schaer*, 644 N.W.2d at 338. Whether one ultimately interprets Harding's June 5 language as having the same legal effect as the law firm's June 16 language is a separate question from whether the parties mutually assented to either version. They didn't, and at the time both sides believed the two versions were materially different.

Estate of Cox by Cox, at 304. The district court did not abuse its discretion when it sealed the documents. There was insufficient evidence to support the request to have an out of district judge appointed, and the denial of the request was appropriate. The district court decision to enforce the settlement is reversed and the case is remanded for further proceedings.

Apartment Leases/Fees, Charges, Liquidated Damage Provisions and Exculpatory Language:
Kline v. SouthGate Property Management, 895 N.W.2d 429 (Iowa 2017)
Kline and others prosecuted a class action against Southgate Property Management, contending leases for apartments violated the Iowa Uniform Residential Landlord and Tenant Act, see Iowa Code Chapter 562A, and contained illegal provisions. The district court granted plaintiffs partial summary judgment on their claims and certified a class. The Iowa Supreme Court granted interlocutory appeal. The Court, Hecht, J., affirmed some of the district court's judgment, reversed other portions of it, found the class certification flawed, and returned the case for further proceedings.

The Court's opinion described the portions of the leases challenged by the plaintiffs:

> SouthGate's leases included provisions imposing fees, charges, and liquidated damages against the tenants in the event of various occurrences. Paragraph 3 prescribed a charge of $25 if a tenant's check was returned for insufficient funds. Paragraph 4 established a charge of $50 per month for each new tenant added after the term of the lease began. Paragraph 9 assessed a handling fee of $50 for each utility bill received or paid by SouthGate as a consequence of a tenant's failure to take responsibility for the obligation and established a $50 utility reconnection charge in the event the tenant's delinquency precipitated a termination of utility service. Paragraph 12 set a charge for maintenance calls caused by a tenant's negligence at the "current rate per hour plus trip charge" as determined by SouthGate. A liquidated damage assessment of $500 was prescribed in paragraph 15 for keeping an unauthorized pet on the premises. An administrative fee of $300 was imposed in paragraph 19 if a tenant assigned or sublet the premises. Paragraph 22 of the lease established a daily rate of $300 per day for tenants holding over and also

required the tenants to pay "any damages" resulting from the holdover. An acceleration clause in paragraph 27 provided the tenant would immediately owe rent for the entire term of the lease in the event of an early termination.

Additional fees were prescribed by SouthGate's Building and Property Rules. Rule 10 charged tenants for "lockout service calls" at the rate of $45 per call during business hours and $85 per call at other times. Rule 11 established a fee of $15 for replacement keys and rule 12 imposed a charge of $25 for each violation of the lease or the building and property rules.

The leases also limited a tenant's remedies in the event SouthGate was unable to deliver possession on the first day of the lease term. Paragraph 11 provided as follows:

> Subject to other remedies at law, if Landlord, after making a good faith effort, is unable to give Tenant possession at the beginning of the term, the rent shall be abated on a pro rata basis until possession can be given. The rebated rent shall be accepted by Tenant as full settlement of all damages occasioned by the delay, and if possession cannot be delivered within ten (10) days of the beginning of the term, this Rental Agreement may be terminated by either party given five (5) days written notice.

The subject of carpet cleaning was also addressed in SouthGate's leases. Property rule 9 provided as follows:

> All carpets are professionally cleaned at the end of each tenancy. The departing tenant had professionally cleaned carpet at move-in and the tenant will be charged for professionally cleaned carpet at termination. Any extra painting or carpet cleaning needed to be done will be deducted from Tenant's Rental Deposit.

Paragraph 30 of the lease established a checklist detailing the condition of the dwelling at the commencement of the lease. This provision provided,

> Within three (3) days of the commencement of occupancy, Tenant shall complete and return to Landlord the Apartment Inspection Checklist, Smoke Alarm and Fire Extinguisher checklists (if applicable). If tenant does not within three (3) days complete and return those checklists, Tenant shall be presumed as acknowledging that there are no defects or damages in the Dwelling Unit. Landlord agrees to review the checklists and notify Tenant of any objections within seven (7) days of receipt of completed checklists. If Landlord does not notify Tenant of Landlord's objections within seven (7) days of receipt of completed checklists, Tenant's evaluation shall be deemed accepted by Landlord. These checklists and objections (if any) shall be retained by Landlord.

Kline, at 432–33 (footnote omitted). The plaintiffs claimed that the lease provisions imposing fines, penalties, liquidated damages, or other fees, including the automatic carpet cleaning

provision violated the Iowa Uniform Residential Landlord and Tenant Act. Plaintiffs argued the Act allows a landlord to obtain only actual damages from a tenant.

SouthGate challenged whether or not the plaintiffs had standing to challenge the leases, contending the plaintiffs' leases had expired before they commenced their lawsuit. The Court focused on the language of the statute, including the word "uses" in rejecting the argument that the plaintiffs did not have standing:

> We also think it apparent that the general assembly's choice of the word "uses" in the second sentence of section 562A.11(2) was intended to address a broader range of landlord conduct than is reached by the word "included" in the previous sentence. Although "uses" in this context obviously subsumes the conduct of attempting to enforce a prohibited provision, we believe it also encompasses the separate egregious act of inserting such a provision in a rental agreement with knowledge that it is prohibited. In his early exegesis of the Act, Professor Lovell presaged that section 562A.11 would authorize a remedy at law "against a landlord who include[s] a prohibited provision in the lease, whether or not the landlord [sought] to enforce that provision against the tenant." Lovell, 31 Drake L. Rev. at 292–93. Standing alone, the defense of unenforceability will not accomplish excision of prohibited provisions from residential rental agreements. *See id.* at 291–92. "There was further concern that without the prospect of other remedial sanctions, there would be some unscrupulous landlords who would continue to insert prohibited provisions in their leases and exploit those provisions against unsuspecting tenants." *Id.* at 292. For these reasons, we conclude section 562A.11(2) authorizes a claim for damages against a landlord, even in the absence of an attempt to enforce a prohibited provision. This interpretation best comports with the general assembly's directive that we liberally construe chapter 562A.6

Kline, at 439–40. The Court rejected defendant's contention that *D.R. Mobile Home Rentals v. Frost*, 545 N.W.2d 302 (Iowa 1996) (per curiam) supported its position regarding proof of actual damages. The Court noted that *Frost* was prosecuted by the landlord who failed to submit adequate proof of its damages.

In its review of the numerous fees, charges, and liquidated damages in the lease and which were found by the district court to violate the Iowa Uniform Residential Landlord and Tenant Act, the Court noted that the Act does not curtail freedom to contract and that the parties can agree to certain fees, charges and other items, but the Act, itself, prohibits other conditions:

> . . . [S]ome specific categories of provisions are expressly prohibited under the Act. For example, provisions waiving rights and remedies established in chapter 562A are banned, as are those confessing judgment, those exculpating, limiting, or indemnifying another party's liability, and those agreeing to pay another party's attorney fees. See Iowa Code § 562A.11(1). Unconscionable provisions are also prohibited. *Id.* § 562A.7. Beyond these express prohibitions, however, landlords and tenants are free to form residential rental contracts consistent with chapter 562A and the principles of law and equity supplementing it. *Id.* § 562A.3.

Kline, at 442. The summary judgment decision finding the fees, charges and liquidated damages were categorically prohibited was incorrect, and the judgment is reversed. The Court added:

> We emphasize, however, that the district court did not decide whether any of the fees, charges, and liquidated damage provisions challenged in this case by the tenants are unconscionable under section 562A.7 or unenforceable penalties under any other principle of law or equity supplementing the Act. *See id.* §§ 562A.7, .9(1). Accordingly, those issues remain for resolution in proceedings on remand.

Kline, at 442–43. The Court agreed with the district court that the delayed possession provision is prohibited by section 562A.11(1)(d). This portion of the lease constitutes an exculpation or limitation of the landlord's liability under law. The Court found that the carpet cleaning provision was not categorically prohibited under the Act. The Court concludes that the checklist based upon the record available "falls short of an agreement to waive or forego rights or remedies prohibited under section 562A.11(1)(a) or an agreement to exculpate or limit SouthGate's liability under the law." *Kline*, at 445. The class certification is reversed because the district court did not make findings as required by Iowa R. Civ. P. 1.264(2), using the factors outlined in Iowa R. Civ. P. 1.264(1). "We conclude the class certification is procedurally flawed in the absence of the required findings and must be reversed. Our ruling should not be understood, however, as a determination that the grounds for certification of a class cannot be established in this case." *Kline*, at 445–46.

Walton v. Gaffey, 895 N.W.2d 422 (Iowa 2017)
This case was decided the same day as *Kline v. SouthGate Property Management*, 895 N.W.2d 429 (Iowa 2017). It involves similar facts and procedure. The district court decision was reversed in part and returned for further proceedings.

Iowa Civil Rights Act/Employment Discrimination:

Sexual Harassment/Direct Negligence:
Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553 (Iowa 2017)
Haskenhoff was lab manager for Homeland Energy Solutions, LLC, at its ethanol plant in Lawler. Haskenhoff complained that she was repeatedly harassed by her immediate supervisor, who was the operation's manager. HES wanted separate jury instructions regarding sexual harassment based upon the position of the individual employee within the company. The co-worker instruction allowed the jury to find HES liable if it knew or should have known of the harassment. The supervisor instruction did not require plaintiff to show that HES knew or should have know of the harassment but allowed an affirmative defense if HES could show it took reasonable steps to prevent the harassment. The plaintiff wanted a single marshaling instruction based upon a direct negligence theory. That was the instruction given by the district court. The jury returned a substantial verdict against HES in favor of Haskenhoff. HES appealed.

The Iowa Supreme Court, Waterman, J., writing for the majority/plurality [Mansfield and Zager,

JJ., and joined in part by Cady, C.J., as well as Appel, Hecht and Wiggins, JJ.], found that plaintiff was entitled to a direct negligence instruction but the instruction as given did not include an element Haskenhoff was required to prove: HES "failed to take prompt and appropriate remedial action." Failing to include this element was error by the district court. The Court declined to "interpret the ICRA to impose employer liability for supervisor harassment under a direct negligence theory despite the employer's prompt and appropriate action to end the harassment. . . . Employers would lose a key incentive to take corrective action if they were automatically liable for harassment whether or not they put a stop to it." *Haskenhoff*, at 578.

The majority/plurality also found that the district court instruction on retaliatory discharge did not correctly state the law.

> . . . [T]he jury should have been instructed on the correct causation standard — requiring Haskenhoff to prove her protected conduct was a significant factor. *See, e.g., French v. Cummins Filtration, Inc.*, No. C11-3024-MWB, 2012 WL 3498566, at *3 (N.D. Iowa Aug. 15, 2012) ("[Under ICRA] [a]s to the causal connection element, the standard is high: '[T]he "causal connection" must be a "significant factor" motivating the adverse employment decision.' " (alteration in original) (quoting *City of Hampton*, 554 N.W.2d at 535)); *Gilster v. Primebank*, 884 F.Supp.2d 811, 831 n.4 (N.D. Iowa 2012) (analyzing both Title VII and ICRA together using determinative-factor approach), overruled on other grounds, 747 F.3d 1007 (8th Cir. 2014); *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1148 (8th Cir. 2008) (applying same higher causation to ICRA and federal claim).

Haskenhoff, at 583. The adverse action instruction, according to the majority/plurality incorrectly detailed certain actions and declared them as a matter of law to be adverse, relieving Haskenhoff of her burden of proof. "We conclude the adverse-action instruction misstated the law and unduly emphasized certain evidence. This prejudicial error requires a new trial." *Id.*, at 591. Instructions on constructive discharge were also inaccurate. An essential element of the claim – that the employee must give an employer a reasonable chance to resolve the problem – was omitted. A new trial is required. Defendant objected to testimony by plaintiff's expert witness. Those claims are overruled. A new trial is ordered.

<u>Jurisdiction under City Civil Rights Ordinance:</u>
Simon Seeding & Sod, Inc. v. Dubuque Human Rights Commission, 895 N.W.2d 446 (Iowa 2017)
The City of Dubuque civil rights ordinance exempts "any employer who regularly employs less than four individuals." The issue on appeal to the Iowa Supreme Court is whether or not Simon Seeding regularly employed four persons or more. The Court, Waterman, J., analyzed whether or not Simon Seeding regularly employed four or more persons:

> We conclude there is substantial evidence in the record to support the DHRC's determination that Simon Seeding regularly employed four or more individuals during the landscaping season in 2012. Simon Seeding's payroll records show it employed four or more individuals (not including Leo Simon) for nineteen weeks during March to

> September 2012. Leo admitted some individuals who he employed were not included on the payroll records. Notably, neither Stapleton nor Jody James appear on its payroll records, although it is undisputed they were employed by Simon Seeding during that time.

Simon Seeding & Sod, Inc., at 467. The case before the human rights commission involved allegations by Jermaine Stapleton, who was employed by Simon Seeding while on a work release program. Leo Simon, supervisor of Stapleton, called him "chocolate", "colored lad" and on at least one occasion used a string of racial epithets directed toward the individual. Simon was asked by Stapleton to not call him names about 90% of the time. Simon Seeding contended there was insufficient evidence to support a finding of liability and damages. The Court rejected the arguments:

> Leo regularly referred to Stapleton using racial epithets, including calling him "chocolate." *See Martin v. Merck & Co.*, 446 F.Supp.2d 615, 628 (W.D. Va. 2006) ("The use or reference to chocolate can indisputably be a racial slur, and thus I find that a reasonable inference of racial animus can be inferred from the fact that chocolate was smeared on Martins' clothing."); *Purnell v. Maryland*, 330 F.Supp.2d 551, 561 (D. Md. 2004) (finding "chocolate bunny" joke showed racial animus); *Boggs v. Die Fliedermaus, LLP*, 286 F.Supp.2d 291, 295, 298 (S.D.N.Y. 2003) (concluding that reasonable jury could find remark that it was a " 'chocolate night' at Le Bar Bat and refer[ring] to the three [plaintiffs] as dark, light, and semisweet *470 chocolate" created a racially hostile environment). Leo admitted to occasionally referring to Stapleton by these terms, although he testified he did not mean them to be derogatory. But "racially offensive remarks are not excused if they are made in a joking manner." *Boggs*, 286 F.Supp.2d at 298. Stapleton testified that about "ninety percent" of the time he asked Leo to stop referring to him in that way, yet Leo persisted.
>
> " 'A hostile work environment is a cumulative phenomenon,' and a series of individual episodes of inappropriate behavior eventually can amount to a hostile environment." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 421 (8th Cir. 2010) *(quoting Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1124 (8th Cir. 2007)). The " 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' does not affect the terms, conditions or privileges of employment to a significant degree." *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 633 (Iowa 1990) (*quoting Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971), *overruled on other grounds by E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 62 n.11, 104 S.Ct. 1621, 1628 n.11, 80 L.Ed.2d 41 (1984)). A few isolated or sporadic racial remarks over a long period of time, or heard secondhand, may not be enough to establish racial discrimination. *See Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 893 (8th Cir. 2005) (holding insufficiently severe or pervasive conduct when employee heard that coworkers and managers referred to him with racial slur); *Elmahdi v. Marriott Hotel Servs., Inc.*, 339 F.3d 645, 653 (8th Cir. 2003) (affirming judgment as a matter of law for defendant when African-American referred to as a "black boy" on a few occasions over several years). But repeated harassing remarks may be sufficient to establish hostile working environment. *See Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights*

> *Comm'n*, 394 N.W.2d 375, 379 (Iowa 1986) (concluding racially hostile environment existed when employees repeatedly referred to employee as "Toby," a character who portrayed a slave in the story "Roots," and harassed him with racist drawings); *see also Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 864 (8th Cir. 2010) (finding sufficient evidence when employee repeatedly subjected to comments about race and gorilla gestures during two-month period). Stapleton testified Leo called him racial epithets two to three times a week over the two-month period he worked for Simon Seeding. We conclude the evidence was sufficient to support the DHRC's finding that the conduct was severe enough to alter the terms or conditions of Stapleton's employment.

Simon Seeding & Sod, Inc., at 469–70. The Court rejected challenges to the damages awarded to Stapleton and attorneys' fees. The decision of the human rights commission was affirmed. Appel, J., joined by Wiggins, J., filed a special concurrence.

Attorney Malpractice/Assault and Battery:

Stender v. Blessum, 897 N.W.2d 491 (Iowa 2017)
At the close of plaintiff's evidence, the district court dismissed two counts of legal malpractice (negligence and breach of fiduciary duty). Two other counts were submitted to the jury, along with a claim of assault and battery. The jury found for the defendant on the attorney malpractice claims; substantial actual and punitive damages were awarded on the assault and battery claim. Plaintiff appealed dismissal of the two legal malpractice claims; plaintiff also challenged evidentiary rulings; the defendant's cross appealed on damages; it was not timely, but the Court considered the merits of the challenge.

The Court, Zager, J., writing for the majority, considered plaintiff's contention that a sexual relationship among and between a lawyer and client is per se legal malpractice (During the course of his representation of Stender, Blessum became romantically involved with her.). Precedent is that a violation of the Rules of Professional Conduct can be some evidence of negligence. Plaintiff wanted the court to recognize a violation as per se negligence. "While we have generally allowed violations to be used as evidence of negligence, we have been careful to caution that evidence of negligence is not the same as conclusive proof of negligence. *See Ruden v. Jenk*, 543 N.W.2d 605, 611 (Iowa 1996); *see also Vossoughi v. Polaschek*, 859 N.W.2d 643, 649–50 (Iowa 2015); *Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007)." *Stender*, at 501. The Court declined to adopt a per se negligence standard for a violation of the Rules of Professional Conduct, and it noted that the sexual relationship in and of itself does not give rise to a legal malpractice claim. Further, Stender did not provide any evidence of injury and loss from the sexual relationship. The district court acted correctly. Stender also claimed that the district court was in error when it dismissed her legal malpractice claim based upon the drafting of a will by attorney Blessum. Again, the Court concluded that Stender failed to provide evidence showing how a duty was breached in the preparation of the will and how she suffered injury and loss. The district court correctly dismissed the claim. The majority of the Court also found that there was no connection between Blessum's breaches sexual relationship with Stender and alleged breaches of his fiduciary duty as an attorney because the sexual relationship was between consenting adults. Again, it was appropriate for the district court to dismiss the two counts. The Court

majority agreed with the district court decision to limit expert testimony regarding Blessum's conduct and its effects upon the attorney-client relationship; it was proper to limit evidence of decisions finding Blessum violated the Iowa Rules of Professional Conduct; the district court properly denied plaintiff's request to preclude Blessum from relitigating a number of issues that were decided by the Iowa Supreme Court in the disciplinary case; medical records of Stender were properly admitted without expert testimony as Stender had put her medical condition at issue, and; testimony of Blessum's estranged wife was properly admitted over Stender's objections: the testimony was relevant regarding Stender's relationship with Blessum and damages. Regarding Blessum's challenge to the damages awarded, the majority of the Court found they did not exceed the range permitted by the evidence. The judgment was affirmed.

Hecht, Appel, and Wiggins, JJ., dissented. Justice Hecht contends that there is a legal nexus among and between the sexual relationship the Blessum had with Stender and his breaches of professional duty. He further argued that there are important policy reasons behind his position: (1) rule 32:1.8(j) establishes a clear standard of conduct for lawyers; (2) no-duty rules should be reserved for "exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *See Stender*, at 519-20. Justice Hecht found that Stender had established emotional damages as a result of the violation of the Rule prohibiting attorney-client sexual relationships. He observed that the majority "no-duty" decision on the breach of fiduciary duties because the sexual relationship was consensual to be an odd justification. Blessum was in a position of power in the relationship because of information he had learned as the attorney for Stender, and he used the information to her detriment. The dissent concludes that the dismissal of the negligence and breach of fiduciary counts should have been reversed and remanded for new trial.

Summary Judgment:

Summary Judgment/Actual Innocence:
Schmidt v. State, _____ N.W.2d _____ (Iowa 2018)
On April 7, 2007, Schmidt pleaded guilty to assault with intent to commit sexual abuse and incest. He was sentenced to up to seven years in prison. On June 23, 2014, Schmidt filed an application for postconviction relief contending that his victim (B.C.) had recanted his story. Schmidt also contended that he was innocent, but pleaded guilty because he faced prison time of up to 50 years. The state moved for summary judgment contending that Schmidt had failed to file for postconviction relief within three years and his application was in direct contradiction to his knowing and voluntary guilty plea. The district court granted summary judgment. The court of appeals affirmed. The Iowa Supreme Court granted further relief.

A majority of the Court, Wiggins, J., (joined by Cady, C.J., Appel and Hecht, JJ.), found that under the Iowa Constitution, Schmidt had a right to assert his actual innocence and to challenge his guilty plea. The Court reviewed the effect of Schmidt's guilty plea; the reasons why persons plead guilty, and; the parameters of the Iowa Constitution in a case such as Schmidt's. The majority of the Court argued that a person who is actually innocent should have an opportunity to prove it:

> The Iowa Constitution affords individuals greater rights than does the United States Constitution. *See, e.g., State v. Lyle*, 854 N.W.2d 378, 395 (Iowa 2014) (noting "we expanded the reach of the Supreme Court's reasoning in a trilogy of juvenile justice cases decided under the Iowa Constitution"). Moreover, we have discretion to construe the Iowa Constitution in such a way as to "provid[e] greater protection for our citizens' constitutional rights." *Nguyen v. State*, 878 N.W.2d 744, 755 (Iowa 2016). Because we "jealously" safeguard our authority to interpret the Iowa Constitution on our own terms, we do not employ a lockstep approach in following federal precedent although United States Supreme Court cases are "persuasive." *See State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010).
>
> Article I, section 9 of the Iowa Constitution prohibits the deprivation of liberty without due process of law. Iowa Const. art. I, § 9 (due process clause). We have enforced "the due process clause of article I, section 9 . . . in a wide variety of settings." *Godfrey v. State*, 898 N.W.2d 844, 871 (Iowa 2017). In fact, "[t]he Iowa constitutional provision regarding due process of law is . . . not a mere hortatory command, but it has been implemented, day in and day out, for many, many years." *Id*. We see no reason why article I, section 9 would not be enforceable for purposes of vindicating defendants who prove they are factually innocent and believe their incarceration triggers the due process clause.
> An innocent person has a constitutional liberty interest in remaining free from undeserved punishment. Holding a person who has committed no crime in prison strikes the very essence of the constitutional guarantee of substantive due process. *See Cole*, 765 N.Y.S.2d at 485 (holding "the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment[,] and thus runs afoul of the due process clause of the [New York] State Constitution").
>
> Even if defendants allege substantive due process violations, they must meet the demanding actual-innocence standard to prove the validity of their actual-innocence claims—a standard we articulate in the next section. Thus, there are limits on actual-innocence claims.

The case is returned to district court to allow Schmidt to attempt to establish his actual innocence claim.

Cady, C.J., filed a special concurrence.

> The process of justice must always be fair. This case stands tall as the embodiment of this fundamental principle of law. It is a substantial step forward in our constitutional march to become better. Innocent people should always have a forum to prove their innocence. I fully concur in the opinion of the court.

The Chief Justice also pointed out that the process to allow Schmidt (and others) to establish actual innocence must be fair.

Waterman, Mansfield and Zager, JJ., dissented. Justice Waterman argued that the three year statute of limitations should apply to Schmidt's claims and that the majority opinion violates long-standing precedent regarding knowing and voluntary guilty pleas. Justice Mansfield gave four reasons that the challenge to the guilty plea should have been rejected:

> First, this case does not involve an actual recantation.
> Second, the rule that a guilty plea waives all defenses and objections which are not intrinsic to the plea is both long-standing and sound.
> Third, the court has provided no doctrinal basis for grounding an actual-innocence claim in the Iowa Constitution.
> Fourth, the court leaves many questions unanswered that will have to be sorted out by our district judges in the coming years.

Summary Judgment/Dram Shop:
Banwart v. 50th Street Sports, LLC, _____ N.W.2d _____ 2018 WL 1559812 (Iowa 2018)
The district court granted summary judgment to a bar which had served a patron three bottled Peach Tree beers between 4:30 pm and 8:30 pm. Shortly after the patron left the bar, she was involved in a rear-end motor vehicle collision. The investigating officer concluded that she was intoxicated. A breath sample for a Datamaster analysis showed a blood alcohol content of .143.

The district court in its order granting summary judgment concluded, "the undisputed evidence of serving three beers over four hours, absent something more, [cannot] create[] an inference that Draught House knew or should [have] know[n] that . . . Campbell [the intoxicated driver] was intoxicated or would become intoxicated."

The Supreme Court, Wiggins, J., concluded that there was sufficient evidence to generate a jury issue as to whether the bar sold and served the driver while she was intoxicated or was likely to become intoxicated:

> Under the facts of this case, Officer Graham's observations of Campbell a few minutes after she left Draught House 50, in addition to Campbell's BAC of .143, raise a sufficient factual issue as to whether Draught House 50 had the requisite scienter at the time it served alcohol to Campbell. Thus, Draught House 50 did not meet its burden in showing the absence of a genuine issue of material fact concerning the scienter element. In granting summary judgment, the district court may not try issues of fact "but must determine only whether there are issues to be tried." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006); *accord Bauer v. Stern Fin. Co.*, 169 N.W.2d 850, 853 (Iowa 1969) ("In ruling on a motion for summary judgment, the court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does.").

The district court decision is reversed. Mansfield, J., joined by Waterman and Zager, JJ., dissented. The dissent argued that the majority created a blanket inference that any person leaving a bar and found to be intoxicated knew or should have known that it had sold and served the individual to the point of intoxication:

> . . . [B]y establishing a blanket inference, the majority routinely sends to the jury all cases where the patron was intoxicated on leaving the establishment, regardless of their facts. Whether the patron was part of a group singing "Die Wacht am Rhein" obnoxiously, singing "La Marseillaise" patriotically, or just behaving quietly, negligence is inferred.

The plaintiff through the use of discovery could have developed evidence to demonstrate the amount of alcohol which was actually sold and served to the patron.

> Courts have to deal with human nature. The customer will tend to understate the amount of alcohol she or he consumed and the server will tend to remember that the customer looked fine. Even without knowing the size of the bottles or Campbell's body weight, there is reason to doubt her claim that she consumed only three bottles of beer, spaced out over a four-hour time period. But this court's response should not be to modify our precedent and adopt an overbroad blanket inference of negligence from intoxication. Rather, we should insist on further factual development concerning the actual circumstances within the establishment that served the alcoholic beverages, such as occurred in Smith and the out-of-state cases relied on by the majority.

Summary Judgment/Municipal Immunity – State of the Art Design:
Kellogg v. City of Albia, Iowa, _____ N.W.2d _____ 2018 WL 1224514 (Iowa 2018)
The district court granted summary judgment for the City of Albia on claims by a homeowner that a nuisance had been created as the result of rainwater being discharged from a storm sewer system near her home. Her basement was flooded by the discharged water. The Supreme Court, Cady, J., held the City of Albia was immune from the homeowner's claims because the storm sewer system was designed in accordance with the state of the art which existed at the time. See, section 670.4(1)(h)), Iowa Code. Wiggins, J., specially concurred (joined by Hecht, J.). The concurrence notes that cities will not be immune from all nuisance claims related to infrastructure constructed to state of the existing art standards. A claim might be viable if it could be shown the system was overloaded, beyond the engineering standards used in the state of the art design.

Defamation and Malicious Prosecution:
Linn v. Montgomery, 903 N.W.2d 337 (Iowa 2017)
Plaintiffs [Linn and her spouse, Shuck] contended that defendants defamed them in connection with a criminal prosecution involving a "water line scheme" at a condominium complex in Bettendorf. Criminal charges of theft were dismissed by the district court because they were brought beyond the applicable statute of limitations. Summary judgment for the defendants on the defamation claims made before March 10, 2013, was granted by the district court. Summary judgment was granted on the malicious prosecution claims. A jury found for the defendants on claims of defamation after March 10, 2013, and on a loss of consortium claim. The Iowa Supreme Court, Wiggins, J., notes that there are no decisions on whether or not the discovery rule applies to the tort of defamation. The Court does not reach the issue of whether or not the district court was correct when it applied the statute of limitations to defamation claims (The Court indicated that the district court misapplied *Kiner v. Reliance Ins.*, 463 N.W.2d 9 (Iowa 1990), to support its conclusion the discovery rule did not apply. The Court noted that in *Kiner*

the plaintiff did not argue the discovery rule. *Id.* at 13–14.). That is because the jury found in response to a special interrogatory that the plaintiffs were not defamed by the defendants. Summary judgment granted on the malicious prosecution claim is affirmed because the plaintiffs could not show that the defendants instigated or procured the prosecution. The district court judgment was affirmed.

Real Estate/Restrictive Covenant:
DuTrac Community Credit Union v. Radiology Group Real Estate, L.C., 891 N.W.2d 210 (Iowa 2017)
A 1996 restrictive covenant on real estate owned by DuTrac Community Credit Union required the approval by a two member architectural control committee before any building or other structure could be constructed. One member of the committee was deceased; the other had either resigned from the committee or refused to act. A declaratory judgment action was commenced asking the district court to find the restrictive covenant unenforceable under the doctrines of impossibility and supervening impracticability. The district court granted DuTrac's Motion for Summary Judgment; the Iowa Supreme Court, Zager, J., affirmed the district court concluding that the covenant could not be modified as proposed by the defendant and that the covenant should be terminated.

Untimely Claim:
Johnson Propane, Heating & Cooling, Inc. v. Iowa Department of Transportation, 891 N.W.2d 220 (Iowa 2017)
The Iowa Department of Transportation (IDOT) condemned a portion of real estate for a highway project. Johnson Propane waited until a compensation commission decided damages to appeal to district court and to contend that the condemnation left it an uneconomical remnant. The district court granted IDOT's Motion for Summary Judgment, holding that it was without jurisdiction because the claim was not filed within the time proscribed by the Iowa Code. The Iowa Supreme Court, Wiggins, J., affirmed, finding that Johnson Propane did not comply with Iowa law which required it to commence an action to contest IDOT's exercise of eminent domain within thirty days from the notice of assessment, see Iowa Code section 6A.24(1) (2014).

Motion to Dismiss:

Bank Participation Agreement:
Central Bank and Real Estate Owned, L.L.C. v. Hogan, 891 N.W.2d 197 (Iowa 2017)
Liberty Bank was the lead in a loan participation agreement. The borrower defaulted and surrendered the collateral to Liberty Bank. Liberty Bank voluntarily dissolved; it was taken over by a trustee; the trustee sold the collateral to Central Bank and gave a quit claim deed. Does Central Bank now own the entire collateral? Central Bank filed a declaratory judgment action which was dismissed. The Iowa Supreme Court, Appel, J., affirmed. The Court reviewed the loan participation agreement and held that it provided the relationships among the parties:

> If the participating banks have an undivided ownership interest in the loan and the collateral, then Liberty Bank only owned a fifty-nine percent interest in The Inn after it was surrendered to the bank. The remaining forty-one percent ownership interest rested

with the participating banks. When Liberty Bank sold its interest in The Inn to Central Bank, it transferred the property through a quitclaim deed. As has been clearly established above, purchasers of a quitclaim deed take the property subject to all outstanding equities. In short, Liberty Bank sold only its interest in The Inn—specifically, its fifty-nine percent interest. The participating banks continue to own their forty-one percent undivided interest purchased through the participating agreements. Because Central Bank received only a quitclaim deed from the trustee of Liberty Bank, it took the property subject to all outstanding equities, including those of the participating banks.

In light of our conclusion regarding the limited ownership interest transferred by the quitclaim deed, we need not address the question of whether the participating banks had a "perfected" security interest in the real estate arising out of the participation agreements. We only hold that the ownership interest of the participating banks in the mortgage and underlying collateral is superior to Central Bank, which claims its interest is derivative of and limited to the interest held by Liberty Bank.

Central Bank and Real Estate Owned, L.L.C., at 209-10.

Damages:

Punitive Damages:
Papillon v. Jones, 892 N.W.2d 763 (Iowa 2017)
Section 808B.8 of the Iowa Code provides:

1. A person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this chapter shall:
. . . .
b. Be entitled to recover from any such person all of the following:
(1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation, or one thousand dollars, whichever is higher.
(2) Punitive damages upon a finding of willful, malicious, or reckless violation of this chapter.

Jones and Papillon were involved in a bitter child custody dispute. Jones placed a recording device and recorded conversations among and between Papillon, her mother friends, and attorneys without their knowledge. Jones used the recordings in consultations with a counselor and intended to use them at a child custody hearing.

After the child custody issues were resolved in favor of Papillon, she filed a lawsuit against Jones seeking damages for illegal recording of her conversations. The district court heard the case and returned a verdict in favor of Papillon including actual damages, attorneys' fees and punitive damages ($18,000.00 in punitive damages were awarded; the district court found Jones' conduct was to hurt and to harass Papillon.). Jones appealed. The Iowa court of appeals affirmed the actual damages, returned the case to district court for recalculation of the attorneys' fees, and overruled the punitive damage award. The court of appeals found that the district court did not

follow the precedent of *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 267 (Iowa 2009(To support an award of punitive damages under chapter 808B, the perpetrator has to have actual knowledge that the statute has been violated.).

The Iowa Supreme Court granted further review. The Court, Waterman, J., considered only the punitive damage issue. The opinion confirmed the viability of *Iowa Beta Chapter* and its requirement of actual knowledge of the statute by the perpetrator. The Court noted that in its punitive damage award, the district court failed to make any finding as to whether or not Jones was consciously aware that he was violating the statute. As an incorrect legal standard was applied, the case is returned to district court for application of the correct standard. The Court observed that there was sufficient evidence to support punitive damages had the correct legal standard been applied. The district court is advised to apply the *Iowa Beta Chapter* standard to the facts that have been developed.

Attorney Fees:

Supreme Court fixes fees and expenses rather than return the case to district court:
Lee v. State, 906 N.W.2d 186 (Iowa 2018)
This is the fourth time the claims of Tina Elizabeth Lee against the state of Iowa and the Polk County Clerk of Court have been considered. Lee has been successful in prosecuting claims that the Clerk of Court violated her family medical leave rights. In this matter, the district court set attorney fees for Lee's counsel, but did not award any expenses. On appeal, the parties requested that the Court determine the fees and expenses, which it agreed to do. The district court reduced the fee request made on behalf of Lee's attorneys by 40 per cent ($361,027.00 were requested; the district court allowed $216,616.20.). The Court, Wiggins, J., determined that the district court did not follow *Lee III* (*Lee v. State*, 874 N.W.2d 631 (Iowa 2016) which adopted procedures for determining attorney fees outlined by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The district court was in error when it reduced the plaintiff's attorney fee request by 40 per cent. "We do not disturb the district court's conclusion that the current hourly rates of Lee's attorneys offset the delay in payment." The Court concluded that a 35% reduction in the fee request was appropriate given the nature of the relief that Lee obtained. Here is the final award granted by the Iowa Supreme Court:

Fees on the July 12, 2016 application	$234,667.55
Fees on the October 3, 2016 supplemental application	$ 7032.50
TOTAL FEES	$241,700.05
Expenses on the July 12, 2016 application	$ 5572.92
Expenses on the October 3, 2016 supplemental application	$ 91.18
TOTAL EXPENSES	$ 5664.10
TOTAL AWARD/ATTORNEY FEES AND EXPENSES	$247,364.15

Statute of Limitations:

Breach of Contract, Breach of Fiduciary Duties, Conversation, and Fraud/Jury Instruction on Statute of Limitations:
Shams v. Hassan, 905 N.W.2d 158 (Iowa 2017)

Shams entrusted his Iowa bank accounts with his sister who lived in Maryland. He had pre-signed checks on the account which the sister was to use to pay Shams' ongoing expenses and to provide money to his children while he was out of the country, serving as an interpreter in Iraq. When he returned to the United States in 2006, Shams learned that some checks had been drawn in favor of his sister. He asked her about the checks; she said his money was safe; the funds had been used to buy land in Maryland for development; Shams was shown the land. In 2009 Shams wanted $50,000.00 from his account to buy a house; it was provided. In 2010, he asked for the rest of his money; his sister told him there was only $124,000.00 remaining. $269,980.66 had been transferred to other accounts by checks which Hassan wrote to herself. Shams filed his lawsuit in Polk County on July 26, 2011 (Hassan claimed Iowa lacked personal jurisdiction over her; the Iowa Supreme Court found sufficient minimum contacts: *Shams v. Hassan*, 829 N.W.2d 848, 860–61 (Iowa 2013)). Hassan contended that the statute of limitations applied to Shams' claims (five years for breach of oral contract, fraud, and injuries to property). The district court denied summary judgment based upon the defense. The district court refused a statute of limitations defense as proposed by the defense. A jury returned a substantial verdict in favor of Shams. It also found for Hassan on a counterclaim for defamation.

The Iowa court of appeals reversed the district court for failing to grant a statute of limitations jury instruction. The Iowa Supreme Court granted further review.

The Court, Mansfield, J., found that the statute of limitations jury instruction proposed by the defense was infirm, but it was sufficient to alert the district court to the issue and the need for such an instruction. Given the different claims, the Court suggested that a separate statute of limitations instruction for each claim would have been appropriate. The Court, in its opinion, described the defendant's proposed instruction as "half baked", but the instruction put the district court on notice that it had a duty to "cook up" an instruction regarding statute of limitations. The court of appeals decision is affirmed. The district court judgment is reversed, and the case is remanded for further proceedings. Wiggins, J., did not participate in this decision.

Contempt/Judgment Not Renewed Within 20 years:
Dakota, Minnesota & Eastern Railroad v. Iowa District Court for Louisa County, 898 N.W.2d 127 (Iowa 2017)
Dakota, Minnesota & Eastern Railroad (DM&E) was found to be in contempt by the Iowa District Court for Louisa County for failing to comply with an injunction/judgment entered in 1977 requiring the railroad to reconstruct a dike in and around the railroad right of way, a bridge and a creek. The railroad filed a petition for certiorari to the Iowa Supreme Court. The Court, Hecht, J., held that the drainage district had failed to renew the judgment within 20 years. The judgment expired in 1997. As a result, the judgment could not have been enforced as the statute of limitations had expired. See, Iowa Code section 614.1(6). The Writ was sustained and the contempt order was vacated.

Insurance:

Workers' Compensation Bad Faith:
Thornton v. American Interstate Insurance Company, 897 N.W.2d 445 (Iowa 2017) reh'g denied (June 22, 2017)
Toby Thornton was paralyzed from his chest down with limited use of his right hand and none of his left after a collision. The load on his truck shifted; the truck rolled; Thornton was trapped in the cab; he had to be removed using the "jaws of life". American Interstate Insurance Company was the workers' compensation carrier for Thornton's employer, Clayton County Recycling (CCR).

At least two weeks after Thornton was injured it was apparent that he was Permanently Totally Disabled (PTD). In a contested case filing with the Workers' Compensation Commissioner, American Interstate died that Thornton was PTD. American Interstate also would not stipulate to a partial commutation, contending that Thornton would not husband any money received. These two actions gave rise to a bad faith claim against American Interstate.

The district court granted summary judgment for Thornton finding that American Interstate committed bad faith when it contested his PTD status. The district court denied American Intercalate's motion for summary judgment on the issue that it was in bad faith by contesting the partial commutation. At the close of evidence, American Interstate moved for directed verdict, contending that because Thornton did not cite specific policy provisions which were breached, he could not establish bad faith and that he could not maintain the claim of bad faith failure to stipulate to a commutation. The motion was denied. The jury was instructed that American Interstate was in bad faith on the PTD issue, and on other issues, including that the failure to stipulate to the partial commutation was evidence of bad faith. Other claims were presented to the jury for decision which returned a verdict in favor of Thornton: $284,000.00 in compensatory damages and $25,000.000.00 in punitive damages. Post trial motions were overruled. American Interstate appealed.

The Supreme Court, Waterman, J., reversed and ordered a new trial. The Court rejected American Interstate's argument that Thornton had to introduce the workers' compensation policy and to demonstrate specific violations of the policy.

> Under Iowa law, to be liable for common law bad faith, a workers' compensation insurer must have "denied" the employee benefits under the policy. *See Gibson*, 621 N.W.2d at 396. We conclude the requisite "denial" may occur when an insurer unreasonably contests a claimant's PTD status or delays delivery of necessary medical equipment. *Cf. Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 310 (Iowa 2005) (Cady, J., dissenting) ("[A] delay in the payments of benefits can occur ... when the employer utilizes unreasonable investigative or other stonewalling tactics that needlessly prolong the ultimate payment of benefits...."). This rationale comports with our long-held view that first-party bad faith arises out of the breach of the affirmative good-faith obligations "that [our workers' compensation] statutes and administrative regulations place on the insurer." *Boylan*, 489 N.W.2d at 743.

Thornton, at 465. The Court agreed with the district court that there was no reasonable basis for American Interstate to deny that Thornton was PTD:

> American Interstate does not argue on appeal it had a reasonable basis for denying Thornton's PTD status. Indeed, it would be hard-pressed to do so, since, as early as two weeks after Thornton's accident, it had received opinions from a medical professional and its claims adjustor that Thornton, a quadriplegic, was PTD. *See Bellville*, 702 N.W.2d at 481 ("Certainly there may be cases in which the ... undisputed damage items [are] so high that there would be no reasonable basis to refuse payment...."). American Interstate internally recognized as much when setting reserves, and its outside counsel expressly recommended that American Interstate concede PTD status. We agree with the district court that contesting Thornton's PTD status under these facts constituted bad faith as a matter of law. *See Arp v. AON/Combined Ins.*, 300 F.3d 913, 917–18 (8th Cir. 2002) (reinstating bad-faith claim against workers' compensation insurer because "[t]he medical evidence ... conclusively demonstrates that James has been permanently and totally disabled since the date of his accident" and "[b]y denying James's status ... AON forced the Arps to hire attorneys to litigate this issue before the South Dakota Department of Labor, when this was completely unnecessary.").

Thornton, at 466. The district court was in error when it declined to grant directed verdict for the defendant related to the claims of failing to stipulata so that a partial commutation could be obtained from the Workers' Compensation Commissioner and for instructing the jury that such conduct was bad faith. The Court looked at the role of the Commissioner in reviewing a request for commutation:

> we conclude that American Interstate was not in bad faith for resisting commutation because Thornton's petition for commutation was fairly debatable on its facts. The reasonable basis element of a bad-faith claim "is an objective one." *Bellville*, 702 N.W.2d at 473. "A claim is 'fairly debatable' when it is open to dispute on any logical basis." Id. Thornton had never managed a large lump sum of money. Alexander testified commutation would be in Thornton's best interest only if Thornton could avoid invading the lump-sum principal. But that begs the question whether Thornton would invade the principal. Omissions in Thornton's proposed budget, his past spending habits, and his lack of experience with investments gave American Interstate a reasonable basis to question the commutation.
>
> The commissioner's role in approving commutation is not a rubber stamp. Commutations have been denied based on concerns like those that American Interstate raised here. *See, e.g., Stoddard v. ADM/Growmark, Iowa Workers' Comp. Comm'n* No. 1140792, 2016 WL 845695, at *1 (Feb. 26, 2016) (denying a request for commutation in part because "neither the claimant nor his wife have even read the proposed financial plans for investing, combined with the claimant's poor financial choices"); *Deleon v. John Morrell & Co.*, Iowa Workers' Comp. Comm'n No. 5007832, 2013 WL 5508544, at *4 (Oct. 2, 2013) (finding that claimant's "lack of experience with any sophisticated financial dealings" was a "significant detriment[ ]" in denying a partial commutation); *Boner v. Bethany Lutheran Home*, Iowa Workers' Comp. Comm'n No. 5022480, 2012 WL

> 3158931, at *4 (Aug. 2, 2012) ("A commutation should not be granted if the evidence shows that claimant is a poor money manager or is incapable of making wise investments.").

Thornton v. Am. Interstate Ins. Co., at 470. Because much of the compensatory damages related to the delay in obtaining the commutation ($14,000 in loss-of-use of money damages; $27,000 in loss of home equity, and; part of $118,000 for attorney fees incurred in the commutation proceedings). Because of this error, the judgment is overruled and the case is returned to district court for a new trial.

The Court observed on retrial that damages for delay in getting a new wheel chair can be presented, but the plaintiff's attorneys are not entitled to seek fees from the defendant for its bad faith.

Wills and Probate:

Will Contest/Preservation of Error and Motion to Amend to Conform to Proof/Abuse of Discretion:

In re Estate of Workman, 903 N.W.2d 170 (Iowa 2017)

Dennis Workman alleged that his brother Gary exerted undue influence upon his mother whose will was executed in 2007 with a codicil in 2008. The will recognized Gary's efforts to build the family farming operation over a number of years. Trial resulted in a jury finding that Gary did not exercise undue influence upon his mother. On appeal, Dennis urged that the Iowa Supreme Court adopt Restatement (Third) of Property regarding the burden of proof in an undue influence case in which a confidential relationship existed. The Court, Mansfield, J., rejected the argument, finding that Dennis failed to preserve error at trial (His attorney did not object to the district court's proposed jury instructions on burden of proof.).

A Motion by Dennis to Amend to conform to the proof presented at trial was denied by the district court and affirmed by the Supreme Court. The Court held that the district court did not abuse its discretion, that the proposed amendment materially varied from the facts, and that the proposed amendment substantially changed the issues. The district court judgment was affirmed.

Trust/Ademption:

In re Steinberg Family Living Trust, 894 N.W.2d 463 (Iowa 2017)

The Steinberg Family Living Trust was created in 2008 with Jack and Clarine Steinberg (husband and wife) and their son, Steven, serving as co-trustees. Their other son, David, was to serve with Steven as co-trustee upon the deaths of both Jack and Clarine. Steven and David were the beneficiaries of the trust. The trust was never amended.

The assets at issue in the appeal are known as the Iowa property and the Minnesota property. About five years prior to her death, Clarine did a like-kind exchange of a portion of the Iowa property ("W1/2SW1/4 Sec. 16-99-26" [described as the Winnebago property])(The trust gave the Winnebago property to Steven.) for the Minnesota property. The trust gave David the Iowa property subject to Steven's first right to purchase or rent David's interest in the NW1/4NW1/4 Sec. 16-99-26 for $1,500.00 per acre. David was allowed to exercise this right at

any time.

The dispute first involves Steven's contention that the Minnesota property was substituted for the Winnebago property when the like-kind exchange occurred. The district court disagreed with Steven and held his interests were adeemed. The Supreme Court, Zager, J., affirmed the district court decision that Steven's interest was adeemed. The Court noted that for many years Iowa followed the identity rule when addressing ademption issues, but now uses a modified intention approach.

> In *Anton*, we addressed the concern that our identity rule is unduly harsh. 731 N.W.2d at 23–24. We noted that the purpose of the modified-intention approach was to mitigate this perceived harshness. *Id*. Our modified-intention approach finds no ademption if the testator did not voluntarily sell or otherwise remove the property from the estate, or if the specific property was destroyed simultaneously with the testator's death. *Id*. We find that this approach is consistent with our rules of interpretation for trusts—the testator's intent is paramount. *Spencer Mem'l Fund*, 641 N.W.2d at 774–75. Our current approach analyzes the surrounding circumstances to determine if the property was adeemed through the voluntary acts of the testator.

In re Steinberg Family Living Tr., at 470. The Court declined to change the ademption rule by adoption provisions of the Uniform Probate Code, section 2–606(a)(5) of the UPC. The Court noted that while the General Assembly has adopted other provisions from the UPC, it has declined to accept section 2-606(a)(5). Because the Winnebago property was adeemed, the Court affirms the district court decision that Article 5, section C of the trust required distribution of the Minnesota property 50 per cent to Steven and 50 per cent to David.

The Court determines that the district court was incorrect when it granted David's Motion for Summary Judgment and determined that Steven could only rent the property for $1,500.00 per acre. The Court found that the provision regarding Steven's option to either rent or to purchase is ambiguous (If Steven could buy the Iowa property for $1,500.00 per acre [approximately $60,000.00] that would be a windfall to him; the property was appraised at $9,500.00 per acre or approximately $380,000.00.). The case is returned to district court for further proceedings on this issue.

<u>Spousal Support and IRA Accounts:</u>
Matter of Estate of Gantner, 893 N.W.2d 896 (Iowa 2017)
The surviving spouse of Joseph Gantner moved for her elective share of the estate and spousal support (She requested $4,000.00 per month to maintain her life style and station in life.). Gantner's will established a trust for his two adult daughters and gave them about 90 per cent of his residual estate. In addition to real estate, the probate inventory showed that Joseph died with three retirement accounts (two IRAs and one SEP IRA). His daughters were designated beneficiaries of the three retirement accounts. Without funds from the retirement accounts, the estate did not have assets to pay the requested spousal support. The district court denied the spouse's request to include the retirement accounts in the estate for purposes of spouse support, reasoning that the accounts transferred to the daughters upon Gantner's death. *See In re Estate of Myers*, 825 N.W.2d 1 (Iowa 2012).

The spouse appealed. Iowa Supreme Court, Mansfield, J., affirmed the district court decision, noting that the retirement accounts pass outside the estate. The Court reviewed Chapter 633D of the Iowa Code governing transfers on death (TOD). Chapter 633D covers six distinct categories of assets: individual retirement accents are not among the categories. Further, federal tax law governing receipt of IRAs and SEP IRAs comes into play:

> However, to us it is critical that upon the death of the individual, the account does not become de facto the property of the beneficiary or beneficiaries. "If you inherit a traditional IRA from anyone other than your deceased spouse, you cannot treat the inherited IRA as your own." IRS, Publication 590-B: Distributions from Individual Retirement Arrangements (IRAs) 5 (2016). The beneficiary cannot roll over the IRA into his or her own IRA. See 26 U.S.C. § 408(d)(3)(C). "[T]he only option is to hold the IRA as an inherited account." *Clark v. Rameker*, 573 U.S. ——, 134 S.Ct. 2242, 2245, 189 L.Ed.2d 157 (2014). "[A] beneficiary must maintain the [inherited] account in the decedent's name and take a distribution of all benefits within either five years or, if an election is made, over the beneficiary's remaining life expectancy in accordance with IRS tables." Jeffrey Cymrot & Donald R. Lassman, Inherited IRAs: Exemption Issues Under the Code, Am. Bankr. Inst. J. 1–2 (May 2011). In short, the nonspouse beneficiary has a right (indeed an obligation) to take distributions from the IRA, but does not take title to the IRA.
>
> Thus, an IRA does not and cannot literally "transfer on death" to anyone other than a spouse. See Iowa Code § 633D.6 (describing how registration in beneficiary form may be shown). The beneficiary does not and cannot take "the ownership [of the account] at the death of the owner." Id. § 633D.5. Although section 633D.9 literally provides that on the death of owner, the account ownership "passes to" the beneficiary or beneficiaries, id. § 633D.9, this is not possible under federal law with respect to a nonspouse's interest in an IRA. Hence, there is no way under federal law for an IRA to conform to chapter 633D's specifications for a TOD account.

Matter of Estate of Gantner, at 903. Iowa Code § 633.357(2) is found to clearly provide that an IRA is not part of a decedent's estate. The Court cited the legislature's explanation regarding the provision:

> > The bill creates a new Code section 633.357 to provide that the beneficiary designation by the owner of a custodial independent retirement account controls the distribution of the benefits and the account is not a part of the testamentary disposition of a deceased owner subject to the terms of the will of the owner unless the designated beneficiary of the account is the estate of the owner.
>
> H.F. 662, 78th G.A., 1st Sess., explanation (Iowa 1999).

Matter of Estate of Gantner, at 903.

Iowa Inheritance Tax:
Tyler v. Iowa Department of Revenue, 904 N.W.2d 162 (Iowa 2017)
Iowa Code section 450.1(1)(e) provides:

> "Stepchild" means the child of a person who was married to the decedent at the time of the decedent's death, or the child of a person to whom the decedent was married, which person died during the marriage to the decedent.

Tyler challenged the law contending it was unconstitutional. The Iowa Supreme Court, Mansfield, J., affirmed the judgment of the district court holding the statute has a rational basis: promoting family relationships and close connections among relatives.

Real Estate

Condemnation by a Municipality:
City of Eagle Grove, Iowa v. Cahalan Investments, LLC, 904 N.W.2d 552 (Iowa 2017)
Cahalan owned two residential properties in Eagle Grove which were in advanced states of disrepair, and the City contended they were abandoned. Petitions were filed in district court by the City asking the properties be transferred to the City under Iowa Code section 657A.10A (2014). After hearing the district court concluded transfer for the properties to the City without just compensation would be an unconstitutional taking. The City appealed.

The Iowa Supreme Court, Hecht, J., reversed the district court decision and remanded the case for further proceedings. The Court concluded the provisions of section 657A.10A are not an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution or article I, section 18 of the Iowa Constitution.

Section 657A.10A of the Iowa Code allows a city in which an abandoned building is located to petition for an order awarding title to the abandoned property to the city. There are a number of factors the district court is to consider:

a. Whether any property taxes or special assessments on the property were delinquent at the time the petition was filed.
b. Whether any utilities are currently being provided to the property.
c. Whether the building is unoccupied by the owner or lessees or licensees of the owner.
d. Whether the building meets the city's housing code for being fit for human habitation, occupancy, or use.
e. Whether the building is exposed to the elements such that deterioration of the building is occurring.
f. Whether the building is boarded up.
g. Past efforts to rehabilitate the building and grounds.
h. The presence of vermin, accumulation of debris, and uncut vegetation.
i. The effort expended by the petitioning city to maintain the building and grounds.
j. Past and current compliance with orders of the local housing official.
k. Any other evidence the court deems relevant.

Iowa Code section 657A.10A(3).5 (The district court concluded based upon the evidence presented that the properties were abandoned as provided by the statute.). The Code provides that upon a finding the property is abandoned, title is to be transferred to the City. In the statute, the General Assembly has established standards by which interests in property may be maintained. "[T]he conditions are calculated to promote public safety by discouraging owners from abandoning their properties in a deteriorated and dangerous condition as defined by criteria enumerated in section 657A.10A(3)." The takings in this instance do not require just compensation. The district court decision is reversed and the case is remanded for entry of an order consistent with the Opinion.

Class Certification:

Freeman v. Grain Processing Corporation, 895 N.W.2d 105 (Iowa 2017)
The Supreme Court, Waterman, J., affirmed the district court certification of two subclasses of persons asserting claims against Grain Processing Corporation's (GPC) wet milling plant in Muscatine. The Court concluded that the district court did not abuse its discretion. The Court reviewed the thirteen factors to be considered when determining whether or not a class should be certified.

> We hold that the district court did not abuse its discretion in rejecting GPC's predominance objection to class certification. Our class action rules do not require that the residents present "common proof on each element of the claim. Rather, we have repeatedly noted that the existence of individual issues is not necessarily fatal to class certification." *Comes*, 696 N.W.2d at 322 (*quoting Howe*, 656 N.W.2d at 289). Individual issues concerning contamination from other sources or the amount of chemicals present on a particular property may affect damage calculations, but such concerns do not overwhelm common issues of liability. GPC's priority of location is conceded, and common proof will be required on GPC's course of conduct, its emissions during the relevant time period, its knowledge of emissions, and at what level emissions interfere with a normal person in the community's enjoyment of his or her property. These common questions of liability are at the heart of the residents' claims.

Freeman, at 128–29. The CRUT also rejected GPC's contention that its due process rights would be violated.

> GPC asserts the residents' plan to extrapolate harm to surrounding properties from testimony of twenty to thirty representative class members violates due process by masking individual issues. GPC argues it must be allowed to pursue individual factors that might reduce certain class members' damages, such as the members' knowledge of the air pollution upon moving to the community. GPC relies on *In re Fibreboard Corp*., 893 F.2d 706 (5th Cir. 1990). In *Fibreboard*, the district court certified a class of over 3000 asbestos claims. *Id.* at 707. To assess damages, it proposed to try a small, limited segment of claims in full, then extrapolate from those individualized awards to an omnibus award for the class. *Id*. at 708–09. From those witnesses, the jury would extrapolate damages to the class as a whole. *Id*. at 709. The Fifth Circuit, in granting mandamus to prevent trial, recognized that such extrapolation violated the defendant's

> rights by masking differences in causation, types of injury, fact of injury, and exposure. *Id*. at 711.

Freeman, at 129. The Court held that GPC's due process rights would be protected by the way this case will be tired:

> The plaintiffs plan to call witnesses from throughout the neighborhood. GPC is free to call additional witnesses. As we have already discussed, this class action can proceed in a manner that preserves GPC's due process rights to contest harm and damages suffered by individual class members.
>
> If proof of individual defenses becomes unmanageable, the district court has discretion to bifurcate the trial, create additional subclasses, or decertify the class.
>
> > [B]ifurcation enables the common issue of liability to be resolved in an aggregate proceeding but reserves the assessment of individual damages for some subsequent, more individualized processing. Courts have therefore held that bifurcation assists certification by responding to due process concerns.
>
> Newberg § 11:10 (footnote omitted). At this stage of the case, GPC has not shown the class certification order violates its due process rights.

Freeman, at 130. Appel, J., concurred noting that Iowa law on class actions is different from federal law. Iowa is one of two states to have adopted the Uniform Class Actions act.

> Consistent with the Uniform Class Actions Act upon which they are based, Iowa courts have consistently stated "[o]ur class-action rules are remedial in nature and should be liberally construed to favor the maintenance of class actions." *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 320 (Iowa 2005); *accord Anderson Contracting, Inc. v. DSM Copolymers, Inc.*, 776 N.W.2d 846, 848 (Iowa 2009); *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 175 (Iowa 1977). In light of this legislative history and our caselaw, federal class action precedent is of limited value in determining class certification under Iowa law.

Freeman, at 130–31.

Jurisdiction:

Iowa Department of Natural Resources:
Brakke v. Iowa Department of Natural Resources, 897 N.W.2d 522 (Iowa 2017)
Iowa Department of Natural Resources (DNR) entered an emergency order requiring Brakke to repair and maintain an electric fence around the property to quarantine land formerly used as a white tail deer preserve because of chronic wasting disease. Brakke exhausted administrative remedies. The district court held that the order was irrational, illogical, and wholly unjustifiable under Iowa Code section 17A.19(10)(l) because the DNR was acting outside the legislature's grant of authority. *Brakke*, at 526. On appeal, the Iowa Supreme Court, Appel, J., upheld the district court decision concluding DNR did not have statutory authority to issue the order it did.

The Court rejected Brakke's claim that the order constituted an impermissible taking of property in violation of the United States and Iowa Constitutions.

Stipulated No Contact Order:
Ney v. Ney, 891 N.W.2d 446 (Iowa 2017)
Bothers, Patrick Ney and John Ney, did not get along. On June 25, 2012, they entered into a stipulated agreement which the court approved and entered an order. The stipulation provided the brothers would:

a. Not threaten, assault, stalk, molest, attack, harass, or otherwise abuse one another;
b. Stay away from each other's residences and not be in each other[']s presence except in a courtroom during court hearings;
c. Not communicate with each other in person or through any means including third persons [except].... through legal counsel;
d. Not communicate with any member of each other[']s family [,] ... [including] spouses, children, grandchildren, and in-laws.

Ney, at 449. In March 2016 Patrick filed a Motion asking the district court to find John in contempt. John filed a Motion to Dismiss contending the stipulation and resulting order were void and unenforceable because the court lacked subject matter jurisdiction to grant the injunction. The district court held that Iowa Code section 664A.2(2) (2011) prescribes the only circumstances in which a district court has jurisdiction to issue a protective order in a civil proceeding; the order which purported to issue a protective order in a civil proceeding involving the brothers was void because the conduct it restrained was not among the grounds for protective orders authorized by section 664A.2(2); the order was void and could not be enforced through a contempt proceeding. Patrick Ney appealed.

The Iowa Supreme Court, Hecht, J., looks to the Iowa Constitution, Article 5, section 6:

> **Jurisdiction of district court**. SEC. 6. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Equitable jurisdiction is further recognized by the Iowa Rules of Civil Procedure. See Iowa R. Civ. P. 1.1501–1.1511. "Our rules recognize that injunctive relief is available as an independent remedy in equitable proceedings and authorize injunctive relief as an auxiliary remedy in any action. *Id*. r. 1.1501. A party may request an injunction by filing a petition for injunctive relief and a supporting affidavit demonstrating the party is entitled to injunctive relief. *Id*. r. 1.1502." *Ney*, at 450. Section 664A.2(2) does not interfere with the Constitutional authority the district court has to afford injunctive relief. "In this case, Iowa Code section 664A.2(2) does not eliminate the district court's equitable jurisdiction to grant injunctive relief when the grounds for such relief are established. The statute merely imposes a duty to grant an injunction when the conditions of Iowa Code section 664A.2(2) are met. See Iowa Code § 664A.2(2) (providing that "[a] protective order issued in a civil proceeding shall be issued pursuant to chapter 232, 236, 598, or 915.")." *Ney*, at 454. The district court was in error when it dismissed Patrick Ney's

action. The case is remanded for further proceedings.

Stay of Proceedings:

Chicoine v. Wellmark, Inc., 894 N.W.2d 454 (2017)
The district court, over objections, stayed plaintiffs' class action petition which contended Wellmark, Inc. conspired with non-party competitors to fix prices, allocate markets, and other noncompetitive conduct in violation of the Iowa Competition Law. See Iowa Code ch. 553 (2015). The stay was remain effective pending further proceedings in federal multidistrict litigation (MDL) in Alabama brought by other plaintiffs under the federal antitrust laws. See 15 U.S.C. §§ 1, 4 (2012). One of the plaintiffs in the Alabama case was an Iowa chiropractor; one of the defendants was Iowa's largest health insurer.

On interlocutory appeal, the Iowa Supreme Court, Hecht, J., held that the district court abused its discretion in granting the stay. While there are some overlaps between the Iowa case and the one in Alabama, the Alabama case at the time of the opinion was just in pretrial proceedings and processing the MDL case could take years. The Court further held there were considerable differences between the issues presented in the two cases. The Court found that the stay was for an indefinite length of time:

> The seminal case concerning a trial court's common law authority to stay a case pendent lite is *Landis*. In *Landis*, the Supreme Court held that the terms of a stay must be moderate in extent and unoppressive in effect. *Id.* at 256, 57 S.Ct. at 166. "[A] stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description." *Id.* at 257, 57 S.Ct. at 167. The Court concluded the trial court abused its discretion by granting a stay pending the final appellate decision in another case that was still in pretrial proceedings because the stay would be in effect for years and might ultimately be of little to no benefit to the stayed case, depending on how the other case was decided. *Id.* at 256–57, 57 S.Ct. at 167. The stay did not become moderate merely "because conceivably the court that made it may be persuaded at a later time to undo what it has done." *Id.* at 257, 57 S.Ct. at 167.

Chicoine, Inc., at 461. The Iowa Supreme Court concluded that the Alabama MDL could take years to conclude while there was a good prospected of more timely procedures in the Iowa case, based upon Iowa law.

> . . . [T]he present case alleges discriminatory treatment of chiropractors instead of artificially low reimbursements for all healthcare providers. In addition, the present case alleges other anticompetitive agreements, including between Wellmark and self-insurers. It is unclear in our view whether any resolution of claims in MDL No. 2406 would result in the resolution of claims in this action. *See Landis*, 299 U.S. at 256, 57 S.Ct. at 166 (noting a stay may be justified in favor of a case with nonidentical issues if "in all likelihood it will settle many and simplify them all").

Chicoine, at 462. Wellmark argued that the Iowa Competition Law is to complement and be

harmonized with Federal antitrust law so that there is a uniform standard and business what is and what is not acceptable conduct. "But attainment of that purpose does not necessarily require an Iowa state trial court to wait for and then defer to the legal rulings of an Alabama federal trial court in a specific case. Our courts are capable of applying antitrust precedent." *Chicoine*, at 462. The case is returned to district court for further proceedings.

Appel, J., did not participate in the decision.

Criminal Cases:

Driving While Barred
State v. Williams, _____ N.W.2d _____ 2018 WL 1652467 (Iowa 2018)
Does the state have to establish, as an element of the crime, that the Iowa Department of Transportation mailed notice that the driver's license was revoked? The majority of the Court, Mansfield, J., held that the elements of driving while barred as a habitual offender under Iowa Code § 321.561 (2015) are:

> (1) the defendant operated a motor vehicle (2) during the time period his or her license was revoked as a habitual offender under section 321.560

The opinion observed that mailing of notice to the driver may be relevant, but it is not an element of the crime. The majority affirmed the defendant's conviction. In dissent, Wiggins, J., joined by Appel, J., found that to comply with due process, the statutory scheme, and administrative rules, the Iowa DOT should have to establish that notice of the bar was mailed to the defendant driver:

> I would hold the proper marshaling instruction consists of two elements: (1) operating a vehicle and (2) operating with a barred license. The second element has two subparts. First, the State must prove the defendant's license was barred on the date in question. Second, the State must present proof the IDOT properly mailed notice to the defendant.

Implied Consent/Operating a Motorboat While Intoxicated:
State v. Pettijohn, 899 N.W.2d 1(Iowa 2017)
A Department of Natural Resources water patrol officer observed Pettijohn operating a pontoon boat. A passenger was sitting on the sundeck; her feet were dangling over the back edge near the motor. The officer stopped the boat, concerned that the passenger might be injured if she fell into the water and came into contact with the propellers. The officer felt that Pettijohn was intoxicated. He directed the boat to a dock, and two other officers after administration of field sobriety tests determined that Pettijohn was intoxicated. Pettijohn was arrested, placed in handcuffs, and transported to the Polk City Police Department. He signed an Informed Consent Advisory and consented to a breath test. Pettijohn's BAC was .194. He was charged with first offense, operating a motorboat while intoxicated. Pettijohn moved to suppress all evidence obtained after his boat was stopped, citing the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. The motion was denied; Pettijohn was found guilty by the district court based upon the minutes, and; Pettijohn appealed.

A majority of the Iowa Supreme Court, Wiggins, J., concluded that Pettijohn's rights under article I, section 8 of the Iowa Constitution were violated and that the Motion to Suppress should have been granted (The majority concluded that the initial stop of the boat operated by Pettijohn was proper as the officer had an articulated reason for his actions: safety of a passenger and violation of a statute requiring boats to be operated in a safe manner.). In a lengthy and detailed opinion, including an analysis of a recent U.S. Supreme Court decision involving implied consent (*Birchfield v. North Dakota*, 579 U.S. _____, 136 S. Ct. 2160 (2016)) the majority of the Court rejects contentions that the consent signed by Pettijohn was voluntary and that the breath test administered to Pettijohn was incident to a legal, warrantless arrest. The Court observed that the provisions of article I, section 8 of the Iowa Constitution are similar to the Fourth Amendment, the Iowa Supreme Court has interpreted this provision more strictly than the Fourth Amendment. The majority indicated that the better procedure for obtaining a breath test would be to obtain a warrant from a magistrate. This can be accomplished with relative ease using the EDMS system. The Court determined that even though Pettijohn signed a consent to the blood alcohol test, his actions were not voluntary: he was intoxicated, he was in custody in a police station, there was no advice that he would give up Constitutional rights, and the information regarding consequences of failing to consent were incomplete or inaccurate. The Motion to Suppress the evidence should have been granted.

Cady, C.J., writes a special concurrence. He observed that the "statutory implied consent scheme for boating in Iowa is inherently coercive and cannot be used under the Iowa Constitution to justify a warrantless withdrawal of blood, breath, or urine based on consent." The $500.00 penalty which is part of the implied consent statute according to the concurrence

> . . . serves primarily, if not entirely, to pressure the person to consent to testing. We simply cannot ignore what the statute actually seeks to accomplish or fail to acknowledge how the penalty interferes with the voluntariness of the decision the boat operator must make when suspected of operating while intoxicated. The statute, plain and simple, is inherently coercive. Any person faced with the prospect of being required to pay $500 unless consent is given would feel the coercion.

The Chief Justice contends that the statute can be revised by using the motor vehicle implied consent provisions as a model.

Waterman, J., joined by Mansfield and Zager, JJ., dissented. Justice Waterman would have affirmed the conviction of Pettijohn. He rejected the majority decision that article I, section 8 of the Iowa Constitution required suppression the breath test. He feels the breath test was proper as being incident to a legal arrest, as well as under the implied consent statute and the U.S. Supreme Court decision of *Birchfield v. North Dakota*, 579 U.S. _____, 136 S. Ct. 2160 (2016).

The dissent also questioned the practicality of using the EDMS system to obtain a warrant prior to obtaining a breath test. He agreed that while the Iowa Supreme Court has expressed a preference for warrants to obtain evidence, implied consent procedures also have a valid, legitimate place in connection with alcohol related offenses:

> Officers will have to race the clock as blood alcohol dissipates, set aside their other

> duties, and obtain a search warrant for the breath test. This may take over an hour, during which time the officer is unavailable to patrol to detect other crimes or respond to other emergencies. In rural areas, it may be impossible to get a warrant in time.
>
> * * *
>
> Implied-consent laws have withstood the test of time in Iowa for over a half century. The legislature enacted Iowa's first implied-consent law in Iowa in 1963. Welch, 801 N.W.2d at 594 (citing 1963 Iowa Acts, ch. 114, § 37–50 (codified at Iowa Code ch. 321B (1966))). The general assembly declared the implied-consent provisions "are necessary in order to control alcoholic beverages and aid the enforcement of laws prohibiting operation of a motor vehicle while in an intoxicated condition." 1963 Iowa Acts ch. 114, § 37.21 And now as to drunken boaters, this court overrides that rational policy choice by our elected branches of government.

The dissent predicted:

> . . . [I]n-the-field PBTs may be admissible, no call or consultation with an attorney will be allowed before chemical breath tests take place at the station, and warrants will be routinely sought and issued based on electronic applications without face-to-face contact between the judicial officer and law enforcement. Taking things further, a rotation could be devised in which one judicial officer per judicial district would be assigned one "night shift" per month. That officer would sit at her or his computer through the night and handle all of that district's electronic warrant requests. This would meet the legal requirements of today's decision, but it would not advance our criminal justice system.

Jury Bias and Impartial Jury

State v. Plain, 898 N.W.2d 801 (Iowa 2017)

Plain (who is black) objected to the composition of a jury pool in Black Hawk County. There was only one black person in the pool. An all white jury was seated to hear charges against Plain of harassment in the first degree (Iowa Code section 708.7(1)(b)). He was found guilty. Plain appealed, contending among other things, that he was denied a fair and impartial jury which represents a cross section of the community under the Sixth Amendment.

The Iowa Supreme Court, Hecht, J., uses this case as a launching pad for discussion about methods to be used to determine whether or not a jury pool is impartial in compliance with the Sixth Amendment (and Article I, section 10 of the Iowa Constitution), as well as juror bias, and jury instructions regarding bias. *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), which found that what is known as the absolute disparity test should be used in Iowa to determine if a jury pool reflected a cross sections of the community, was overruled. The Iowa Supreme Court approved consideration of all three tests outlined by the United States Supreme Court in *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979). The three tests for evaluating the cross section of a jury pool are:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair

> and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364, 99 S. Ct. at 668. The Court also observed that "[t]o measure representation, jurisdictions generally apply one or more of the following statistical tests: (1) absolute disparity, (2) comparative disparity, and/or (3) standard deviation. *United States v. Hernandez-Estrada*,749 F.3d 1154, 1160 (9th Cir. 2014)." A flexible approach should be allowed to evaluate whether a jury pool passes Constitutional muster.

Plain's attorney attempted to obtain historic jury pool information in an effort to demonstrate make a prima facie case of underrepresentation, but the Black Hawk County jury manager could not provide such date (Iowa law requires such information be maintained). The case is returned to district court to allow development of the Sixth Amendment claims of Plain.

Plain also requested an implicit bias instruction to the jury, but it was refused by the district court. The Supreme Court found the district court committed abused discretion by not giving such an instruction, but Plain was not prejudiced. Among the reasons offered by the district court for refusing to grant the requested instruction was that there was no uniform instruction on implicit bias. Contentions by Plain that he was prejudiced by admission of hearsay over objection and by the repeated use of the word victim by the prosecutor in closing argument are rejected. The Court, however, does caution about overuse of the word victim.

Wiggins, J., joined by Cady, C.J., and Appel, J., in a special concurrence would require judges to give an implicit-bias instruction in every case where counsel requests one and implicit bias may have an effect on a jury. Waterman, J., in a special concurrence joined by Mansfield and Zager, JJ., questioned whether it would be wise to require implicit-bias instructions in every case as suggested by Wiggins and Appel, JJ. He suggested the attempts to address bias might backfire. He pointed to an implicit-bias instruction delivered by United States District Court Judge Mark W. Bennett before opening statements in all of his civil and criminal cases. Mansfield, J., in a special concurrence addressed the majority opinion dealing withe use of the word victim by the prosecution in closing argument. The word was used only in closing argument, and objection to its use was made only after the prosecutor had said it numerous times. Justice Mansfield observed, "Experienced lawyers make these kinds of objections not because they expect to be upheld by the trial judge, but because they want to make sure the jury understands what is going on — i.e., an opponent's repetitive and even ham-handed use of a rhetorical device. The objection does the job whether or not it is sustained by the district court."\

<u>Motion to Strike Juror:</u>
State v. Jonas, 904 N.W.2d 566 (Iowa 2017)
Jonas was convicted on a charge of second degree murder. During jury selected he urged the district court to dismiss for cause a potential juror who expressed potential bias against gay persons (Jonas is gay.). The murder had sexual overtones. Jonas used one of his peremptory strikes to eliminate the juror; there was no showing that the jury panel was prejudiced. Jonas argued the potential juror should have been removed for cause and that would have allowed him to use his peremptory strike on another potential juror. Jonas asked the Court to reconsider *State*

v. Neuendorf, 509 N.W.2d 743, 747 (Iowa 1993) which is precedent contrary to his position.

On appeal, the Iowa court of appeals rejected the juror challenge citing Neuendorf, found the evidence at trial was sufficient, and rejected claims that the trial counsel was ineffective. The Iowa Supreme Court granted further review on the issue of whether or not the juror who expressed bias toward gay persons should have been dismissed by the court from the panel for cause. Appel, J., wrote the Court's opinion and noted after a review of Iowa cases, none was found close to the facts of the *Jonas* case. Case law on juror disqualification is also sparse. The standard by which the district court is judge on juror disqualification is abuse of discretion (". . . [D]istrict court judges are required to make rulings on juror disqualification on the spot and in real time. *State v. Mootz*, 808 N.W.2d 207, 225 (Iowa 2012) ("Voir dire is a very short window of time for attorneys and the court to determine whether a juror will be unbiased and impartial.")." Discretion is not unlimited in allowing or disallowing challenges for cause in criminal cases. District courts have been cautioned about allowing close questions to enter the record and threaten the validity of a criminal trial. The Court found the district court abused its discretion.

> We rely primarily on the potential juror's expression of actual bias against gay people in the original questionnaire and during voir dire. *See Morgan*, 504 U.S. at 723–24, 739, 112 S. Ct. at 2226–27, 2235 (holding that a jury which was not questioned about their willingness to impose a sentence other than death had inadequate voir dire despite every juror agreeing to be fair and impartial); *Dyer*, 151 F.3d at 984 (noting when an individual is prejudiced in a case, bias is presumed despite assertions to the contrary); *Fletcher*, 353 P.3d at 1281 (holding an inference of bias may not be rebutted by subsequent assurances of fairness); *Gosling*, 376 S.E.2d at 544 ("A juror's subsequent statement that he can give the defendant a fair and impartial trial . . . is not dispositive when preceded by positive, unequivocal testimony."). Where a potential juror initially repeatedly expresses actual bias against the defendant based on race, ethnicity, sex, or sexual orientation, both in a pretrial questionnaire and in voir dire, we do not believe the district court can rehabilitate the potential juror through persistent questioning regarding whether the juror would follow instructions from the court. *See Merrow*, 181 P.3d at323 (Webb, J., specially concurring) ("[A] record laden with leading questions by the trial court can leave a reviewing court uncertain about the sincerity of the prospective juror's answers."). Our conclusion in this case is reinforced by the fact that even after the extensive colloquy with the court, the potential juror still continued to express his own concerns about his potential bias and ability to be fair and impartial. Under these circumstances, when the defendant moved to disqualify the potential juror for cause after the conclusion of the colloquy, the district court erred in refusing to disqualify him.

The Court, then, turns to the issue of prejudice that resulted from the district court's decision. The Court analyzed a line of decisions and determined:

> . . . [I]n order to show prejudice when the district court improperly refuses to disqualify a potential juror under Iowa Rule of Criminal Procedure 2.18(5)(k) and thereby causes a defendant to expend a peremptory challenge under rule 2.18(9), the defendant must specifically ask the court for an additional strike of a particular juror after his peremptory

> challenges have been exhausted. Where the defendant makes such a showing, prejudice will then be presumed.
>
> This three-pronged approach discourages a defendant who is satisfied with a jury notwithstanding judicial error in failing to strike a potential juror for cause from engaging in a sandbagging approach of awaiting the results of a jury verdict before crying foul. *See Trotter*, 576 So. 2d at 693. It also tends to avoid another sandbagging scenario where the defense leaves an unqualified juror on the panel, awaits the verdict, and then appeals.

Jonas did not identify an additional juror who defense wanted to remove by use of a peremptory challenge. The actual prejudice test from *Neuendorf* applies. Prejudice was not shown; the conviction is affirmed.

Waterman, J., wrote a special concurrence in which Mansfield and Zager joined. Waterman, J., observed that the district court acted within its discretion. The other points made in the majority opinion should wait for another case and another day.

Search and Seizure/Motion to Suppress:
State v. Brown, 905 N.W.2d 846 (Iowa 2018)
Police with a search warrant went to a home looking for drugs, firearms and other items. Two individuals believed to live at the home were named in the warrant. Brown was among four persons at the home at the time of execution of the search warrant. She was not named in the warrant. She was placed in custody. Her purse was searched by an officer who found marijuana. Brown was charged with possession. Prior to trial she moved to suppress the evidence. The district court denied the Motion. Brown was found guilty of possession. On appeal Brown contends that the rights under the United States and Iowa Constitutions were violated (Fourth Amendment; Article I, section 8). The Iowa Supreme Court, Appel, J., writing for the majority, reviewed the case *de novo*. The majority held that the state could not establish Constitutional grounds for a warrantless search of Brown and her purse. The search was improper. The conviction was reversed and the case remanded to district court.

Waterman, J., in dissent, joined by Mansfield and Zager, JJ., would have found the search legal based upon the warrant.

> The warrant entitled the officers to search the house and any containers or things found inside capable of concealing narcotics or weapons. See United States v. Ross, 456 U.S. 798, 820–21, 102 S. Ct. 2157, 2170–71 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found . . . . Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.").

Justice Waterman further observed, "Facts matter. Brown was not an innocent passerby in the wrong place at the wrong time. She was at the Sickles' house to smoke methamphetamine. The police were there looking for methamphetamine and weapons. Ample authority and common sense support the validity of this search."

State v. Scheffert, _____ N.W.2d _____ 2018 WL 1652465 (Iowa 2018)
The Supreme Court granted the State's Petition for Further Review, and overturned its prior decision in this case. In the earlier decision, the Supreme Court found that there was not probable cause of a deputy sheriff to arrest Scheffert. The Court in its new opinion finds that there was probable cause. The district court decision is affirmed.

Black Hawk County did not have park hours posted. Scheffert was stopped by a deputy sheriff on Beaver Valley Road in the Falls Access area. The hours for the park were 6:00 AM until 10:30 PM, but the hours were not posted at entrances as required by section 350.5, Iowa Code. A consent search of Scheffert's car was conducted. Marijuana, a marijuana pipe and prescription drugs were found. Motion to Suppress was denied. Scheffert was found guilty by the district court.

The State in its Petition for Further Review argued that section 350.10 of the Iowa Code provides for a 10:30 PM closing time for parks. The Supreme Court, Wiggins, J., agreed with the State's position:

> Section 350.10 clearly states that the 10:30 p.m. closing time in section 461A.46 applies to the area where the officer found Scheffert's vehicle if the county conservation board has not modified or superseded by rule this closing time. Although the county conservation board attempted to supersede the closing time in section 461A.46 by rule, the rule contained in its ordinance never took effect because the board failed to post it as required by section 350.5. Thus, at the time the officer stopped Scheffert, the closing time was 10:30 p.m. in the area where the officer found Scheffert's vehicle. The officer stopped Scheffert after 10:30 p.m. Accordingly, at the time of the stop, the officer had probable cause to stop Scheffert's vehicle under the Iowa Constitution.

The defendant's conviction was affirmed.

State v. Storm, 898 N.W.2d 140 (Iowa 2017)
Storm asked the Iowa Supreme Court to abandon the automobile exception to the search warrant requirement of Article I, second 8 of the Iowa Constitution. A majority of the Court, Waterman, J., Mansfield and Zager, JJ., joined in a special concurrence by Cady, C.J., declined to do so. The majority finds that a deputy who stopped Storm for a seat belt violation was faced with exigent circumstances which allowed a search of his vehicle. Marijuana and other drugs were found. In the district court Storm moved to suppress the evidence; the Motion was denied; he was convicted on a charge of intent to deliver.

The majority held that the circumstances which faced the arresting deputy were such that he was not able to obtain an electronic warrant for a search of the vehicle. The majority favored continuance of a blight line rule.

> The automobile exception is easy to apply, unlike its alternative — an amorphous, multifactor exigent circumstances test. We generally "prefer the clarity of bright-line rules in time-sensitive interactions between citizens and law enforcement." *State v. Hellstern*, 856 N.W.2d 355, 364 (Iowa 2014). Bright-line rules are "especially beneficial"

> when officers "have to make . . . quick decisions as to what the law requires where the stakes are high, involving public safety on one side of the ledger and individual rights on the other." *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 601 (Iowa 2011). The ad hoc exigency approach is the antithesis of a bright-line rule.

In his concurrence, Chief Justice Cady restated his opinion from *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015) in which he expressed doubts about the continued viability of the automobile exception rule to the warrant requirement for a search. The Chief Justice found in this case that Storm failed to establish the circumstances involving the search of his vehicle were not exigent.

Hecht, J., in a dissent joined by Appel and Wiggins, JJ., called for abandonment of the automobile exception and to require a warrant for a search of a vehicle.

Speedy Indictment:
State v. Williams, 895 N.W.2d 856 (Iowa 2017)
510 days after the incident, the Black Hawk County attorney filed trial informations against Williams and three other men charging them with sexual abuse in the second degree under Iowa Code section 709.3(3) (2011). Williams and two others filed motions to dismiss; the district court denied the motion concluding there is a distinction between an arrest under the Fourth and Fourteenth Amendments and an arrest under the speedy indictment rule. The last man against whom a trial information was filed pleaded guilty. The Iowa court of appeals on discretionary review reversed the district court. The Iowa Supreme Court granted further review.

A majority of the Court in an opinion by Cady, C.J., addressed long-standing precedent: *State v. Wing*, 791 N.W.2d 243, 249 (Iowa 2010). Williams argued the precedent was wrong. The Court majority determined there were compelling reasons to overrule precedent in the face of stare decisis. The majority observed:

> Overall, our approach to the application of the speedy trial rule since *Schmitt (State v. Schmitt*, 290 N.W.2d 24 (Iowa 1980)(Prosecution of Schmitt for escape from jail should have been dismissed because a trial information was not filed within 45 days of his arrest. The Court found the detention of Schmitt by an officer in connection with his escape from jail was an arrest for purposes of Iowa Rule of Criminal Procedure 27(2)(a).) has been nuanced and subject to criticism. See 4A B. John Burns, Iowa Practice Series™: Criminal Procedure § 7:3, at 84–91 (2016). Moreover, Iowa stands as the only jurisdiction in the country to interpret its speedy indictment rule to rely solely on the moment of arrest to trigger the rule. Additionally, it has created an inconsistency in the rule so that adult offenders have the benefit of the "arrest" rule, while juvenile offenders must await transfer to adult court before they may assert speedy indictment protections, regardless of how long prior they were subjected to an arrest. *See State v. Harriman*, 513 N.W.2d 725, 726 (Iowa 1994); *Bergman v. Nelson*, 241 N.W.2d 14, 15 (1976); *State v. White*, 223 N.W.2d 173, 176 (Iowa 1974).
>
> In *Wing*, we rejected the suggestion to change course and align the meaning of "arrest" under our speedy indictment rule with the federal speedy indictment rule. 791 N.W.2d at 249. "Arrest" under the federal speedy indictment rule means the time when the

> defendant is first charged and held to answer for a charge. *See United States v. Sayers*, 698 F.2d 1128, 1130–31 (11th Cir. 1983); see also Speedy Trial, 45 Geo. L.J. Ann. Rev. Crim. Proc. 449, 458 & n.1284 (2016) (noting the federal time limit "does not begin when a defendant is arrested and released without being charged" and compiling cases). We continued to apply a fact-based analysis to trigger the speedy indictment rule by focusing on the circumstances surrounding custody. We even took a step further away from considering the comprehensive statutory manner of an arrest by defining an arrest for the purposes of the speedy indictment rule as of the time when seized under constitutional law. *Wing*, 791 N.W.2d at 248.

Williams, at 863–64. The majority held that the facts of Schmitt resulted in a less than full analysis of all elements involved in an arrest:

> The failure to account for the entire process of an arrest in *Schmitt* significantly undermines our confidence in the interpretation of the speedy indictment rule. This shortcoming alone causes us to acknowledge our mistake and directs us to correct it. The need to correct our mistake is also revealed by the inconsistent outcomes we have reached over the years and the inconsistent application of the speedy indictment rule that fails to give the same relief to juvenile offenders as it does to adult offenders and encourages the use of "placeholder" charges during the pendency of an investigation. For example, the State argues Williams was not entitled to speedy indictment protection because he was a minor. Under the State's interpretation, Washington and Smith, both adults, would go free while Williams would not. *See Harriman*, 513 N.W.2d at 726. Alternatively, Williams was found with a marijuana pipe, a simple misdemeanor. See Iowa Code § 124.414(1)(a)(2), (2). If the police would have charged Williams with this offense that would mean, under our precedent, that Williams was arrested for that offense only, and charges for sexual assault could come at any time within the statute of limitations. *See Penn-Kennedy*, 862 N.W.2d at 390. Washington and Smith, found with no contraband, would obtain the benefit of the speedy indictment rule while Williams would not. This is all regardless of the presence or absence of probable cause at any point in the investigation.

Williams, at 866. The majority stated that it was correcting a past mistake:

> Arrest for the purposes of the speedy indictment rule requires the person to be taken into custody in the manner authorized by law. The manner of arrest includes taking the arrested person to a magistrate. The rule is triggered from the time a person is taken into custody, but only when the arrest is completed by taking the person before a magistrate for an initial appearance.

Williams, at 867. Mansfield, J., filed a special concurrence, joined by Waterman and Zager, JJ. He contended that *Wing* just had not worked out. Hecht, J., dissented. The dissent was joined by Appel and Wiggins, JJ. The dissent noted, "The majority abruptly changes course in this case, turning the clock back to the pre-1978 formulation of the rule. Concluding this court got it wrong in *Schmitt*, the majority decides today that an arrest for purposes of the speedy indictment rule does not occur until one is held to answer." *Williams*, at 871. Wiggins, J., in a separate dissent

laments the majority decision departing from stare decisis.

Search Warrant/Failure to Sign Application by Officer:
State v. Angel, 893 N.W.2d 904 (Iowa 2017)
An officer who prepared an application for a search warrant did not sign the application. The officer appeared before a judicial officer, provided information under oath, and the warrant was issued. The defendant moved to suppress the warrant; the district court granted the Motion finding the officer had not complied with Iowa Code section 808.3. The district court also noted that the judicial officer who signed the warrant "failed to do any striking out or circling on the endorsement form where it said, 'The information (is/is not) found to justify probable cause,' and 'I therefore (do/do not) issue probable cause.'" *Angel*, at 908. The state applied for discretionary review which was granted.

A majority of the Supreme Court, Mansfield, J., held:

> We believe the warrant complied with the statute. The application was "supported by the person's [i.e., Deputy Furlong's] oath or affirmation." Id. The statute does not state that the oath or affirmation itself must be in writing. To the contrary, the statute requires a "written application," while separately requiring that the written application be "supported by the person's oath or affirmation." Id. Both prerequisites were met here. The adjective "written" modifies "application," not "oath or affirmation."

Angel, at 909. Appel, J., in a dissent joined by Hecht and Wiggins, wrote:

> I would find that the search warrant in this case was not validly executed because the search warrant was not supported by an oath in writing as obviously required by Iowa Code section 808.3 (2015). The majority's effort to feather the requirement that the oath be in writing is unconvincing and reflects a troublesome lack of seriousness about procedural regulatory in search and seizure law.
>
> Further, I would also find that the search warrant is invalid because of the failure of the district court to make a finding of probable cause. We rely upon the district court to exercise appropriate judicial oversight of the search and seizure process. We should not be left guessing as to whether such oversight has, in fact, been appropriately exercised.

Angel, at 912.

Anticipatory Federal Search Warrant and Use State Proceedings:
State v. Ramirez, 895 N.W.2d 884 (Iowa 2017)
Federal agents obtained an anticipatory search warrant from a United States Magistrate Judge after intercepting a shipment of methamphetamine from Mexico. With the assistance of local law enforcement, the package was delivered to Ramirez at his apartment in Waterloo. Using the federal warrant, the apartment was searched and evidence obtained. Analysis of the drugs in the package was performed by the Iowa Division of Criminal Investigation (Approximately one kilogram of methamphetamine was recovered.). The United States Attorney for the Northern District of Iowa determined that prosecution should be handled by the state. Ramirez was

charged with possession of methamphetamine with intent to deliver and drug tax stamp violation. Became of prior convictions for possession with intent to deliver, Ramirez faced an enhanced sentence. Motion to suppress the search warrant under the United States Constitution, Iowa's Constitution and Iowa Code chapter 808. The motion was denied. Ramirez was found guilty. After post trial motions, he appealed.

The Supreme Court, Mansfield, J., agreed with Ramirez that Iowa law does not recognize an anticipatory search warrant. In other words the warrant was valid under federal law, but it was not under Iowa law.

> Here a valid search warrant was issued by a federal magistrate judge to federal officers conducting a federal investigation. *Cf. State v. Kern*, 831 N.W.2d 149, 164 (Iowa 2013) (noting that warrantless invasion of the home was the "chief evil" that article I, section 8 sought to address). Although state officers were later enlisted to help, this was not an attempt to bypass the requirements of Iowa law. *Cf. State v. Brown*, 890 N.W.2d 315, 327 (Iowa 2017) (holding that warrantless searches performed by an off-duty police officer were motivated by a "legitimate" private interest, were therefore not covered by article I, section 8, and could be used in a state-court prosecution). While Iowa law would not have authorized the type of warrant issued, no argument is raised that the search—if statutorily authorized—would have violated the Iowa Constitution. *Cf. State v. Cline*, 617 N.W.2d 277, 293 (Iowa 2000) (declining to adopt a good-faith exception to the exclusionary rule for unconstitutional searches because "[t]o do so would elevate the goals of law enforcement above our citizens' constitutional rights"), abrogated on other grounds by *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).
>
> Under this combination of circumstances, we cannot say that the admission of the results of the May 16, 2015 search either rewarded unlawful police conduct or undermined the integrity of our courts. Rather, it accorded a proper recognition to the bona fide actions of the federal government pursuant to that government's lawful authority, including the official acts of a federal magistrate judge.

Ramirez, at 898. The majority of the Court affirmed the conviction of Ramirez. Wiggins, J., dissented. His dissent was jointed by Appel and Hecht, JJ.

> The majority bases its opinion on cases that subscribe to the reverse silver-platter doctrine. The majority finds these cases persuasive. However, in finding these cases persuasive, the majority fails to examine the underpinnings of the silver-platter doctrine as originally established and abandoned by the federal courts. The majority also fails to reconcile its position with the reasons why we apply the exclusionary rule in Iowa. In Iowa, we should not decide an issue by color matching the facts from other jurisdictions. Rather, we should look behind the facts of those cases and determine if the reasoning of those cases comport with our Iowa precedent.

Ramirez, at 899.

First Degree Murder/Conviction Overturned/New Trial Ordered:
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
Vernon Huser was tried for a second time on charges of first degree murder based upon a theory that he aided and abetted in the murder of Lance Morningstar. He was found guilty. Huser's appeal was rejected by a divided Iowa court of appeals. The Iowa Supreme Court granted further review.

The Court majority, Appel, J., found that there was sufficient circumstantial evidence to support the conclusion that Huser aided and abetted Lance Woolheater, the individual convicted of the murder of Morningstar. The case is remanded for a new trial primarily because the prosecution, despite an order limiting what testimony a witness could offer, elicited improper hearsay. The offending questions were:

> Q: I do have just a couple of quick questions. Now, without telling me what Mr. Woolheater said, did he ever speak of Lance Morningstar?
> A: Yes.
> Q: Without telling me what Mr. Woolheater said, did he ever speak of Deb Huser?
> A: Yes.
> Q: And without telling me what Mr. Woolheater said, did he speak about Vern Huser?
> A: Yes.

Huser, at 484. Defense counsel did not immediately object to the first question, but did at the conclusion of the sequence. Defense counsel believed an Order in Limine had covered this area. On appeal the state contended that the defense had not objected in a timely manner to the questioning. The Court majority rejected the argument based upon the district court Order and the Iowa count of appeals decision in the first *Huser* case about admission of hearsay.

> In our view, Huser's objection should be considered timely. The district court's ruling was unambiguous and declared that Mitrisin's hearsay testimony was not admissible. It was not a preliminary ruling but a final ruling of the court. *See O'Connell*, 275 N.W.2d at 202. Further, at the hearing on Huser's suppression motion, the State agreed that "the three statements designated as hearsay by the Iowa Court of Appeals will [not] be mentioned until a further hearing by the Court outside the presence of the jury."
>
> We agree with the district court that, at a minimum, the State violated the spirit, if not the letter, of their stated agreement by attempting to indirectly achieve what the court of appeals and the district court had prohibited. A very brief delay in bringing the issue to the attention of the district court tended to minimize the damage done rather than a contemporaneous display of fireworks that would have prevented any successful judicial intervention. Under the circumstances, we consider Huser's objection to the backdoor hearsay as timely.

Huser, at 494–95. The majority added these observations about the back-door hearsay testimony elicited by the state:

> We think it clear that the State was attempting to circumvent the ruling in *Huser I* by giving rise to an inference that Huser and Woolheater were talking about Deb and Morningstar at the Quonset hut in late August or early September. Mitrisin, of course, had no personal knowledge about what Huser and Woolheater discussed. Indeed, she had no personal knowledge sufficient to identify Huser. While the defense was willing to allow testimony that Huser and Woolheater were together at the Quonset hut, the defense did not consent to innuendo about the subject matter of the Huser–Woolheater meeting.
>
> We recognize that the form of the question did not literally require the jury to infer the subject matter of the meeting. But the use of the "don't tell me what he said" questioning directly after Mitrisin testified about the Quonset hut meeting was designed to encourage the jury to make the connection. In *State v. Carey*, we noted that the state
>
> > is not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial.
>
> 165 N.W.2d 27, 32 (Iowa 1969) (*quoting State v. Haney*, 219 Minn. 518, 18 N.W.2d 315, 317 (1945)). Here too, through a questioning strategy, the State sought to leave the impression with the jury about the existence of inadmissible evidence. We therefore conclude that the questioning violated the ruling of the district court in the motion to suppress through a backdoor strategy.

Huser, at 497. The defense proposed to offer testimony from a witness who had talked with Woolheater after Morningstar was killed. The district court, after hearing the proposed testimony, determined that it could be offered, but it would open the door to other testimony about what Woolheater had said to other witnesses. The defense made the evaluation that it was all or nothing and did not offer the testimony:

> we conclude that Woolheater's statement to Zwank after the crime—that Morningstar had something on Woolheater that could send him to prison—was admissible as a statement against interest. We further conclude there is no basis for requiring admission of other Woolheater statements based on opening the door, curative admissibility, or rule 5.106. In particular, we view rule 5.106 as not permitting admission of other hearsay conversations that have no bearing on the Zwank conversation itself.
>
> As a result, Huser should have been allowed to present to the jury Zwank's testimony that Woolheater told her that Morningstar had something on Woolheater that could send him to jail. Further, given the closeness of this case, we do not find the error harmless. Zwank's testimony would have given Huser a powerful argument, namely, that Woolheater acted to save his own skin rather than at the direction or encouragement of Huser.

Huser, at 509. Mansfield, J., joined by Waterman and Zager, JJ., filed a partial concurrence and dissent. In the dissent, Justice Mansfield offers the opinion that the conviction of Huser should

stand and a third trial is not necessary. The focus of the dissent is Part IV of the majority opinion which found that the district court should have allowed testimony that Woolheater had said Morningstar had something on Woolheater that could send him to jail. The dissent found that the district court handled the issue correctly.

Statute of Limitations/Criminal Case:

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)

Four years after he allegedly masterminded a scheme to win a large Hot Lotto prize (December 29, 2010), Tipton was charged with fraudulently passing or redeeming, or attempting to pass or redeem, a lottery ticket, Iowa Code section 99G.36(1) (2011), and influencing or attempting to influence the winning of the prize through fraud, deception, or tampering with lottery equipment or materials. Iowa Code section 99G.36(2). The district court denied Tipton's motion to dismiss based upon a three year statute of limitations. Iowa Code section 802.3. The district court found the statute was extended because Tipton's offenses, including fraud, were continuing conduct. Iowa Code sections 802.5 and 802.7. Tipton was found guilty. His appeal was heard by the Iowa court of appeals which found that neither sections 802.5 nor 802.7 extended the statute of limitations on the charges of fraudulent passing or redeeming. The court of appeals, however, concluded the tampering charge was timely as it was not discovered until October 2014. The Supreme Court granted further review.

The majority opinion of the Court, Appel, J., concluded that the three year statute of limitations applied to the crimes of fraudulently uttering, passing, and redeeming a lottery ticket, see Iowa Code section 99G.36(1), and tampering under Iowa Code section 99G.36(2). Each is a discrete crime, and there are no indications the General Assembly intended them to be continuing offenses. The Court also rejected arguments that a one year fraud extension should have applied. The Court held that the State was less then diligent in pursuing the case. With regard to the fraudulent redeeming charge, the Court observed:

> All in all, we find there is substantial evidence to submit the surviving redeeming claim to the jury. There was substantial evidence Tipton purchased the winning ticket, he had extensive computer knowledge, he had access to the lottery facility at a key time, he ultimately succeeded in tampering with the machines, and he must have been behind the effort of Shaw to redeem the ticket as late as January 17, 2012. On this record, there is substantial evidence to allow a reasonable jury to connect the dots and find Tipton guilty of fraudulent redeeming in the surviving portion of Count I.

Tipton, at 693. The case was remanded for new trial on the redeeming claim. Mansfield, J., in a partial concurrence and dissent, stated that he would the district court decision that the State commenced the tampering charge within one year of discovery by the aggrieved party.

Identity Theft:

State v. Martinez, 896 N.W.2d 737 (Iowa 2017)

Martinez was charged under Iowa law with identity theft and forgery. She used another person's birth certificate to obtain a driver's license when she was a teenager (Martinez was brought to the United States by her parents when she was eleven.). After she became a participant in the DACA program, Martinez applied for a driver's license in her own name. The Iowa Department of

Transportation (IDOT) investigate upon suspicion that Martinez had obtained licenses previously under an assumed name. Martinez moved to dismiss the state charges contending her immigration status was a matter of federal law. The district court denied the motion, concluding that the state charges were not subsumed by federal law. An interlocutory appeal was granted by the Iowa Supreme Court.

Writing for the majority of the court, Appel, J., concluded that federal law preempted both the identity theft and forgery provisions. The case was remanded to district court for dismissal of the charges.

Mansfield, J., joined by Waterman and Zager, JJ., dissented. The thrust of the dissent was that the majority decision incorrectly read federal law and carved an exception for foreign nationals who use false documents when a citizen could be prosecuted for similar actions (The example used by the dissent is that a citizen might use a false name to avoid bill collectors or garnishment actions.).

False Statement on an Application for a Gun Permit:
State v. Downey, 893 N.W.2d 603 (Iowa 2017)
James Downey filled out an application from the Johnson County Sheriff's Office to purchase a gun. The statute governing the application provides:

> 1. The application for a permit to acquire pistols or revolvers may be made to the sheriff of the county of the applicant's residence and shall be on a form prescribed and published by the commissioner of public safety. **The application shall require only the full name of the applicant, the driver's license or nonoperator's identification card number of the applicant, the residence of the applicant, the date and place of birth of the applicant, and whether the applicant meets the criteria specified in section 724.15.** The applicant shall also display an identification card that bears a distinguishing number assigned to the cardholder, the full name, date of birth, sex, residence address, and brief description and color photograph of the cardholder, or other identification as specified by rule of the department of public safety. The sheriff shall conduct a criminal history check concerning each applicant by obtaining criminal history data from the department of public safety which shall include an inquiry of the national instant criminal background check system maintained by the federal bureau of investigation or any successor agency. A person who makes what the person knows to be a false statement of material fact on an application submitted under this section or who submits what the person knows to be any materially falsified or forged documentation in connection with such an application commits a class "D" felony.

Iowa Code section 724.17 (emphasis added). The Johnson County Sheriff's Office form including ten additional questions, including question two:

> Have you ever been convicted in any court of a felony, or any other crime involving a firearm or explosives for which the court could have sentenced you to imprisonment for more than one year, even if you received a shorter sentence including probation?

Downey, at 605. Downey had been convicted of operating while intoxicated (OWI) third offense. The Sheriff's Office denied the application, and Downey was prosecuted for making a false statement on the application to acquire a gun permit. Downey appealed his conviction. The Iowa court of appeals affirmed. Further review was granted by the Iowa Supreme Court.

Wiggins, J., concluded that while Downey made a false statement, it was to information not required by section 724.17 of the Code. "[W]e hold, the legislature did not authorize the questions on the reverse side of the application to acquire a weapon permit nor did it require Downey to answer the question concerning his prior felony conviction." *Downey*, at 608. The opinion further observed:

> When the legislature enacted section 724.17, it decided that the only items the DPS could require an applicant to provide on an application to acquire were the full name of the applicant, the driver's license or nonoperator's identification card number of the applicant, the residence of the applicant, and the date and place of birth of the applicant. Iowa Code § 724.17. The legislature criminalized the act of making "what the person knows to be a false statement of material fact on an application submitted under this section." *Id.* (emphasis added). The DPS added a series of questions not authorized by this section. If we were to find a violation of section 724.17 occurs when a person falsely answers a question not authorized by the legislature, we are in fact allowing the executive branch, through the actions of the DPS, to define the crime. For example, under the statutory interpretation urged by the State, the DPS could ask on the application to acquire a weapon permit the color of the applicant's vehicle and if the person answered falsely, the applicant could be convicted of a class "D" felony in violation of section 724.17. We think such result would be absurd. *See In re Det. of Swanson*, 668 N.W.2d 570, 574 (Iowa 2003) ("We read the statute 'as a whole and give it "its plain and obvious meaning, a sensible and logical construction," ' which does not create an 'impractical or absurd result.' ") (*quoting Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 197 (Iowa 2003)). Accordingly, an unauthorized question on the application to acquire a weapon permit cannot be the basis for a criminal conviction.

Downey, at 608.

<u>Expungement:</u>
State v. Doe, 903 N.W.2d 347 (Iowa 2017)
The Iowa Supreme Court, Mansfield, J., has to determine what is a "criminal case" under the provisions of section 901C.2 of the Iowa Code:

> 901C.2. Not-guilty verdicts and criminal-charge dismissals — expungement
>
> 1. a. Except as provided in paragraph "b", upon application of a defendant or a prosecutor in a criminal case, or upon the court's own motion in a criminal case, the court shall enter an order expunging the record of such criminal case if the court finds that the defendant has established that all of the following have occurred, as applicable:
>
> (1) The criminal case contains one or more criminal charges in which an acquittal was entered for all criminal charges, or in which all criminal

charges were otherwise dismissed.

(2) All court costs, fees, and other financial obligations ordered by the court or assessed by the clerk of the district court have been paid.

(3) A minimum of one hundred eighty days have passed since entry of the judgment of acquittal or of the order dismissing the case relating to all criminal charges, unless the court finds good cause to waive this requirement for reasons including but not limited to the fact that the defendant was the victim of identity theft or mistaken identity.

(4) The case was not dismissed due to the defendant being found not guilty by reason of insanity.

(5) The defendant was not found incompetent to stand trial in the case.

b. The court shall not enter an order expunging the record of a criminal case under paragraph "a" unless all the parties in the case have had time to object on the grounds that one or more of the relevant conditions in paragraph "a" have not been established.

2. The record in a criminal case expunged under this section is a confidential record exempt from public access under section 22.7 but shall be made available by the clerk of the district court, upon request and without court order, to the defendant or to an agency or person granted access to the deferred judgment docket under section 907.4, subsection 2.

The statute was effective January 1, 2016. A magistrate and the district court found that Doe was not entitled to expungement. The statute is found to be ambiguous regarding what is meant by a "case". The Court reasons that the purpose of the statute was to provide clarity regarding criminal charges and status to them:

> . . . [A] driving concern behind chapter 901C was that a member of the general public — such as an employer doing an informal background check—could access our computerized docket and potentially draw inappropriate inferences from the mere presence of a criminal file relating to an individual, even though the criminal charges were dismissed or the individual was acquitted. This same member of the general public, though, would not likely be familiar with the ins and outs of the Iowa Rules of Criminal Procedure. Thus, if two separate case files show up in a records search, such as AGIN****** and SMSM******, this hypothetical member of the public might well conclude that the dismissed domestic abuse assault charge in SMSM****** related to a different incident, not the same incident as to which the defendant entered a guilty plea in AGIN******.
>
> In other words, instead of being necessary to give the public the full picture of an alleged criminal incident that resulted in a conviction, disclosure of a separate numbered legal proceeding involving a simple misdemeanor could instead give the public the misimpression that the defendant was involved in another alleged criminal incident — a misimpression we presume the legislature wanted to avoid. If the public is likely to assume the existence of an additional alleged criminal incident whenever the public records show an additional criminal proceeding, then Doe's interpretation of the statute does a better job of avoiding undue stigma.

The Court rejects interpretations of expungement statutes from Ohio and Maryland, noting that the laws in those states are different from Iowa's. The Court concluded that Doe was entitled to have a charge in an SMSM****** case expunged, the case is remanded to the district court for entry of an Order consistent with the opinion.

Withdrawal of Guilty Plea:
State v. Weitzel, 905 N.W.2d 397 (2017)
Weitzel pleaded guilty to domestic abuse assault, possession of methamphetamine, carrying weapons, and operating while intoxicated. Judgment was entered, and he was sentenced. Weitzel sought to withdraw his guilty plea, contended that he was not properly advised during the plea colloquy with the district court of the provisions of Iowa Rule of Criminal Procedure 2.8(2)(b)(2) regarding the statutory thirty-five percent surcharges. The Iowa court of appeals reversed the district court. The Iowa Supreme Court granted the state's request for further review.

Wiggins, J., wrote the majority opinion, focusing on the provisions of Rule 2.8(2)(b)(2) of the Iowa Rules of Criminal Procedure which in part provides:

> b. Pleas of guilty. . . . Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
> . . . .
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

The majority opinion noted that the district court must substantially comply with the Rule. Substantial compliance "requires that the essence of each requirement of the rule be expressed to allow the court to perform its important role in each case." *Meron*, 675 N.W.2d at 544; *accord United States v. Cotal-Crespo*, 47 F.3d 1, 4 (1st Cir. 1995) ("We have distinguished between 'technical' violations of Rule 11 and violations of the rule's 'core concerns[.]' "). The Court held that surcharges are a form of punishment, and the district court's failure to advise Weitzel of the thirty-five percent surcharge cannot pass the substantial compliance threshold. The guilty pleas are set aside, and the case is remanded to district court for further proceedings.

Mansfield, J., joined by Waterman, JJ., dissented. The dissent agreed that Weitzel should have been advised about the thirty-five percent surcharge, but the record showed there was substantial compliance with the Rule.

State v. Diallo, 905 N.W.2d 394 (Iowa 2017)
Diallo wanted to withdraw a guilty plea resulting in judgment and sentence to a charge of bodily injury. Diallo contended his plea was not voluntary because he was not informed of potential immigration consequences, he did not know about the thirty-five percent criminal surcharge applicable to the offence, and he was not properly advised about victim restitution requirements. The Iowa court of appeals reversed the district court. The Iowa Supreme Court granted further review upon the request of the state. The Court, Wiggins, J., held the district court did not substantially comply with Iowa Rule of Criminal Procedure 2.8(2)(b)(2). The written plea form

did not advise the defendant about the mandatory thirty-five percent criminal penalty surcharge. Mansfield, J., joined by Waterman, J., filed a special concurrence. See *State v. Weitzel*, 905 N.W.2d 397 (2017), decided the same day on the same issue. The court of appeals was affirmed, and the case was remanded to district court for further proceedings.

Standby Interpreter:

State v. Gomez Garcia, 904 N.W.2d 172 (Iowa 2017)

The district court denied Gomez Garcia's wavier of a standby interpreter during his criminal trial (An interpreter was provided during all pre-trial proceedings, but Gomez Garcia felt at trial he did not need an interpreter, that he would be distracted by the interpretation, and that he would be prejudiced in front of the jury.). The interpreter was in the gallery of the courtroom and provided translation by a wireless earpiece which Gomez Garcia could use at his discretion. Gomez Garcia waived a jury trial; the district court in a bench trial found him guilty of selling cocaine; the court of appeals reversed and remanded holding that Gomez Garcia knowingly waived his right to an interpreter and the district court committed error by requiring the standby interpreter. The Iowa Supreme Court, Waterman, J., reversed the court of appeals and affirmed the district court judgment. The Court stated that the district court had to make a "game day" decision with a jury waiting and little Iowa precedent for guidance.

> We conclude the district court properly balanced the goal of ensuring a fair trial while accommodating in part Gomez Garcia's request to waive the interpreter on the morning of trial. The district court chose a reasonable middle ground by ensuring that Gomez Garcia had access to translation services, even if he elected not to use them.

The Court addressed Gomez Garcia's contention that his attorney was ineffective and that his waiver of a jury trial was not properly recorded. The Court emphasized that going forward the provisions of Iowa Rule of Criminal Procedure 2.17(1) must be strictly observed and that the jury waiver colloquy must be conducted on the record (The recording of the colloquy cannot be waived.). Ineffective counsel complaints can be raised by post-conviction relief proceedings. The judgment of the district court was affirmed.

Jury Instructions – Second Degree and Third Degree Robbery

State v. Ortiz, 905 N.W.2d 174 (Iowa 2017)

Ortiz was found guilty of second degree robbery by a jury. His attorney objected to the robbery instructions as given by the district court contending that there was a failure to show the difference between second degree and third degree robbery. The district court overruled the objections to the jury instructions. The Iowa Supreme Court, Waterman, J., held that there was error in the jury instructions. They failed to advise the jury of the difference between second degree and third degree robbery. "We conclude the evidence was insufficient to convict Ortiz of second-degree robbery but sufficient to convict him of third-degree robbery. We construe the jury verdict as finding Ortiz guilty of third-degree robbery." The jury instruction on second degree robbery did not accurately state the law because it included third degree robbery. The jury when it found Ortiz guilty of second degree robbery necessarily found him guilty of third degree robbery/simple assault.

The Court rejected challenges by Ortiz that the statutes under which he was charged and tried

were constitutionally inform, as well as a claim of ineffective counsel for failing to raise a constitutional challenge to the statutes.

The case is remanded to district court for entry of judgment on third degree robbery and imposition of a new sentence.

Speedy Trial:
State v. McNeal, 897 N.W.2d 697 (Iowa 2017)
After plea negotiations were not successful (prosecution was led to believe that an offer would be accepted and a plea hearing would be held on June 9, 2015, instead of trial), the district court set the case to begin on June 23. On June 16, the parties returned to court and the prosecution requested a new trial date, advising that several expert witnesses were not available. The district court entered an order setting jury selection for June 26; evidence was taken on July 7; a jury found McNeal guilty of assault with intent to inflict serious injury, criminal trespass, willful injury causing serious injury, and being in possession of a dangerous weapon at the time of the assault. McNeal appealed. The Iowa court of appeals found that the start and stop procedure adopted by the district court did not comply with the speedy trial provisions of Iowa law and that good cause was not shown for the delay in McNeal's trial. The Iowa Supreme Court granted further review.

A majority of the Court, Mansfield, J., found there was good cause for the district court to employ the procedure that it did. "Here, the postponement was relatively minimal — eight days past the speedy trial deadline. The defendant does not claim any resulting prejudice. Although these considerations do not eliminate the State's duty to show a valid reason for the delay, the reason does not have to be as strong." *McNeal*, at 704. There was no abuse of discretion. Cady, C.J., and Waterman, J., joined by Zager, J., filed separate concurring opinions. Zager also filed a separate concurrence.

Dissent by Appel, J., was joined by Hecht and Wiggins, JJ. The dissent concluded that the state failed to establish good cause for the bifurcated trial:

> The only purpose of this bifurcated trial was an attempt to avoid the speedy trial deadline of rule 2.33(2)(b). Such a start-and-stop strategy cannot be employed to avoid otherwise applicable speedy trial deadlines. *See United States v. Stayton*, 791 F.2d 17, 20 (2d Cir. 1986) (holding prosecution must show justification for delay between impaneling of jury and receipt of evidence).
>
> In order to avoid dismissal under Iowa Rule of Criminal Procedure 2.33(2)(b) based on unavailability of witnesses, the State must show the necessity of the witnesses, that it exercised due diligence in attempting to secure the presence of witnesses needed for trial, and that, notwithstanding its diligent efforts, the witnesses needed for trial are unavailable. Note that the State must show, and not simply proclaim, good cause. The State bears the burden of showing such good cause. *State v. Olson*, 528 N.W.2d 651, 653 (Iowa Ct. App. 1995).

McNeal, at 713.

Sufficiency of Evidence/Second Degree Murder Conviction:

State v. Shorter, 893 N.W.2d 65 (Iowa 2017)

Shorter was found guilty of second degree murder. Three theories were presented to the jury: (1) the defendant, individually, (2) or through joint criminal conduct, (3) or through aiding and abetting another, assaulted Richard Daughenbaugh. The jury returned a general verdict. Shorter appealed arguing that the evidence did not support his conviction on any of the three theories. The Iowa court of appeals reversed and remanded; the court of appeals held that there was sufficient evidence to support the theory that Shorter was a principal or aided and abetted, but the evidence did not support a finding that he aided and abetted another; the court of appeals also relied upon *State v. Tyler*, 873 N.W.2d 741 (Iowa 2016)(Tyler was another participant in the attack upon Daughenbaugh; the Iowa Supreme Court reversed Tyler's conviction, holding there was not sufficient evidence to support joint criminal conduct.).

The Iowa Supreme Court granted further review. Appel, J., analyzed the evidence and found that the information presented at trial sufficiently supported all three theories regarding Shorter's conduct and his conviction. The Court rejected contentions by Shorter that one witness, who identified him, testified beyond the minutes testimony and that was improper. He also argued that his attorney was ineffective when he did not ask for an eyewitness identification instruction. The conviction of Shorter was affirmed.

State v. Russell, 893 N.W.2d 307 (Iowa 2017)

This is a companion case to *Shorter*. Russell's conviction was affirmed by the Iowa Supreme Court using an analysis similar to that in *Shorter*.

Ex parte Subpoenas:

State v. Russell, 897 N.W.2d 717 (2017)

Russell contended that he did not have to provide the state with notice regarding subpoenas issued on his behalf in his criminal case. The state requested that the district court enter an order regulating the issuance of subpoenas in the criminal case to (1) situations in which the parties had agreed; (2) witnesses for deposition with notice to all parties, and (3) a witness for trial or hearing. Russell objected. The district court entered an order providing that Russell's counsel was:

> prohibited from issuing any subpoena except to secure the attendance of a witness listed as a witness by the State at a deposition on notice to all parties pursuant to Iowa Rule of Criminal Procedure 2.13(1); to secure the attendance of a witness not listed by the State by order of the Court pursuant to Iowa Rule of Criminal Procedure 2.13(2); to secure the attendance of a witness at trial or other court proceedings pursuant to Iowa Rule of Criminal Procedure 2.13(2). The Defendant may also attach a request for documents, subpoena duces tecum, pursuant to Iowa Rule of Criminal Procedure 2.15(2), provided the subpoena also requests the witness's attendance in the above-prescribed manner.

Russell, at 721. The Iowa Supreme Court granted Russell's interlocutory appeal. The Supreme Court, Zager, J., affirmed the district court rejecting Russell's arguments including claims that requiring notice of the subpoenas to all parties violated due process and his right to effective assistance of counsel.

Minimum term of incarceration for crimes committee by a juvenile:
State v. Roby, 897 N.W.2d 127 (Iowa 2017)
The issue before the Iowa Supreme Court is does Article I, section 17 of the Iowa Constitution categorically prohibit imposition of any minimum term of incarceration without the possibility of parole as a result of a crime committed by a person who at the time was a juvenile?

Cady, C.J., reviewed the evolving area of sentencing for persons who commit crimes as a juvenile. The majority of the Court concluded:

> . . . [A]pplying the two-step inquiry we use for categorical challenges, we can conclude, at this time, (1) there is no national or community consensus against imposing minimum terms of incarceration without the possibility of parole on juveniles, provided they have the opportunity to appear before a neutral decision-maker for an individualized review; and (2) in our independent judgment article I, section 17 does not yet require abolition of the practice.

Roby, at 143. The opinion confirmed that in re-sentencing an individual who committed a crime as a juvenile, the district court must adequately review the five factors outlined in *State v. Lyle*, 854 N.W.2d 378, 404 (Iowa 2014):

> (1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the particular "family and home environment" that surround the youth; (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful offenders in navigating through the criminal process; and (5) the possibility of rehabilitation and the capacity for change.

The district court imposed a sentence upon Roby of incarceration without parole eligibility. The majority of the Court concluded the district court abused its discretion and as a matter of law the district court did not properly consider the five factors from *Lyle* in order to protect the individual from cruel and unusual punishment. The sentence was vacated, and the case returned to district court for re-sentencing.

Wiggins and Appel, JJ., joined in the opinion. Hecht, J., filed a concurring opinion. Appel, J., filed a separate concurring opinion in which Wiggins, J., joined. Zager, J., dissented. Mansfield and Waterman, JJ., joined in the dissent. Justice Zager observed, "The court introduces a number of statements that go beyond what this court has decided in its prior juvenile sentencing opinions. For example, the court declares that minimum periods of incarceration need to be "short" and "uncommon." These statements can, and I expect will, be seized upon in future cases to strike down any minimum term of incarceration." *Roby*, at 150-1.

State v. Majors, 897 N.W.2d 124 (Iowa 2017)
Majors addressed the same issue as *State v. Roby*, 897 N.W.2d 127 (Iowa 2017)(decided the same day), and the result and opinions were the same.

State v. White, 903 N.W.2d 331 (Iowa 2017)
Follows the Iowa Supreme Court's decision in *State v. Roby*, 897 N.W.2d 127 (Iowa 2017). Four to three decision; majority opinion by Chief Justice Cady returns the case to district court for application of the *State v. Roby* analysis and a more scientific analysis of the mandatory minimum sentence for an individual convicted for committing three second degree robberies while 17 years old. Hecht, J. and Appel, J., joined by Wiggins, J. write separate concurrences contending mandatory minimum sentences for juveniles should be eliminated. Mansfield, J., joined by Waterman and Zager, JJ., dissents, finding there is no basis for his views to displace those of the district court who followed the *Miller/Ragland* factors.

State v. Propps, 897 N.W.2d 91 (Iowa 2017)
The Supreme Court majority, Zager, J., in considering a writ for certiorari rejected constitutional arguments challenging four consecutive ten year sentences on charges of wilful injury causing serious injury. The individual was a juvenile at the time the crimes were committed. The writ was annulled. Cady, C.J. specially concurred. Wiggins, J., joined in the special concurrence. Appel and Hecht, JJ., dissented.

State v. Graham, 897 N.W.2d 476 (Iowa 2017)
Graham was 17 years old when he engaged in a sex act with a 13 year old. He pleaded guilty to one count of sex abuse in the third degree. The was sentenced to a life time special sentence of parole and a life time requirement that he register as a sex offender. Graham challenged the sentence as cruel and unusual under the Eighth Amendment of the United States Constitution and Article I, section 17 of the Iowa Constitution. The Supreme Court, Appel, J., rejected Graham's challenges and upheld his sentence.

<u>Post Conviction Relief:</u>
Belk v. State, 905 N.W.2d 185 (Iowa 2017)
The State moved to dismiss Belk's amended petition for post-conviction relief, contending it failed to state a viable claim under the post-conviction relief act: Iowa Code section 822.2(1)(a) (2013). The district court granted the Motion. Belk appealed. The Iowa Supreme Court, Wiggins, J., writing for a majority of the Court, found Belk should have been allowed to pursue post-conviction relief under section 822.2(1)(e). The crux of the issue is Belk's complaint that Iowa Department of Corrections policy denied him timely access to the sex offer treatment program (SOTP). Because of the policy of delay, Belk could not qualify for parole, and his liberty interests were violated. The Opinion held "we conclude an inmate may proceed under Iowa Code section 822.2(1)(e) when alleging an unconstitutional denial of his or her liberty interest based on the IDOC's failure to offer SOTP when SOTP is a necessary prerequisite to parole. That section applies when 'the person is otherwise unlawfully held in custody or other restraint.' Iowa Code § 822.2(1)(e)." The case is remanded to district court for further proceedings.

Waterman, J., joined by Zager, J., dissented, writing the district court did not commit error when it dismissed Belk's amended petition. The dissent also contends that Belk should exhaust his administrative remedies.

Franklin v. State, 905 N.W.2d 170 (Iowa 2017)
Franklin in 1990 pleaded guilty to second degree murder and sexual abuse in the second degree. He was sentenced to up to 50 years of murder and up to 25 years for sexual abuse. He has been eligible for parole since 2012; his tentative discharge date is 2033. Franklin argued that Iowa Department of Corrections policy delaying participation in the sex offender treatment program (SOTP) until two or three years before his discharge date artificially lengthened his sentence and removed any meaningful change to participate in work release or parole. The district court granted the state's Motion for Summary Judgment, finding that it did not have subject matter jurisdiction and that Franklin needed to pursue other remedies without specifying the remedies.

Wiggins, J., writing for the majority, holds Franklin appears to bring his claim under section 822.2(1)(e) of the Iowa Code. "We have expanded the postconviction-relief method of review to SOTP classifications, work release revocations, and disciplinary actions involving a substantial deprivation of liberty or property interests. *Pettit v. Iowa Dep't of Corr.*, 891 N.W.2d 189, 193–96 (Iowa 2017)." The case is remanded for further proceedings before the district court.

Waterman and Zager, JJ, dissent, citing the dissent in *Belk v. State*, 905 N.W.2d 185 (Iowa 2017).

State of Iowa v. Iowa District Court for Jones County, 902 N.W.2d 811 (Iowa 2017)
The Iowa Department of Corrections in January 2016 adopted a new interpretation of Iowa Code section 903A.2 policy governing inmates and the Sex Offender Treatment Program (SOTP). The new interpretation/policy increased the penalty for refusing to participate in or being removed from the SOTP.

> An offender required to complete SOTP who refuses or is removed from the SOTP Program will have a hearing with an ALJ. Upon an ALJ decision affirming the classification committee's SOTP requirement, the offender's records will reflect the offender has not received any earned time sentence reduction. An offender that has refused or been removed from SOTP may begin accruing earned time after successful completion of SOTP, effective the date of completion. An offender who successfully completes SOTP upon initial placement in the program will receive the earned time sentence reduction effective their date of entry into DOC.

Iowa Dep't of Corr., Policy & Procedures, SOTP Hearing and Appeal Procedures, OP-SOP-09 (2016). The new interpretation/policy conflicted with the Iowa Supreme Court decision of *Holm v. State*, 767 N.W.2d 409, 414, 418 (Iowa 2009). *Holm* provided that an inmate could be denied future earned time, but accrued earned time could not be deducted or eliminated.

Michael Miller was convicted in April 2011; he was transferred to the Mount Pleasant Correctional Facility in March 2015 to participate in SOTP. Miller was disciplined while at Mount Pleasant and the new policy was applied to his accrued earned time. Miller filed an administrative appeal and after exhausting his administrative remedies there was an appeal to district court. The district court found the policy as applied to Miller was contrary to *Holm* and violated the *Ex Post Facto* provisions of the United States and Iowa Constitutions. The state filed a Petition for Writ of Certiorari and request for a stay; both were granted by the Iowa

Supreme Court.

The Court, Waterman, J., determined that the state was asking for *Holm* to be overtuned. The Court noted that there was irony in this case. Counsel for Holm was counsel for Miller in this case. Holm's attorney took the position that the state has now adopted, and vice versa. The Court in *Holm* adopted the state's position that accrued earned time could not be forfeited. The Court looked at both stare decisis and legislative acquiescence in the *Holm* decision. It is noted that the *Holm* decision avoids potential ex post facto issues. The Court refused to overture *Holm*. The Court observed that if the Department of Corrections wanted to change the Holm precedent, it needed to seek relief from the General Assembly. The writ was annulled.

Attorney Duty to Advise Regarding Effects of Guilty Plea by an Unauthorized Alien:
Diaz v. State, 896 N.W.2d 723 (2017)
Diaz was in the United States illegally. He was arrested in Tama County and was charged with forgery, related to an identification card that he provided an investigating officer. His attorney did not advise Diaz of the immigration effects of a guilty plea to an aggravated misdemeanor forgery under Iowa Code section 715A.2(2)(b): after entry of the guilty plea he was removed from the United States and sent to Mexico by Homeland Security.

Diaz contended before the district court that his counsel was ineffective: failing to properly advise him of the consequences regarding his immigration statutes if he pleaded guilty to an aggravated misdemeanor. The district court agreed. The Iowa court of appeals reversed the district court decision. The Iowa Supreme Court granted further review. Cady, C.J., discussed the scope of an attorney's duty to advise about the consequences of a guilty plea to a criminal offense by an unauthorized alien. In this instance, the attorney failed to adequately advise Diaz. The decision of the district court is affirmed.

Registration as a Sex Offender:
Maxwell v. Iowa Department of Public Safety, 903 N.W.2d 179 (Iowa 2017)
Iowa Department of Public Safety policy required a person convicted of a sex offense to register without regard to an appeal and a posting of an appeal bond. Maxwell was convicted on a charge of lascivious acts with a minor. He appealed and filed an appeal bond. He argued that he did not have to register as a sex offender until the appeal was concluded.

The Iowa Supreme Court, Waterman, J., upheld the position of the Iowa Department of Public Safety (DPS):

> DPS argues registration is automatically required upon the conviction of a sex offense and that to delay registration while the defendant is free on bond pending appeal would leave a convicted sex offender at large without alerting the community. We conclude, based on the statutory language, that the legislature has resolved these competing policy choices in favor of registration.

The Court also noted that it did not find decisions from any other states supporting the position taken by Maxwell.

Conviction Upheld for OWI/nonimpairing metabolite of marijuana present in driver's system:
State v. Childs, 898 N.W.2d 177 (Iowa 2017)
Childs was stopped after his car was observed crossing the center line of a road. He admitted to having smoke some marijuana and to being under its influence. A presence of nonimpairing metabolite of marijuana was found in his urine. Childs moved to dismiss the OWI charge. The district court rejected the Motion and found Childs guilty of violating section 321J.2 of the Iowa Code (operating while intoxicated). Childs appealed. The Iowa court of appeals affirmed the conviction citing *State v. Comried*, 693 N.W.2d 773 (Iowa 2005)(Childs argued that *Comried* should be overturned as the Arizona precedent upon which it was based had been overturned.). The Iowa Supreme Court granted further review. The Court, Waterman, J., reaffirmed *Comried*. Childs was guilty of violating Iowa law under the plain meaning of the text of Iowa Code section 321J.2(1)(a) (2014) (operating while under the influence of drugs) and (c) (operating a motor vehicle while "any amount of a controlled substance is present in the . . . person's blood or urine").

Right to Counsel:
State v. Green, 896 N.W.2d 770 (2017)
Green was found guilty of second degree murder. The Iowa Supreme Court, Cady, C.J., concluded that Green did not have a right to have counsel present during a police interrogation that occurred in Florida and prior to an arrest warrant being issued for Green. The county attorney observed the interrogation from another room and from time-to-time provided questions to be asked by the investigating officers. During the interrogation, Green confessed to the murder. Prior to trial, Green moved to suppress the confession citing his Constitutional right to an attorney and contending that the involvement of the county attorney in the interrogation was, in effect, a prosecution. The Motion was denied. The Supreme Court held that there is no right to counsel based solely upon the presence and assistance of a prosecuting attorney during an interrogation. Green also argued that the district court committed error by giving a malice aforethought instruction. A baseball bat held to the throat of the victim resulting in death. The Court concluded a jury could infer that when the bat was used as it was, Green intended to kill his victim, and he did not with malice aforethought. Appel, J., filed a separate concurring opinion, joined by Hecht and Wiggins, JJ. Waterman, J., filed a separate concurrence, joined by Zager, J.

Failure of Counsel to Request an Instruction Defining Household Member in a Domestic Assault Case:
State v. Virgil, 895 N.W.2d 873 (Iowa 2017)
The Supreme Court, Waterman, J., held that trial counsel was ineffective for failing ask for a jury instruction defining "household member" Virgil was tried and convicted on charges of domestic assault. The jury had asked the court for definitions of "Reside + Domestic". The district court advised the jury to use ordinary definitions. The Court held that Virgil was prejudiced by his attorney's failure to request a household member instruction and that a new trial was required.

Administrative Rules:

Insurance Regulation:
Abbas v. Iowa Insurance Division, 893 N.W.2d 879 (Iowa 2017)
After receiving an unfavorable decision from the Iowa Supreme Court in *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244 (Iowa 2012)(The chiropractors contended that Wellmark engaged in anti-competitive conduct by paying them lower rates for services and violated various statutes regrading insurance and reimbursement.), the chiropractors requested a contested case before the Iowa Insurance Division. The chiropractors contended that Wellmark wrongfully imposed restrictions and paid lower rates for chiropractic services than for equivalent services offered by medical and osteopathic doctors in violation of Iowa Code section 514F.2. The insurance commissioner referred the claims to an Administrative Law Judge (ALJ) who conducted a hearing and issued a proposed decision. The insurance commissioner issued a declaratory order instead of treating the matter as a contested case. Essentially, the insurance commissioner held against the chiropractors. The district court was asked to review the commissioner's declaratory order. The district court affirmed the commissioner. The chiropractors appealed.

Wiggins, J., wrote the plurality opinion, in which, Cady, C.J., specially concurred. Mansfield, J., joined by Waterman, J., wrote a separate, special concurrence.

The plurality opinion examined the history of section 415F.2 of the Iowa Code, and concluded that the insurance commissioner and district court incorrectly interpreted the statute. The Court examined the statute's legislative history:

> The house passed section 514F.2 independently from sections 509.3, 514.7, and 514B.1. The latter three sections are coverage sections. The purpose of those sections was to set forth the requirements between an insurer and its policyholders, subscribers, or enrollees. The purpose of section 514F.2 was to set forth the reimbursement requirements between the insurer and providers, including chiropractors. Section 514F.2 does not contain any specific language pertaining to "policyholders," "subscribers," or "enrollees," as the other three sections do.
>
> We find, based on the legislative history, the legislature intended section 514F.2 to be distinguishable from the other three coverage provisions. We further find the legislative intent of section 514F.2 was to regulate the reimbursement an insurer is required to pay a chiropractor rather than an insurer's coverage of its insured. Therefore, we disagree with the commissioner and district court interpretations of section 514F.2.

Abbas, at 890–91. The Court, then, examined the reasons behind different payments to doctors of chiropractic as compared to medical doctors and osteopathic physicians and surgeons. "There is no question Wellmark pays lower fees to chiropractors than it does to medical and osteopathic doctors for (1) manipulation, (2) x-rays or radiology, and (3) office visits. Although chiropractors receive a lower fee for these services, it does not necessarily follow that Wellmark is basing the lower fee solely on a chiropractor's licensure." *Id.* at 891. The Court provides a lengthy explanation of how Wellmark sets fees it will pay chiropractors as compared to medical doctors and osteopathic physicians and surgeons, including reliance upon national standards.

> Although another fact-finder may come to a different conclusion, the record made at the hearing supports the commissioner's finding that the method Wellmark uses to set fees for its providers depends on a large number of complex factors concerning the healthcare system and that Wellmark does not base its reimbursement to chiropractors based solely on a chiropractor's licensure. Because substantial evidence supports the commissioner's finding that the lower fees Wellmark pays to chiropractors is not based solely on a chiropractor's licensure, we are required to affirm the commissioner's finding.

Abbas, at 893. The Court found that payments on behalf of self-funded health plans administered by Wellmark to doctors of chiropractic are governed by ERISA, and as a result state law is pre-empted.

Mansfield's special concurrence, joined by Waterman, J., made this observation about section 514F.2:

> Because I do not view Iowa Code section 514F.2 as authority for regulating rates, I do not need to reach Part VI of the court's opinion. However, let me briefly explain my disagreement with that part of the court's analysis. To the extent section 514F.2 prohibits discrimination, the sweep is broader than just discrimination based "solely on licensure," as urged by the court. To the contrary, section 514F.2 also prohibits discrimination based upon the "practices" that chiropractors are authorized to perform or "a method of classification, categorization, or description based upon differences in terminology used by different licensees." Iowa Code § 514F.2.
>
> To me, when an insurer says it pays all chiropractors categorically less than it pays other healthcare providers for performing the same procedures because chiropractors as a group have less training, a more limited scope of practice, and lower overhead and costs, this is not an out for the insurer. The insurer is still discriminating based on the chiropractor's status as a chiropractor (*i.e.*, his or her licensing and practice). Wellmark does not claim, for example, that it would pay more to a chiropractor who had a Ph.D. or an ornate office.
>
> But again, I do not believe Iowa Code section 514F.2 is a rate provision. Thus, section 514F.2 does not prohibit an insurer from paying a chiropractor less than another healthcare provider for the same procedure, so long as the insurer covers chiropractic performance of that procedure. Accordingly, Part VI of the court's opinion reaches an issue that I do not need to reach.

Abbas, at 895–96.

<u>Racing and Gaming Commission:</u>
Kopecky v. Iowa Racing and Gaming Commission, 891 N.W.2d 439 (Iowa 2017)
The Supreme Court held that the Iowa Racing and Gaming Commission had authority to adopt administrative rules, including a rule that allows it to consider the economic effect of a new gaming operation on existing gaming facilities when deciding whether to issue a new gaming license.

Judicial Hospitalization/Jurisdiction:

Matter of M.W., 894 N.W.2d 526 (Iowa 2017)

In an opinion by Wiggins, J., the Court majority held that it did not have jurisdiction to hear an appeal by an individual who was ordered hospitalized by a judicial hospitalization referee. Prior to a hearing, M.W. was given notice, but his guardian was not. At the hearing the attorney for M.W. moved for a continuance because the guardian had not been served. The request was denied and the referee ordered M.W. hospitalized because he was seriously mentally impaired. M.W.'s attorney filed an appeal to district court of the denial of the Motion to Continue. A new treatment plan was devised for M.W. and he was released from the hospital. The district court entered an order that a hearing requested by M.W. was not pursued and the matter was concluded. M.W. appealed to the Iowa Supreme Court.

> On December 21, M.W. withdrew his appeal to the district court after the UIHC discharged him from its care. When a party abandons an appeal, he or she can no longer prosecute the appeal for the appellate court has lost jurisdiction of the matter. *Dewey v. Pierce*, 69 Iowa 81, 82–83, 28 N.W. 445, 445 (1886). Here, the district court was the appellate court. When M.W. withdrew his appeal, the district court lost jurisdiction, and the case was no longer pending in the district court. Granting M.W. an interlocutory appeal is no longer feasible because M.W.'s case is no longer being prosecuted in the district court.
>
> Accordingly, the December 9 district court order is not appealable as a matter of right, and we are unable to convert the notice of appeal to an application for interlocutory appeal. Therefore, we must dismiss M.W.'s appeal of the December 9 district court order.

Matter of M.W., at 533. Appel, J., dissented arguing that M.W.'s guardian was entitled to notice of the initial proceeding before the judicial hospitalization referee.