IOWA SUPREME COURT CASE LAW REVIEW

Polk County Bar Association
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AUTOMATED TRAFFIC ENFORCEMENT (ATE)

Decided April 27, 2018 – IDOT had no authority to adopt ATE regulations

City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)

The Iowa Department of Transportation (IDOT) adopted rules regulating the placement of automated traffic enforcement (ATE) cameras along primary routes. IDOT directed the cities of Cedar Rapids (locations on I-380); Des Moines (on I-235), and; Muscatine (along U.S. Highway 61) to remove ATE cameras. The cities challenged the IDOT orders.

The Supreme Court, Mansfield, J., framed the issue before the court as whether or not IDOT had authority from the General Assembly to adopt the rules it did to regulate ATE systems.

> Ordinarily, state agency rules are given "the force and effect of law." *Stone Container Corp. v. Castle*, 657 N.W.2d 485, 489 (Iowa 2003) (quoting *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 835 (Iowa 2002)). However, **"agencies have 'no inherent power and [have] only such authority as [they are] conferred by statute or is necessarily inferred from the power expressly given.**' " *Wallace v. Iowa State Bd. of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009) (alterations in original) (quoting *Zomer v. W. River Farms, Inc.*, 666 N.W.2d 130, 132 (Iowa 2003)). For a rule to be validly adopted, it "must be within the scope of the powers delegated to [the agency] by statute." *Id.* (quoting *Iowa Power & Light Co. v. Iowa State Commerce Comm'n*, 410 N.W.2d 236, 239 (Iowa 1987)). Thus, if the rules adopted by the agency "exceed the agency's statutory authority, the rules are void and invalid." *Id.* **"An agency cannot by rule ... expand or limit authority granted by statute.**" *Smith–Porter v. Iowa Dep't of Human Servs.*, 590 N.W.2d 541, 545 (Iowa 1999).

City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431, 440–41 (Iowa 2018)(emphasis added). The court rejected arguments by the IDOT that the rules were based upon authority from Chapter 318 of the Iowa Code regarding removal of obstructions from highways (". . . it is not plausible to use the term 'obstruction' for a traffic camera that takes a photograph for law enforcement purposes of a vehicle going more than ten miles over the speed limit." *Id.*, at 447), and sections 307.2 and 307.12(1)(j) of the Iowa Code (described as "two

broadly worded statutes" *Id.*) regarding planning, development, regulation, and improvement of transportation and rule making under Chapter 17A of the Code.

The court observed that in 2014 the General Assembly adopted specific legislation banning the use of drones for traffic enforcement (*See*, Iowa Code section 321.492B)("This shows that the legislature has the ability to enact laws regulating newer methods of traffic law enforcement." *City of Des Moines*, at 449), but no statutes have been enacted governing ATE systems:

> . . . [W]e conclude that the IDOT did not have statutory authority to promulgate the administrative rules dictating placement and continued use of ATE equipment by the Cities. As a result, the agency was without authority to rely on those rules to order the Cities to move, remove, or disable their ATE systems.

City of Des Moines, 911 N.W.2d at 449–50. Footnote 8 of the opinion is worth attention regarding statutory construction:

> As noted, the legislature has specifically empowered the IDOT to act in other areas, but not with respect to ATE systems. We have long recognized the principle of *expressio unius est exclusio alterius,* i.e., the expression of one is the exclusion of the other, as an aid to statutory interpretation. *See, e.g., Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013); *Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013); *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008).

Id., at 449.

Decided August 31, 2018 – Plaintiffs may proceed with Equal Protection, Substantive Due Process, and Privileges and Immunities Claims along with potential damages for violations of the Iowa Constitution

Weizberg v. City of Des Moines, ----- N.W.2d ----- (2018)(2018 WL 4178518)

Plaintiffs asserted the City of Des Moines Automated Traffic Enforcement (ATE) ordinance violated the equal protection, due process and privileges and immunities provisions of the Iowa Constitution. They further claimed that the ATE ordinance preempted state and local laws; created an unlawful delegation of government duties, and; as a result, the City of Des Moines was unjustly enriched. Plaintiffs urged the district court to allow a class action to seek unjust enrichment damages. They also requested declaratory and injunctive relief.

A majority of the Supreme Court, Appel, J., reversed the district court decision to grant the City of Des Moines' Motion to Dismiss the equal protection, substantive due process, and privileges and immunities[1] claims under the Iowa Constitution. The majority held there were distinctions

[1]In footnote 8, which is part of his dissent, Justice Mansfield noted: "Plaintiffs' references to the "privileges and immunities" clause of the Iowa Constitution are to the second clause of Article I, section 6, which is nowadays generally regarded as an equal protection guarantee and is

between this case and two others challenging ATE systems:

> The procedural distinction between *Behm* and this case is critical. Generally, a motion to dismiss should not be granted. We have stated that "nearly every case will survive a motion to dismiss under notice pleading." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009); *see also Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). If a claim is "at all debatable," we have advised against the filing or sustaining of a motion to dismiss. *Renander v. Inc., Ltd.*, 500 N.W.2d 39, 40–41 (Iowa 1993). This case thus stands in marked contrast to *Behm*, which was decided on a motion for summary judgment, and *Leaf*, where the matter actually went to trial. *See Behm*, —— N.W.2d at ——; *Leaf*, —— N.W.2d at ——.

The district court decision permitting plaintiffs' procedural due process claim to proceed was reversed. The court majority held that the ordinance complied with procedural due process (notice and opportunity for a meaningful hearing). Dismissal of claims of unlawful delegation was affirmed. The majority noted that if upon remand to the district court the plaintiff was able to prevail on the constitutional claims, then the plaintiff would be able to seek damages. A class certification was reversed because the plaintiffs were not representative of individuals who had paid civil penalties under the ordinance.

Mansfield, J., joined by Waterman, J., dissented. Justice Mansfield would have upheld the dismissal of the constitutional claims (equal protection, due process and privileges and immunities). The plaintiffs failed to resist the Motion to Dismiss by showing that the ordinance was irrational or that cost was not a legitimate concern in the framing of the ordinance. In further dissent, Justice Mansfield observed that the substantive due process claims seemed to be founded on the IDOT regulations of ATE systems which the court earlier had found were not valid.

Decided August 31, 2018 – Fundamental Right to Travel; Interaction between Ordinance and section 364.22, Iowa Code

Behm v. City of Cedar Rapids, ----- N.W.2d ----- (Iowa 2018) 2018 WL 4178517

The district court granted the city's Motion for Summary Judgment on plaintiffs' claims that the City of Cedar Rapids ATE ordinance violated various provisions of the Iowa Constitution, including equal protection, due process and privileges and immunities, and was an improper delegation of authority to a third party. The plaintiffs also contended that the ordinance interfered with the fundamental right to travel. Plaintiffs appealed. The case was referred to the court of appeals which affirmed the district court agreeing with most of its reasoning.

The Supreme Court addressed whether or not the Cedar Rapids ATE ordinance infringed upon the fundamental right to travel. The court concluded that it did not.

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also the basis of plaintiffs' equal protection claim. See Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6 of the Iowa Constitution*, 66 Drake L. Rev. 147, 148 (2018)."

> But we do not find the ATE ordinance in this case infringed any right to travel. The term "infringement" in this context is a term of art with at least some ambiguity, but it clearly does not mean anything that impacts travel. *See Matsuo*, 586 F.3d at 1184. Yet, if traffic regulations infringed the right to travel, there could be no traffic regulations. No one, however, can seriously question the power of the state or a municipality to impose speed limits on public highways. *See Moore v. Supreme Ct.*, 447 F.Supp. 527, 531 (D.S.C. 1977) (noting that while a sales tax or speed limit may influence decisions on whether to travel to a state, such statutes do not directly impinge on the fundamental right). Speed limits do not have the function or purpose of penalizing or discouraging travel itself and ordinarily do not impose substantial burdens on the traveling public. *See Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991) (emphasizing minor restrictions on travel do not amount to denial of a fundamental right). It is not surprising that courts that have considered the validity of ATE systems have not found the right to travel infringed by their enforcement. *See Hughes*, 840 F.3d at 995.

Behm v. City of Cedar Rapids, No. 16-1031, 2018 WL 4178517, at *14. Plaintiffs' substantive due process arguments rely heavily upon the IDOT regulations which were found to be invalid by the court in *City of Des Moines v. Iowa Dep't of Transportation*, 911 N.W.2d 431 (Iowa 2018). Plaintiffs' argued that the ordinance failed to provide procedural due process and was in conflict with section 364.22 of the Iowa Code:

> . . . [W]e find two problems emerge with respect to the ordinance. First, it provides that a person who does not respond to a notice of citation served by first-class mail pursuant to the ordinance "waives all defenses" and is liable the civil fine under the ordinance. Second, the ordinance purports to impose liability if a person who has proceeded through the administrative process fails to timely request that the City file a municipal infraction. *Id.* But, as seen above, liability for a municipal infraction can only be determined through the municipal infraction process and upon the entry of a judgment by the court. *See* Iowa Code § 364.22(4), (5)(b) (requiring city to file municipal infraction citations with the district court and with the county treasurer's office); id. § 364.22(10)(a)(1) (civil penalty may be imposed by court after entry of judgment).
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> The statute does provide for a default mechanism if the defendant fails to respond. *See id.* § 364.22(7). But the default provision kicks in only when the court determines that a person has been served as provided in Iowa Code section 364.22(4) (providing for service of a notice by personal service, certified mail, or publication and requiring that the notice, among other things, clearly indicate the time and place of a court appearance and the penalty for failure to appear in court) and the court further determines that the failure to respond was without good cause. Id. § 364.22(7). If these requirements are met, the statute provides that the court shall enter judgment against the defendant. Id.
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> Under the statute, it is clear that any liability that might arise from the failure of a defendant to respond to a municipal infraction is subject to judicial supervision under the standards elaborated in Iowa Code section 364.22. Such liability does not arise automatically as a result of a failure of a defendant to meet the procedural requirements of

> a local ordinance.
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> We conclude the provisions of the ordinance that purportedly impose liability on a protesting vehicle owner who does not respond to a notice of violation or who does not timely file a request with the City to institute a municipal infraction proceeding at the conclusion of the administrative process are irreconcilable with the provisions of Iowa Code section 364.22. Upholding these provisions of the ordinance would be tantamount to choosing the City's enactment over the legislature's enactment, contrary to *Seymour*, 755 N.W.2d at 541. If the City wishes to enforce liability under its ordinance upon a vehicle owner who does not voluntarily agree to pay, it must institute a municipal infraction action under Iowa Code section 364.22. As a result, we conclude that the district court erred in granting summary judgment to the defendant on the question of whether Iowa Code section 364.22 preempted the ordinance.

Behm v. City of Cedar Rapids, No. 16-1031, 2018 WL 4178517, at *29–30 (Iowa Aug. 31, 2018). The court split on the issue of whether or not the city improperly delegated the duty to properly calibrate the ATE equipment to the vendor. Chief Justice Cady and Justices Appel and Wiggins felt there was an improper delegation of duty and that the district court was wrong when it granted summary judgment for the city. Justices Mansfield, Waterman and Zager agreed with the district court. The decision of the district court was affirmed as a matter of law.

Justice Waterman dissented in part, arguing that the court should not have relied upon *Racing Ass'n of Central Iowa v. Fitzgerald (RACI II)*, 675 N.W.2d 1 (Iowa 2004) as part of its analysis of the claims of violation of the Iowa Constitution, and instead, should have overruled the decision.

> I am unable to join part IV because it embraces *RACI II*, a precedent that is plainly erroneous. The *RACI II* majority, purporting to apply the federal rational basis test, held that a tax differential for land-based and riverboat casino slot machine revenue violated the equal protection clause of the Iowa Constitution on remand after the unanimous United States Supreme Court held the differential did not violate the Federal Equal Protection Clause. 675 N.W.2d at 3. The *RACI II* majority thereby essentially took the position that the nine Justices of the United States Supreme Court were irrational in applying the same rational basis test in the same case, despite the well-settled and long-standing tradition of judicial deference to legislative classifications. *RACI II* was wrongly decided for the reasons set forth in the eloquent separate dissents by Justices Cady and Carter. See id. at 16–17 (Carter, J., dissenting); *id.* at 17–28 (Cady, J., dissenting); *see also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 110, 123 S.Ct. 2156, 2161, 156 L.Ed.2d 97 (2003) (reversing *RACI I* on federal equal protection grounds); *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI I)*, 648 N.W.2d 555, 563–64 (Iowa 2002) (Neuman, J., dissenting, joined by Carter and Cady, JJ.).
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> *RACI II* as a practical matter has been limited to its facts. We have never relied on *RACI II* to strike down another municipal or state legislative enactment. Yet members of this court persist in citing *RACI II* for the view that courts can apply "rational basis with

> teeth" to declare unconstitutional legislative enactments that do not involve fundamental rights or a protected class. The court's dicta today suggests that litigants can mount evidentiary challenges to ATE ordinances or other laws and that judges can then weigh the "evidence" to strike down a duly enacted law as unconstitutional. In my view, that use of *RACI II* is antidemocratic and contrary to basic principles of self-government. *See Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 240 (Iowa 2018) (Waterman, J. concurring) ("We need to be cognizant of the right of Iowans to govern themselves through laws passed by their chosen representatives, a right recognized explicitly in article I, section 2 [of the Iowa Constitution]."). The elected branches are accountable to voters. Judges, applying rational basis review to a record made by litigants, should not override legislative policy choices and classifications as irrational.

Behm v. City of Cedar Rapids, No. 16-1031, 2018 WL 4178517, at *44. Justice Waterman's partial dissent was joined by Mansfield, J., who also filed a partial dissent, focused on the issues of preemption and unlawful delegation.

Decided August 31, 2018 – Trial resulting in verdict against driver affirmed; Hearsay objection to evidence from ATE system rejected along with claims under the Iowa Constitution

City of Cedar Rapids v. Leaf, ----- N.W.2d ----- (Iowa 2018) 2018 WL 4178458

The City of Cedar Rapids ATE system determined that Leaf was speeding on Interstate 380 at the J Avenue Interchange. Leaf contested the citation. An administration hearing was held by telephone, and the challenge to the citation was denied. Leaf next requested that the City file a municipal infraction against her. Evidentiary hearing was held before a magistrate in small claims who found clear and convincing evidence that Leaf had violated the ordinance. Her legal challenges to enforcement were rejected. A civil penalty of $75.00 plus court costs was imposed. Leaf appealed to district court which affirmed the magistrate's decision. Leaf's appeal to the Supreme Court was transferred to the Iowa court of appeals which upheld the decisions below.

The Supreme Court, Appel, J., considered Leaf's contentions and affirmed the court of appeals and district court. Leaf first argued that evidence from the ATE equipment was hearsay and that there was no evidence to support the contention that the equipment was properly calibrated.

> Our review of the trial record reveals that Leaf candidly admitted she was driving her vehicle at the time and place recorded by the ATE system. Although she denied speeding, Cedar Rapids' ATE equipment recorded a violation. Cedar Rapids' witnesses testified that the equipment was properly calibrated and tested. As a result, it is not necessary for us to determine whether the district court erred in rejecting Leaf's hearsay objection to the admission of documents related to the calibration of the equipment. Based on our review of the record developed at trial, we conclude there was substantial evidence to support the small claims court's determination that Cedar Rapids proved by clear, satisfactory, and convincing evidence that Leaf violated the ordinance.

City of Cedar Rapids v. Leaf, No. 16-0435, 2018 WL 4178458, at *11. An argument that the ordinance and its enforcement substantially interfered with the right to travel, giving rise to claims of violations of the equal protection, privileges and immunities, and substantive due process provisions of the Iowa Constitution was rejected. Claims that procedural due process was violated along with an unlawful delegation of authorities were also rejected. The opinion noted that it had found IDOT regulations governing ATE systems to be invalid. The City of Cedar Rapids did not improperly delegate decisions regarding violations of the ATE ordinance. The company it employed to install and maintain the ATE system only mailed notices of violation which had been found by a City of Cedar Rapids police office. This was a ministerial function.

IOWA DOT ENFORCEMENT OFFICERS

Decided October, 19, 2018: Traffic Citations Issued by IDOT Enforcement Officers prior to May 11, 2017, found to be Invalid

Rilea v. Iowa Department of Transportation, ----- N.W.2d ----- (Iowa 2018) 2018 WL 5090853

Prior to May 11, 2017, two drivers were stopped and cited for speeding by Iowa Department of Transportation (IDOT) Motor Vehicle Enforcement (MVE) officers (Both drivers were stopped by an IDOT MVE officer and were cited for speeding in a construction zone.). The drivers contended the MVE officers did not have legal authority to issue citations for speeding. The IDOT disagreed and upheld the citations. The drivers appealed to the district court which found the IDOT MVE officers did not have authority to issue speeding citations.

The Supreme Court, Mansfield, J., affirmed the district court.

> . . . [W]e conclude that MVE officers lacked authority during the relevant time period to stop vehicles and issue speeding tickets or other traffic citations that did not relate to operating authority, registration, size, weight, and load. Neither Iowa Code chapter 321 nor Iowa Code chapter 804, the two fonts of authority cited by the IDOT, provided the necessary legal grounding for the MVE officers' actions.[2]

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[2]Prior to amendment, section 321.477 of the Iowa Code authorized IDOT peace officers "to make arrests for violations of the motor vehicle laws relating to ... operating authority, registration, size, weight, and load." Iowa Code § 321.477 (2016). Iowa Code section 321.477 was amended in 2017 with the amendment taking effect on May 11, 2017. The revised statute provides:

> 1. The [IDOT] may designate by resolution certain of its employees upon each of whom there is conferred the authority of a peace officer to enforce all laws of the state including but not limited to the rules and regulations of the department. Employees designated as peace officers pursuant to this section shall have the same powers conferred by law on peace officers for the enforcement of all laws of this state and the apprehension of violators.
> 2. Employees designated as peace officers pursuant to this section who are assigned to the

Rilea v. Iowa Dep't of Transportation, No. 17-1803, 2018 WL 5090853, at *1. Chapter 321 did not authorized IDOT MVE officers to enforce traffic laws and to issue citations for violations. Arguments based upon Chapter 804 by the IDOT were rejected. Chapter 804 permits citizens arrests. IDOT MVE officers were not private persons for purposes of Chapter 804.

Decided October 19, 2018: Conviction Based upon Citations Issued by IDOT MVE Officer for Speeding and Driving While License Revoked Overturned

State v. Werner, ----- N.W.2d ----- (Iowa 2018) 2018 WL 5090782

Jeremy Werner was stopped by an IDOT MVE officer in Iowa County on August 18, 2016. Werner was cited for traveling at 72 miles per hour in a construction zone. He was also found to be driving while his license was revoked. Werner argued that evidence and the citation issued to him should have been suppressed because the IDOT MVE officer did not have legal authority to stop him. The district court overruled the motion to suppress and found Werner guilty for driving while his license was revoked. Werner appealed.

The Supreme Court, Mansfield, J., relies upon *Rilea v. Iowa Department of Transportation*, decided the same day, to overturn Werner's conviction. The IDOT argued that sections 801.4(11) and 321.492 when read together authorized the MVE to stop a vehicle for any traffic violation; school bus safety standards might be unenforceable by IDOT MVE officers; the traffic stop of Werner was a citizen's arrest; community caretaking authorized the traffic stop, and; a stop for driving while license was under revocation was permissible. These arguments were rejected.

HABITUAL OFFENDERS

Decided October 19, 2018: Habitual Offender Provisions of sections 902.8 and 902.9 do NOT apply to OWI Third and Subsequent Offenses

Noll v. Iowa District Court for Muscatine County, ----- N.W.2d ----- (Iowa 2018) No. 17-0783

Richard Eugene Noll was found guilty by a jury in Muscatine County guilty of OWI. It was his third conviction. After trial Noll stipulated that he had two prior OWI convictions and two prior felony OWI, third offense, convictions. The district court adjudged Noll guilty of third offense OWI and being a habitual offender. Noll was sentenced to an indeterminate term of incarceration

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> supervision of the highways of this state shall spend the preponderance of their time conducting enforcement activities that assure the safe and lawful movement and operation of commercial motor vehicles and vehicles transporting loads, including but not limited to the enforcement of motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers, and registration of a motor carrier's interstate transportation service with the department.

Iowa Code § 321.477 (2018).

not to exceed fifteen years with a three-year mandatory minimum term of confinement; he was ordered to pay a $5000 fine, a 35% surcharge, court costs, attorney fees, and a $10 DARE surcharge. Five years after he was sentenced, Noll filed a "Motion to Correct Illegal Sentence" contending that he received an illegal sentence: "Iowa law no longer authorizes the State to impose habitual offender enhancements on an OWI 3rd." The state resisted. The district court denied the Motion. Noll appealed.

The Supreme Court, Wiggins, J., first noted that the proper way to challenge denial of a Motion to Correct an Illegal Sentence is by Writ of Certiorari. The court decided to treat the Notice of Appeal and brief filed by Noll as a Petition for Writ of Certiorari. See Iowa R. App. P. 6.108.

As part of his Petition for Writ of Certiorari, Noll contended that "the habitual offender sentence contained in sections 902.8 and 902.9 d[id] not apply to him because the legislature prescribed by statute in section 321J.2(5) the maximum and minimum sentence for felony OWI, third and subsequent offenses." The court concluded that the

> plain and ordinary meaning of the words used in sections 321J.2(5), 902.8, and 902.9 articulate a legislative intent that the court should not have sentenced Noll as a habitual offender. Section 902.9 states its sentencing scheme does not apply if the statute under which the court is sentencing the person prescribes the maximum sentence for that felony. Iowa Code § 902.9. Section 321J.2(5) prescribes the maximum sentence for OWI, third offense, as "an indeterminate term not to exceed five years, with a mandatory minimum term of thirty days." Id. § 321J.2(5)(a). It also follows that because the court should not have sentenced Noll as a habitual offender, he could not be subject to the minimum sentence in section 902.8. See id. § 902.8 ("A person sentenced as an habitual offender shall not be eligible for parole until the person has served the minimum sentence of confinement of three years." (Emphasis added.)).

The writ of certiorari was sustained, Noll's sentenced was vacated, and the case was returned to the district court for re-sentencing.

Decided April 6, 2018: Mailing Notice of Revocation of License as a Habitual Offender is NOT an element of section 321.561, Iowa Code

State v. Williams, 910 N.W.2d 596 (Iowa 2018)

Williams was stopped in Boone County after a motorist reported he was operating his vehicle erratically. A sergeant and deputy from Boone County determined at the scene that Williams was intoxicated and that his license to drive had been revoked. Williams was charged and tried for OWI and Driving While Barred. A jury found him guilty. He was sentenced to prison terms. Williams appealed. The court of appeals affirmed the district court.

A majority of the Supreme Court, Mansfield, J., considered only the issues related to whether or not proof of mailing notice of revocation of a driver's license was an element of proof to establish the crime of driving while barred. The opinion first focused on the statute:

> It shall be unlawful for any person found to be a habitual offender to operate any motor vehicle in this state during the period of time specified in section 321.560 except for a habitual offender who has been granted a temporary restricted license pursuant to section 321.215, subsection 2.

Iowa Code § 321.561. "Reading Iowa Code section 321.561, it requires a person found to be a habitual offender to be operating a motor vehicle in Iowa during a specified period of time. Iowa Code § 321.561. It does not refer to notice as part of the offense. *See id.*" *State v. Williams*, 910 N.W.2d 586, 590 (Iowa 2018). The conviction of Williams was affirmed.

Wiggins, J., joined by Appel, J., dissented. The focus of the dissent was a reading of the revocation provisions of Iowa law and their interaction with the habitual offender provisions. The dissent urged that mailing of notice of revocation was an element of the crime of habitual offender.

SEARCH AND SEIZURE

Decided June 29, 2018: Inventory of a Vehicle without obtaining a Warrant held to Violate the Iowa Constitution

State v. Ingram, 914 N.W.2d 794 (Iowa 2018)

Bion Ingram was stopped on highway 14 in Newton by an officer because his license plate was not illuminated as required by law. Upon further investigation it was determined the that vehicle was not registered. The officer decided to impound the vehicle. An inventory of the contents was performed. While conducting the inventory, a black cloth bag was found next to the gas pedal. Inside the bag was glass pipe and almost a gram of methamphetamine. Ingram was charged with possession of methamphetamine, second offense, and possession of drug paraphernalia. Ingram moved to suppress evidence from the search contending it violated the Fourth Amendment to the United States Constitution and article 1, section 8 of the Iowa Constitution. The motion to suppress was overruled. The trial court found that inventory searches are an exception to the warrant requirement. Ingram was found guilty and sentenced. He appealed, arguing that the Iowa Constitution provides greater protections from searches and seizures than the Fourth Amendment.

In one of the opening paragraphs, Appel, J., wrote:

> We accept the invitation to restore the balance between citizens and law enforcement by adopting a tighter legal framework for warrantless inventory searches and seizures of automobiles under article I, section 8 of the Iowa Constitution than provided under the recent precedents of the United States Supreme Court. In doing so, we encourage stability and finality in law by decoupling Iowa law from the winding and often surprising decisions of the United States Supreme Court. In the words of another state supreme court, we do not allow the words of our Iowa Constitution to be "balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme

> Court, following some tortuous trail." *Penick v. State*, 440 So.2d 547, 552 (Miss. 1983). We take the opportunity to stake out higher constitutional ground today.

State v. Ingram, 914 N.W.2d 794, 797–98 (Iowa 2018). Justice Appel, writing for the majority of the court, observed the ever changing standards enunciated by the United States Supreme Court under Fourth Amendment jurisprudence:

> In considering whether to adopt the evolving enabling of warrantless inventory searches and seizures of automobiles espoused by the United States Supreme Court into our interpretation of article I, section 8 of the Iowa Constitution, it is important to recognize the United States Supreme Court's approach in its warrantless inventory search and seizure caselaw has been highly contested. The nature and scope of the disputed law may be seen in an overview of the majorities and dissents in the warrantless inventory search and seizure cases. In several of the United States Supreme Court warrantless inventory search cases, the Court reversed decisions of state supreme courts limiting and regulating warrantless inventory searches under the Fourth Amendment. *See Bertine*, 479 U.S. at 376, 107 S.Ct. at 743; *Lafayette*, 462 U.S. at 648, 103 S.Ct. at 2610; *Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100 (majority opinion). A more detailed look at the United States Supreme Court opinions in the warrantless inventory search and seizure cases illustrates some of the constitutional choices available to us in the interpretation of article I, section 8 of the Iowa Constitution.

State v. Ingram, 914 N.W.2d at 805–06 (Iowa 2018). An extended discussion of United States Supreme Court search and seizure decisions along with a review of state supreme court rulings is provided in the opinion. Three justifications for conducting an inventory of an impounded vehicle without a warrant have been identified: (1) protect the state from false claims; (2) officer safety, and; (3) assisting the owner in protection of valuables. The opinion called into question these justifications and concluded that the owner should have been offered alternatives to the impoundment and warrantless search/inventory of the vehicle. The motion to suppress should have been granted. The case is remanded to the district court.

Cady, C.J., wrote a concurring opinion:

> As this case illustrates, the problem with the inventory search doctrine is it gives law enforcement officers free rein to conduct a warrantless investigatory search and to seize incriminating property, despite the doctrine's genesis as a means of protecting private property, guarding against false theft claims, and protecting officers from potential harm. *See South Dakota v. Opperman*, 428 U.S. 364, 369–70, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976). Yet, the three rationales that have allowed police to inventory the personal property located in an impounded vehicle may also be upheld by applying the more balanced doctrines of consent, plain view, *Terry*, and probable cause. Indeed, officers may protect private property by invoking the consent exception, and officers concerned about safety when handling requested items within a vehicle may apply the existing doctrines of plain view, *Terry*, and probable cause that currently exist to protect police in all encounters with citizens. This approach strikes a better balance between the interests

of citizens and the needs of government.

State v. Ingram, 914 N.W.2d at 821. Mansfield, J., joined by Waterman and Zager, JJ., concurred specially. Justice Mansfield offered the opinion that the case should have been decided under existing Fourth Amendment jurisprudence, rather than creating a new interpretation of Article 1, Section 8 of the Iowa Constitution.

Decided June 22, 2018: Stop and Search Upheld under the Community Caretaking Exception to the Search Warrant Requirement

State v. Coffman, 914 N.W.2d 240 (Iowa 2018)

Terry Coffman and his wife had stopped their car on the shoulder near Slater in Story County, Iowa, around 1:00 AM. A deputy sheriff observed the car; pulled over; turned on his red and blue lights, and; approached the vehicle to check on the welfare of the occupants. While walking to the car, the deputy observed what he believed might be a registration violation (A license plate bracket was covering the registration sticker, and it could not be determined if the registration was current.). Once at the driver's window, the deputy smelled a "strong"odor of alcohol and observed that the driver's eyes were red and watery. Field sobriety tests were conducted. Coffman failed. A preliminary breath test (PBT) indicated Coffman was under the influence of alcohol. He was charged with OWI, first offense. Coffman filed a motion to suppress arguing that the stop violated the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution. The district court overruled the motion. Coffman asked to re-open the record to distinguish the Fourth Amendment and article I, second 8 of the Iowa Constitution on the issue of the community caretaking doctrine. The district court ruled:

> A car parked on the shoulder of a highway at 1:00 a.m. in a rural area in Iowa should raise a number of concerns. There is a safety issue in having a vehicle parked within two feet of the traveled portion of a highway, especially at 1:00 a.m., in an area that is not lighted. Second, the occupant(s) of the vehicle might have car problems or medical issues that they are experiencing. Most people would not simply pull over to the side of the road in this type of setting at such an hour. It would have been irresponsible for Deputy Hochberger to simply drive by without checking on the vehicle.

State v. Coffman, 914 N.W.2d 240, 243 (Iowa 2018). Coffman was tired on the minutes of testimony. The district court found Coffman guilty. Coffman was sentenced to two days in jail and was ordered to pay a fine and surcharges. Coffman appealed. The court of appeals affirmed. The Supreme Court granted further review.

Mansfield, J. reviewed the community caretaking doctrine:

> We have said that application of the community caretaking exception involves a three-step analysis:
>
> > (1) was there a seizure within the meaning of the Fourth Amendment?; (2) if so,

> was the police conduct bona fide community caretaker activity?; and (3) if so, did the public need and interest outweigh the intrusion upon the privacy of the citizen?
>
> *Crawford*, 659 N.W.2d at 543; *accord Tyler*, 867 N.W.2d at 170; *Kern*, 831 N.W.2d at 173; *Kurth*, 813 N.W.2d at 277. We have cautioned that "[e]very community caretaking case must be assessed according to its own unique set of facts and circumstances." *Kurth*, 813 N.W.2d at 277.

914 N.W.2d at 245 (Iowa 2018). After reviewing Coffman's agreements as to why the community caretaker doctrine should be limited, the majority of the court concluded:

> . . . [W]e do not believe the conduct of the deputy in this case was unconstitutional or even deserving of criticism. Iowans expect law enforcement on patrol to offer a helping hand in situations like this where a motorist is pulled over on a public highway at night and may be in difficulty. As noted above, Iowa state troopers assisted over 10,000 motorists in need in a single year, and the sheriff's office of this county assisted nearly 1000 motorists in that time span. Applying the same three-part test we have used under the Fourth Amendment, but modifying it to impose a further requirement that the officer acted out of a genuine community caretaking motivation, we find that the stop here did not violate article I, section 8.

914 N.W.2d at 258. Appel, J. dissented (joined by Wiggins, J.). The dissent focused on whether or not the community caretaking doctrine meets the standards of the Iowa Constitution:

> The first question under *Crawford* is whether there was a seizure. 659 N.W.2d at 543. The State does not contest that a seizure occurred when the officer in this case activated his overhead emergency lights. There is ample authority for the proposition that a seizure occurs when a police officer activates emergency lights and pulls behind a parked vehicle. See, e.g., *Livingstone*, 174 A.3d at 621–25; *Anderson*, 362 P.3d at 1237. But see *Kramer*, 759 N.W.2d at 606 (assuming without deciding that driver was seized).
>
> The second question is whether the police officer was engaging in a bona fide community caretaking activity. *Crawford*, 659 N.W.2d at 543. In order to support the seizure in this case as a bona fide community caretaking activity, under the better-reasoned cases, there must be specific, peculiar, and articulable facts to support the notion that the occupants of the vehicle consented to receiving assistance. See *Schmidt*, 47 P.3d at 1274; *McDonough*, 346 Ill.Dec. 496, 940 N.E.2d at 1109. We said as much in *Crawford*, where we stated that "specific and articulable facts" were required to support the warrantless seizure. 659 N.W.2d at 542–43.
>
> The requirement of specific, peculiar, and articulable facts is critical to any community caretaking analysis. Even the cases that embrace the public-servant prong of community caretaking emphasize the need for providing effective limits to prevent abuse. See *Livingstone*, 174 A.3d at 637; *McCormick*, 494 S.W.3d at 688. Without clear controls, the

> public-servant prong could swallow search and seizure protections. *Ray*, 88 Cal.Rptr.2d 1, 981 P.2d at 941 (Mosk, J., dissenting). If there is to be a public-servant aspect of the community caretaking exception, it must be carefully controlled.

914 N.W.2d at 271. Justice Appel concluded that the seizure was invalid under article I, section 8 of the Iowa Constitution.

ABORTION REGULATION

Decided June 29, 2018: Statute Requiring a 72 Hour Waiting Period for an Abortion Overturned

Planned Parenthood of the Heartland v. Reynolds ex rel State, 915 N.W.2d 206 (Iowa 2018)

Planned Parenthood of the Heartland (PPH) challenged Iowa Code ch. 146A (2018) which created prerequisites for physicians performing an abortion, including a mandatory 72-hour waiting period between informational and procedure appointments. PPH argued that the statute violated the equal protection and substantive due process provisions of the Iowa constitution.

The majority opinion was written by Chief Justice Cady. In the opinion, there is a detailed discussion of the actions of PPH staff before a client actually has an abortion:

> At trial, PPH offered uncontested evidence demonstrating nearly all patients schedule their abortion appointments after giving considerable thought to their decision and after making a firm decision. The majority of questions patients ask during the education phase relate to the medical procedure itself—usually how to take the misoprostol at home and when to call the clinic. Jason Burkhiser-Reynolds, the Center Manager for the Des Moines clinic, testified that in his experience, almost all patients are firm in their decisions. Burkhiser-Reynolds works with patients individually and frequently acts as a patient educator. In his experience, no patient has ever expressed regret, wished she had more time, wished she had continued the pregnancy, or believed she was rushed through the education session. PPH offered expert testimony, which the State did not contest, that the vast majority of abortion patients do not regret the procedure, even years later, and instead feel relief and acceptance.

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 217–18 (Iowa 2018). The majority opinion reviewed a number of statistics regarding obstetrical care for women in Iowa.

- Iowa ranks 46th in the nation for OB/GYN practitioners
- 66 of the state's 99 counties do not have an OB/GYN
- 7.6% of family practitioners perform pregnancy ultrasounds in their offices
- Rural residents wait from 2 to 6 weeks to see an obstetrician
- Close to half of the physicians in Iowa are employed by a hospital system
- 40% of the hospitals in Iowa are affiliated with Catholic organizations which

prohibit abortion care

> . . . [W]omen in Iowa face significant obstacles in procuring an abortion. There is scarce OB/GYN access. A majority of PPH patients live in poverty and must somehow gather the resources to obtain the procedure, women must travel significant distances to the nearest clinic, and women who are victims of domestic violence or assault face additional barriers beyond those imposed by distance and poverty.

915 N.W.2d at 220. Considering the substantive due process claim, the opinion observed that such claims are not easy to establish. At the same time, "the constitutional right to an abortion was grounded in the deeply personal nature of the decision. It is part of the host of personal freedoms that emanate from the concept of 'liberty' guaranteed under the Due Process Clause." 915 N.W.2d at 234. The court majority also noted:

> The Iowa Constitution "is a living and vital instrument." *In re Johnson*, 257 N.W.2d 47, 50 (Iowa 1977). "[U]nlike statutes, our constitution sets broad general principles. ... Its very purpose is to endure for a long time and to meet conditions neither contemplated nor foreseeable at the time of its adoption." *Id.* We have explained that our constitution "must have enough flexibility so as to be interpreted in accordance with the public interest. This means they must meet and be applied to new and changing conditions." *Pitcher v. Lakes Amusement Co.*, 236 N.W.2d 333, 335–36 (Iowa 1975). Indeed, we once noted we had "freed ourselves from the private views of the constitution's framers which were in many cases but accidents of history." *Id.* at 336.
>
> > [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.
>
> *Id.* (quoting *United States v. Classic*, 313 U.S. 299, 316, 61 S.Ct. 1031, 1038, 85 L.Ed. 1368 (1941)). Our constitutional doctrines "are not necessarily static, and [our analysis] instead considers current prevailing standards that draw their 'meaning from the evolving standards ... that mark the progress of a maturing society.' " *Griffin v. Pate*, 884 N.W.2d 182, 186 (Iowa 2016) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958)). Ultimately, "[t]his approach reveals the enduring strength of our constitution." *Id.*

915 N.W.2d at 236. The majority further stated, "Autonomy and dominion over one's body go to the very heart of what it means to be free. At stake in this case is the right to shape, for oneself, without unwarranted governmental intrusion, one's own identity, destiny, and place in the world.

Nothing could be more fundamental to the notion of liberty. We therefore hold, under the Iowa Constitution, that implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy." 915 N.W.2d at 237. The right to an abortion is not limited. It is subject to reasonable regulation. Strict scrutiny is the standard by which the provision will be evaluated (Is the statute narrowly tailored to meet the state's compelling interest?). The statute failed to satisfy the strict scrutiny standard. As a result the 72 hour waiting requirement was found to violate due process under the Iowa Constitution.

The 72 hour provision also was found to be contrary to the equal protection provisions of the Iowa Constitution:

> When a state action infringes upon a fundamental right, the guarantee of equal protection of the law requires the state to demonstrate the action is narrowly tailored to serve a compelling government interest. *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005). As discussed, we conclude the Act cannot satisfy strict scrutiny. Thus, we hold the "seventy-two hour[ ]" waiting requirement of Division I of Senate File 471 violates the right to equal protection under the Iowa Constitution.

915 N.W.2d at 245–46. Mansfield, J., dissented. The dissent was joined by Waterman, J. Justice Mansfield wrote, "After considering the text, original meaning, and subsequent interpretation of the constitutional provisions at issue, the record in this case, the district court's carefully written decision, and abortion cases from around the country, I conclude that the waiting period in Senate File 471 does not violate either article I, section 9 or article I, section 6 of the Iowa Constitution." 915 N.W.2d at 246.

PUBLIC DUTY DOCTRINE

Decided June 8, 2018: Summary Judgment Based upon Public Duty Doctrine Affirmed

Johnson v. Humboldt Cty., 913 N.W.2d 256 (Iowa 2018)

Kaitlyn Johnson was a passenger in a pickup truck driven by her then husband. He fell asleep. The truck went off a Humboldt County road, into a ditch, and struck a concrete embankment which had been erected by a landowner (The county had a right-of-way easement over the land where the embankment was located.) Johnson suffered severe injuries. She sued the landowner and the county. Both the landowner and the county moved for summary judgement. The district court denied summary judgment for the landowner but granted summary judgment to the county based upon the public duty doctrine. The plaintiff appealed.

The Supreme Court in a majority opinion by Mansfield, J. affirmed the grant of summary judgment to the county based upon the public duty doctrine. The majority opinion relied upon the recent opinion in *Estate of McFarlin v. State*, 881 N.W.2d 51 (Iowa 2016)(The public duty doctrine was upheld in connection with the placement of and warnings about a dredge pipe in a lake owned and maintained by the state.)(*Estate of McFarlin* is also a 4 to 3 decision.).

> "Under the public-duty doctrine, 'if a duty is owed to the public generally, there is no liability to an individual member of that group.' " *Id.* at 58 (quoting *Kolbe v. State*, 625 N.W.2d 721, 729 (Iowa 2001)). "[A] breach of duty owed to the public at large is not actionable unless the plaintiff can establish, based on the unique or particular facts of the case, a special relationship between the [governmental entity] and the injured plaintiff...." *Kolbe*, 625 N.W.2d at 729.

Johnson v. Humboldt Cty., 913 N.W.2d 256, 260 (Iowa 2018). Wiggins, J., joined by Appel and Hecht, JJ., dissented. Justice Wiggins argued that the county had an affirmative duty to act regarding the embankment:

> The County has a statutory obligation to remove the concrete embankment in the ditch pursuant to Iowa Code section 318.4, yet the County failed to do so. Section 318.4 provides, "The highway authority shall cause all obstructions in a highway right-of-way under its jurisdiction to be removed." Iowa Code § 318.4 (2013).
>
> Section 37 of the Restatement (Third) of Torts provides, "An actor whose conduct has not created a risk of physical ... harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 37, at 2 (Am. Law Inst. 2012) [hereinafter Restatement (Third)].
>
> Section 38 of the Restatement (Third) provides, "When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty." Id. § 38, at 21. Furthermore, comment c of section 38 provides,
>
> > When the legislature has not provided a [private cause of action], but the interest protected is physical ... harm, courts may consider the legislative purpose and the values reflected in the statute to decide that the purpose and values justify adopting duty that the common law had not previously recognized.
>
> *Id.* § 38 cmt. c, at 22.

913 N.W.2d at 268. The dissent characterizes the public duty doctrine as confusing and inconsistent and noted that a number of jurisdictions have either been limiting or rejecting the public duty doctrine.

ASSAULT AND CHILD ENDANGERMENT

Decided October 19, 2018; opinion amended October 25, 2018; Conviction on charges of Assault and Child Endangerment Overturned/New Trial Ordered

State v. Benson, ----- N.W.2d ----- (Iowa 2018) No. 17-0650

Owen Benson used a wooden handle from a toy broom stick to spank his fiancé's three minor children. The children had caused some damage to furniture. Investigation by the Department of Human Services resulted in Woodbury County authorities filing charges against Benson for assault causing bodily injury and child endangerment in connection with the spanking of the youngest of the three children, Z.B. A jury convicted Benson on both charges. He filed a Motion for New Trial contending the conviction was contrary to the weight of the evidence. The Motion was denied. The court of appeals affirmed the conviction.

The Supreme Court, Christensen, J., overturned the conviction and ordered a new trial, concluding that the marshaling instructions regarding intent failed to properly inform the jury about which type of intent applied to which charge. The court agreed with Benson that the way the instructions were given had a tendency to mislead the jury about intent.

> Th[e] confusion could have been resolved with a marshaling instruction explaining which form of intent applied to which charge, such as:
>
> INSTRUCTION NO. 15
> [Concerning Instruction 16 only,] "specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind . . . .

The court also noted that there with instances in the record about statements "made to the jury during Benson's trial may have created further confusion for the jury as to the requisite intent for each charge."

Benson's arguments that there was insufficient evidence to support a finding that he assaulted Z.B. and committed child endangerment were rejected by the court.

STATE REGULATION

Decided October 12, 2018: Claim by Manufacturer and Seller of Electronic Games that Registration was not needed Rejected

Banilla Games, Inc. v. Iowa Department of Inspections and Appeals, ----- N.W.2d ----- (Iowa 2018) No. 17–1300

Banilla Games manufactured and sold electronic devices "Superior Skill 1" and "Superior Skill 2". It contended the games were not subject to registration pursuant to Iowa Code section 99B.53 (2016). Section 99B.52 of the Code provides in relevant part:

> [A]n electrical or mechanical amusement device in operation or distributed in this state that awards a prize where the outcome is not primarily determined by skill or knowledge of the operator shall be registered by the department as provided in this section.

The Iowa Department of Inspections and Appeals found that the outcomes of the two games were

not dependent upon the skill of the person playing them. The Department required the games to be registered as provided by Iowa law. The district court on judicial review affirmed the Department of Inspections and Appeals.

The Supreme Court, Wiggins, J., concluded that the Department of Inspections and Appeals properly interpreted section 99B.52; that the Department did not prejudice the substantial rights of the manufacturer and seller based upon an irrational, illogical, or wholly unjustifiable application of law to fact, and; the substantial rights of the manufacturer and seller unreasonably, arbitrarily, capriciously, or through an abuse of discretion were not prejudiced.

PREMARITAL AGREEMENTS

Decided on July 6, 2018: Premarital Agreement on Attorney Fees found to be contrary to statute and not enforceable

In re Marriage of Erpelding, 917 N.W.2d 235 (Iowa 2018).

Prior to their marriage in Las Vegas, Tim and Jodi Erpelding executed a premarital agreement. It provided regarding attorney fees in the event of a dissolution of marriage:

> the Parties shall have no other rights to property, interests in property, property settlement, attorney fees and expenses upon the filing of a petition requesting legal separation, divorce, dissolution or other judicial termination of their marriage, and upon the Court granting any such petition and thereafter.

In re Marriage of Erpelding, 917 N.W.2d 235, 237 (Iowa 2018). After 18 years of marriage, Jodi Erpelding filed for dissolution. Among the issues litigated were child custody, child support, property division and attorney fees. The district court denied Jodi Erpelding's claim for attorney fees, citing the plain language of the agreement and the lack of a public policy prohibiting an attorney fee provision such as was in the parties' premarital agreement. Jodi Erpelding appealed. The court of appeals reversed the district court holding "the provision in the Erpelding' premarital agreement waiving [attorney] fees and costs is void and unenforceable as to child-related issues because it violates Iowa 'public policy by discouraging both parents from pursuing litigation in their child's best interests.' " The court of appeals did not consider the Iowa Uniform Premarital Agreement Act (IUPAA).

The Supreme Court, Hecht, J., held that the Iowa Uniform Premarital Agreement Act (IUPAA), see especially, section 596.5(2), Iowa Code, applied to the premarital agreement.[3] The opinion

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[3]The statute provides in relevant part:

> 1. Parties to a premarital agreement may contract with respect to the following:
> ....
> g. Any other matter, including the personal rights and obligations of the parties, not in violation of public policy or a statute imposing a criminal penalty.

provided, "[A] premarital-agreement waiver of attorney fees pertaining to child support or spousal support is unenforceable because it adversely affects a spouse's or child's right to support in contravention of section 596.5(2)." *In re Marriage of Erpelding*, 917 N.W.2d at 238–39 (Iowa 2018). Any provision in a premarital agreement effecting child custody was held to be contrary to Iowa public policy.

> Given the need to take into account the best interests of the children, we find provisions in a premarital agreement that limit child custody rights are void as a matter of public policy. *See In re Marriage of Best*, 387 Ill.App.3d 948, 327 Ill.Dec. 234, 901 N.E.2d 967, 970 (2009) ("The law severely limits on public policy grounds the enforceability of contracts affecting the custody and support of minor children. Illinois law per se rejects premarital agreements that impair child-support rights or specify custody.").

In re Marriage of Erpelding, at 246–47. (Iowa 2018). The case is returned to the district court for a determination of the amount of attorney fees to be awarded Jodi Erpelding for child custody, child support, and spousal support issues litigated in the dissolution matter in the district court and appellate attorney fees for the child custody, child support, and spousal support issues.

PROMISSORY ESTOPPEL

Decided on November 2, 2018: Promissory Estoppel is Premised upon a Promise, Not Agreement

Kunde v. Estate of Arthur D. Bowman, ----- N.W.2d ----- (Iowa 2018) No. 17-0791

Ronald Kunde and Arthur Bowman entered into an option contract related to farm land in Jackson County, Iowa. Kunde agreed to lease the property and to make improvements to the land at his expense. The improvements Kunde made, including labor, totaled about $52,000.00. In August 2013, Kunde attempted to exercise his option, Bowman's daughter said she had found a third party right of first refusal. When Bowman learned of his daughter's position, he told Kunde "I feel like I lied to you." After Bowman died, his Estate gave notice of termination of the lease and the farm was sold. Kunde sued the Estate for breach of contract and equitable remedies: promissory estoppel, unjust enrichment and quantum meruit. A jury trial resulted in a finding of breach of contact and damages of $52,000.00 for Kunde. The district court then granted defendant's motion for directed verdict on the contract claim and denied Kunde's motion for new trial on the equitable claims. Kunde appealed. The court of appeals affirmed the district court's directed verdict on the contract claim, but ordered a new trial on the equitable claims. Upon remand the district court granted defendant's motion for summary judgment on the equitable relief claims. Kunde appealed, again. The court of appeals reversed the district court decision on the promissory estoppel claim. The Supreme Court granted further review.

> 2. The right of a spouse or child to support shall not be adversely affected by a premarital agreement.

Iowa Code § 596.5(1)(g), (2).

The Court, Appeal, J., held there were two questions to be answered: (1) whether the plaintiff may bring a claim for the cost of improvements to the property based on implied contract in the face of an express contract which allocated the cost of improvements, and; (2) whether the plaintiff may seek to bring a claim of promissory estoppel under the facts and circumstances of this case.

The court observed that Kunde's unjust enrichment and quantum meruit claims focused on the improvements made to the real estate. The lease provided that any improvements made by Kunde would be considered additional rent and the improvements would inure to the real estate. If Kunde wanted Bowman to pay for any improvements, Bowman had to agree in writing. The court concluded that the district court was correct when it dismissed the unjust enrichment and quantum meruit claims.

The court found with regard to the promissory estoppel claim that Kunde made improvements to the property based upon a promise that he had an option to purchase the land.

> While Kunde's attempt to shift the costs of improvements to Bowman under his unjust enrichment and quantum meruit theories flies directly in the face of explicit contractual terms allocating the cost of improvements, the notion that Bowman promised Kunde an option to purchase the farmland that he improved is not necessarily inconsistent with the terms of the lease. *See Levien Leasing Co. v. Dickey Co.*, 380 N.W.2d 748, 752 (Iowa Ct. App. 1985) (finding that option to purchase is not necessarily inconsistent with written lease even though the written lease contained an integration clause when the evidence showed a practice of separating a lease from an option to purchase); *see also Walker v. Horine*, 695 S.W.2d 572, 577 (Tex. App. 1985) (per curiam) (holding that lease and option are separate agreements even though executed on same day because each agreement gives the parties separate benefits as well as separate obligations); *Bess v. Jensen*, 782 P.2d 542, 544–45 (Utah Ct. App. 1989) (holding that lease and option are separate agreements because executed in different documents and supported by different consideration); *Ledaura, LLC v. Gould*, 237 P.3d 914, 921–22 (Wash. Ct. App. 2010) (holding that lease and option are separate agreements even though executed on consecutive days by the same parties concerning the same property). Further, we note that in this case, the farm leases did not contain an integration clause suggesting that the leases were designed to represent the sole expression of the parties' relationship.

The opinion further noted that the decision to allow Kunde to proceed with the promissory estoppel claim did not rewrite the contract. "[W]e are simply holding that Kunde has raised a triable issue on the question of whether he made his improvements at his own expense in reliance upon the alleged promise of an option to purchase the land."

The court also addressed the use of the term agreement and promise in various decisions dealing with promissory estoppel. The court concluded:

> The issue in this case is whether promissory estoppel requires the presence of a "clear and definite agreement" or whether it is sufficient for a party to present evidence of a "clear

> and definite promise" of the type that the promisor would understand would cause the promisee to rely upon. We think it clear that a "clear and definite promise" is sufficient if the other elements of promissory estoppel are met.

See also Restatement (Second) of Contracts, section 90, especially illustration 12. The case is remanded to the district court for further proceedings on the promissory estoppel claim.

REMOVAL OF A COUNTY ATTORNEY FROM OFFICE

Decided June 29, 2018: County Attorney Removed from Office for Misconduct Reinstated

State v. Watkins, 914 N.W.2d 827 (Iowa 2018)

Abraham K. Watkins was Van Buren County Attorney. A former assistant Iowa Attorney General with experience in matters involving public official misconduct was employed by the Board of Supervisors to investigate complaints against Watkins about his conduct in office. After reporting to the Board about Watkins' conduct, it was recommended that an acting county attorney be retained and that proceedings to remove Watkins from office be commenced. The petition against Watkins alleged:

> Four involved allegations that Watkins engaged in "willful misconduct or maladministration in office" in violation of Iowa Code section 66.1A(2) by (1) creating a "hostile work environment" that included sexual harassment, (2) supplying a minor with alcohol in violation of Iowa Code sections 123.47(1) and 123.47(2)(a), (3) retaliation, and (4) accepting three private-practice cases that created conflicts of interest with his position as county attorney. The petition also sought Watkins's removal on the ground that he had been intoxicated in violation of Iowa Code section 66.1A(6).

State v. Watkins, 914 N.W.2d 827, 835 (Iowa 2018). After trial, the district court entered its Order:

> The district court ordered Watkins's removal from the office of Van Buren County Attorney solely based on the sexual-harassment claim. In reaching its decision, the district court found a "significant contrast between the recollections of the State's witnesses versus the recollections of Mr. Watkins; his wife; and current employee, Ms. Richardson." The district court found the State's witnesses more credible and considered their testimony to be truthful because nothing indicated the witnesses fabricated their testimony or had a substantial personal interest in the outcome in comparison to Watkins's witnesses, who, the district court noted, were not eager to testify.

914 N.W.2d at 836. Watkins appealed.

Zager, J., wrote for a majority of the court

> to remove a public official from office for willful misconduct or maladministration in

> office, the State has the burden to prove by clear, convincing, and satisfactory evidence that the official committed the charged acts "intentionally, deliberately, with a [subjectively] bad or evil purpose, contrary to known duty." *Roth*, 162 Iowa at 651, 144 N.W. at 344; *see Smith*, 232 Iowa at 255, 4 N.W.2d at 268."

914 N.W.2d at 842. It is noted that the district court in its opinion to remove Watkins from office relied upon the Iowa Rules of Professional Conduct and civil employment law. The district court did not consider Chapter 66 and Iowa supreme court precedents interpreting that law:

> Instead, the district court focused on three things. First, it emphasized that Watkins repeatedly engaged in "unacceptable behavior." As the district court explained, "[T]he citizens of any county have a strong interest in ensuring that their elected officials behave appropriately." Second, the court noted that Watkins's conduct could create monetary liability for the county. Third, the district court observed that Watkins was an attorney and the Iowa Rules of Professional Conduct prohibit "any physical or verbal act of a sexual nature that has no legitimate place in a legal setting" regardless of whether a sexual-harassment claim is established as defined in the civil rights laws. *Moothart*, 860 N.W.2d at 604.
>
> To be clear, sexual harassment in any form is never acceptable or appropriate behavior. It is important that our court system, like all institutions, protect and support victims of sexual harassment. Watkins's actions and statements were disgraceful, disrespectful, and inappropriate. Certainly, we do not condone such behavior. As morally reprehensible as we find Watkins's behavior, this is not the standard by which we need to analyze whether the State has met its high burden to establish whether Watkins committed willful misconduct or maladministration in office by creating a sexually hostile work environment. We are a court of law, not a court of public opinion.

914 N.W.2d at 844. The court majority orders that Watkins be reinstated as county attorney and that he be allowed attorney fees related to the removal action:

> In our democratic system of government, it is vitally important that the judiciary not be seen as imposing standards of conduct on elected officials, even if those standards are firmly grounded. We are judges, not guardians of behavior for elected officials. We do not believe the legislature intended to allow courts to remove elected officials for crude, outrageous, or even shocking behavior by itself. Nor do we believe the potential for governmental monetary liability should be the basis for invoking chapter 66. There are many instances where the conduct of public officials exposes the government to financial liability; only a few warrant the drastic remedy of removal. The facts of this case do not warrant such a drastic remedy under our precedent.
>
> Chapter 66 places significant authority in the hands of the judiciary. We must keep in mind the possibility that this authority could be misused in a partisan way to benefit one political faction or one elected official at the expense of another. The judiciary should

exercise considerable restraint in such disputes.

914 N.W.2d at 847. Mansfield and Waterman, JJ. joined in the opinion. Appel, J. filed a concurring opinion. "I want to make clear that today should not be regarded as a vindication for Watkins. By the narrowest of margins, he has escaped heroic, quasi-penal judicial removal from his office of county attorney. In short, this case should be a model for county attorneys of how not to conduct themselves in office." 914 N.W.2d at 848.

Chief Justice Cady dissented. His dissent was joined by Hecht, J. The dissent concluded that Watkins' conduct created a hostile work environment. "He consistently, over the course of months, made unwelcome and sexually charged comments to Wallingford [a twenty year old woman employed by Watkins as a legal assistant] and in her presence and engaged in misconduct in office." 914 N.W.2d at 858.

> While the plurality sees itself as upholding the integrity of elections, such a view weakens the checks and balances of government. The very purpose of the removal statute is to undo an election. Moreover, the opinion reveals the enduring vestiges of de jure discrimination. We were able to see with clarity in 1978 that no sheriff could possibly believe that brutalizing a prisoner is permissible, yet still cannot see with clarity today that no employer could possibly believe that creating a workplace atmosphere defined by degrading women is permissible. One view is not less serious than the other. Both are but different forms of willful misconduct. It is time for but one view to exist. The prolonged period of societal disinterest in the plight of working women must no longer obscure how inappropriate comments about one woman unquestionably concerns all women in the workplace.
>
> Watkins's conduct was more than "inappropriate" and "disrespectful"—it was discriminatory. He deliberately subjected Wallingford to a barrage of indignities directed solely at women. An officer who intentionally discriminates on the basis of sex commits grave misconduct in office and is removable under section 661.A.

914 N.W.2d at 861. Wiggins filed a separate dissent.

> A majority of the members of this court holds the allegations of sexual harassment do not amount to "willful misconduct or maladministration in office" warranting removal. I disagree with this conclusion and must dissent. I would find the State provided sufficient evidence to show willful misconduct on the part of Abraham Watkins.

914 N.W.2d at 861. In the mid-term 2018 elections, Watkins sought re-election. He received 583 votes compared to his Republican challenger, H. Craig Miller, who received 2,165 votes. https://ottumwaradio.com/2018-midterm-election-results-2/2018-van-buren-county-midterm-election-results/ (November 7, 2018).

STATE/QUALIFIED IMMUNITY

Decided June 29, 2018: Certified Question from the United States District Court for the Northern District of Iowa Regarding Qualified Immunity from Damages for Violations of the Iowa Constitution

Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018)

Greg Baldwin was charged with violation of a city ordinance for operating an ATV on a city roadway and in a ditch along the roadway. The trial court found that the ordinance under which Baldwin was charged had not been adopted by the city council and was not in force and effect at the time of Baldwin's acts. The case against Baldwin was dismissed with costs assessed to the city.

Baldwin filed civil suit in district court seeking damages from the city and its police officers under various theories, including violations of his rights under article I, sections 1 and 8 of the Iowa Constitution and his rights under the Fourth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983. The defendants removed the case to the United States District Court for the Northern District of Iowa as the case presented a federal question. The federal district court granted defendants' motion for summary judgment on Baldwin's §1983 claims on two grounds: (1) that the officers did not lack probable cause for Baldwin's arrest, and; (2) that they were entitled to qualified immunity. Summary judgment was also granted on Baldwin's common-law false arrest claim.

The question presented to the Iowa Supreme Court by the federal district court was: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of article I, § 1 and § 8 of the Iowa Constitution?" *Baldwin v. City of Estherville*, 915 N.W.2d 259, 260 (Iowa 2018). For a majority of the court, Mansfield, J., responded:

> A defendant who pleads and proves as an affirmative defense that he or she exercised all due care to conform with the requirements of the law is entitled to qualified immunity on an individual's claim for damages for violation of article I, sections 1 and 8 of the Iowa Constitution.

915 N.W.2d at 260–61. The court majority rejects the idea that violations of constitutional rights under the Iowa Constitution should be subject to strict liability. The court looks to traditional tort concepts:

> . . . We believe instead that qualified immunity should be shaped by the historical Iowa common law as appreciated by our framers and the principles discussed in *Restatement (Second) of Torts* section 874A.
>
> This means due care as the benchmark. Proof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's

> Constitution. See *Hetfield*, 3 Greene at 585; Howe, 12 Iowa at 203–04. And it is still the basic tort standard today. See *Restatement (Second) of Torts* § 874A (discussing reliance on analogous tort standards).
>
> Because the question is one of immunity, the burden of proof should be on the defendant. See *Anderson v. State*, 692 N.W.2d 360, 364 (Iowa 2005) (indicating that the party asserting the discretionary function immunity has the burden to prove it). Accordingly, to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.

915 N.W.2d at 280. The court majority concluded:

> Constitutional torts are torts, not generally strict liability cases. Accordingly, with respect to a damage claim under article I, sections 1 and 8, a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law.

915 N.W.2d at 281. Appel and Hecht, JJ., dissented. The dissent questioned the limitation being placed upon remedies for a legal violation.

> The notion that judges may create a "gap" between constitutional rights and the remedies afforded is untenable. The consequence of such a gap is to effectively reduce the constitutional protections afforded to the public. To the extent they are not enforced, the nice words in the constitution do not mean what they seem to mean.

915 N.W.2d at 284. The dissent was very blunt in its observations about the effects of the qualified immunity defense accepted by the majority:

> The importance of claims brought under article I, section 1 of the Iowa Constitution cannot be rendered a mere appendage either. Article I, section 1 was purposefully placed at the beginning of the Bill of Rights. See 1 *The Debates of the Constitutional Convention of the State of Iowa* 103–04 (W. Blair Lord rep. 1857), [hereinafter The Debates], http://www.statelibraryofiowa.org/services/collections/law-library/iaconst. It makes the point of emphasizing "inalienable rights," which, I take it, includes rights that cannot be abrogated by the legislature, or this court. Further, the "free and equal" provision of article I, section 1 is at the heart of our government structure and provided the constitutional foundation to *Coger v. Northwestern Union Packet Co.*, an important and highly celebrated case prohibiting discrimination by a steamboat operator against a female passenger "partly of African descent." 37 Iowa 145, 147, 153–55 (1873). Like article I, section 8, this constitutional provision is not the place to cut remedial corners. Indeed, it is an area requiring exceptional remedial vigilance.
>
> In short, when citizens suffer potentially grievous harms from unconstitutional conduct in violation of article I, section 1 or article I, section 8, we should require the officials who

> engaged in the unconstitutional conduct to bear the burden of the loss. We should not allow the officials who engage in unconstitutional conduct to respond to the prayer of the harmed citizen with, "Aw, tough luck. Tut tut. Bye bye."

915 N.W.2d at 285. The dissent observed that the negligence standard could be applied in an unsound fashion that might "chew and choke potential liability." 915 N.W.2d at 300.

> There is also some ominous language in the majority opinion suggesting that various provisions of Iowa Code chapters 669 and 670 might be used to ensure that Iowa citizens cannot recover for the constitutional harms caused by government officials. As indicated above, application of legislative restrictions on the ability of private citizens to recover for constitutional harms imposed on them by the government has a fox-in-the-henhouse quality. The very suggestion, for instance, that Iowa Code section 669.14(4), which prohibits "[a]ny claim [for damages] arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," is a legislatively created vehicle to prevent citizens from recovering from grievous constitutional harm is astounding. The idea that the government might be immune from liability for an unconstitutional beating using excessive force, for example, is what one might expect in an authoritarian state, not a democracy. Further, the suggestion that punitive damages may not be awarded for constitutional torts, as suggested in Iowa Code section 670.4(1)(e), would be absolutely astounding to the founding and antebellum generations so familiar with the *Wilkes* cases. If there are to be any cases where private citizens who are harmed by unconstitutional conduct are to be prevented from being compensated by the officers who caused the harm, that decision should be determined by the court and not the legislature.

915 N.W.2d at 301. The dissent concluded that the majority opinion is misguided in light of the history of liberty and the placement of the bill of rights in the Iowa Constitution.

NUISANCE/SUMMARY JUDGMENT

Decided June 22, 2018: Summary Judgment Decision Finding Section 657.11(2), Iowa Code Unconstitutional Overturned

Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223 (Iowa 2018)

Plaintiffs filed nuisance claims against Valley View Swine in connection with operation of confined animal feeding operations (CAFO) in Wapello County. Defendants filed motion for summary judgment contending that Iowa Code section 657.11(2) (2016)[4] barred plaintiffs's

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[4]Section 657.11(2) provides:

> 2. An animal feeding operation, as defined in section 459.102, shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action.

claims. The plaintiffs could not meet the requirements of the statute to recover special damages against the CAFOs. The plaintiffs sought partial summary judgment to strike the defendants' statutory immunity defense under section 657.11(2). The trial court denied the defendants' motion and granted plaintiffs partial summary judgment, concluding that "section 657.11(2) was unconstitutional as applied to the plaintiffs under article I, section 1 of the Iowa Constitution because it denie[d] plaintiffs access to a remedy for their alleged injuries." *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 226–27 (Iowa 2018).

The Supreme Court granted an interlocutory appeal, and in an opinion by Zager, J., reversed the district court decision. The opinion concluded that the district court failed to make specific findings of fact regarding plaintiffs. "Without this fact-based analysis, we are unable to resolve this issue on this record." 914 N.W.2d at 227. An outline for the way to proceed in this case is provided by the majority opinion:

> Whether the statutory immunity established in section 657.11(2) is unconstitutional as applied to the plaintiffs is inherently fact-specific. In order for a court to determine whether section 657.11(2) is unconstitutional as applied, plaintiffs must show they (1) "received no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general[,]" (2) "sustain[ed] significant hardship[,]" and (3) "resided on their property long before any animal operation was commenced" on neighboring land and "had spent considerable sums of money in improvements to their property prior to construction of the defendant's facilities." *Id.* at 178. This proof is dependent upon the genuine issues of material fact of each case.
>
> Here, each of the parties presented genuine issues of material fact at the summary judgment stage that could lend themselves to a jury verdict for the nonmoving party. As we have previously held, "[s]ummary judgment is appropriate if the only conflict concerns the legal consequences of undisputed facts." *Plowman*, 896 N.W.2d at 398 (quoting *Peppmeier*, 708 N.W.2d at 58). That is not the case here.
>
> Our holding in *Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656 (Iowa 2010), demonstrates why the *Gacke* factors require a fact-based analysis that generally requires a trial on the merits, or at least an evidentiary pretrial hearing. There we rejected the

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> However, this section shall not apply if the person bringing the action proves that an injury to the person or damage to the person's property is proximately caused by either of the following:
>
> a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.
>
> b. Both of the following:
>
> (1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property.
>
> (2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.

> plaintiff's argument that section 657.1(2) violated Iowa's inalienable rights clause as applied because it was "premature at this [pretrial] juncture." *Id.* at 664. In doing so, we noted this constitutional analysis applying the three-prong *Gacke* test required the "fact-specific enterprise" of "balancing of interests" that could not be proven in the pretrial phase of litigation. *Id.* We concluded the plaintiff's "allegations have not been proven at this stage of the litigation." *Id.* Consequently, we declined to address the issue "until, as in Gacke, a factual basis ... ha[d] been established." *Id.*
>
> Although it is possible that an as-applied constitutional challenge to section 657.11(2) could be resolved in pretrial litigation, the proper course of action for parties disputing the applicability of section 657.11(2) is to allow the CAFOs to plead section 657.11(2) as an affirmative defense to the claims, if applicable. Correspondingly, the plaintiffs claiming section 657.11(2) is unconstitutional as applied to them must prove the factors set forth in Gacke. After the parties have submitted their proof, the court can then determine the constitutionality of section 657.11(2) as applied to particular plaintiffs. While a district court may conduct a pretrial hearing for the specific purpose of determining the as-applied challenge, the plaintiffs can still rely on the exceptions to the immunity under sections 657.11(2)(a) and (b) if the district court finds the statute is not unconstitutional as applied.

914 N.W.2d at 237–38. Waterman, J. wrote a concurrence, in which Mansfield, J. joined. Justice Waterman argued that "*Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), is outdated and should no longer control the analysis under the inalienable rights clause of the Iowa Constitution . . ." 914 N.W.2d at 239. Justice Waterman argued the proper analysis is found in *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015)("Jacobsma restores the proper deference to the policy choices of the elected branches." 914 N.W.2d at 239.).

FEDERAL PREEMPTION

Decided June 22, 2018: Federal Preemption of State Tort Claims against Railroads

Griffioen v. Cedar Rapids and Iowa City Railway, 914 N.W.2d 273 (Iowa 2018)

Plaintiffs made state law tort claims against railroads in the Cedar Rapids area following flooding of the Cedar River. Plaintiffs alleged efforts by the railroads to keep river bridges from washing out during the flooding exacerbated damage to their property. The railroads argued plaintiffs' claims were preempted by the Federal Interstate Commerce Commission Termination Act (ICCTA). See 49 U.S.C. § 10501(b) (2006). The statute provided in relevant part:

> The ICCTA confers "exclusive" jurisdiction on the Federal Surface Transportation Board over "transportation by rail carriers" and over the "construction" or "operation" of rail tracks or "facilities." *Id.* The ICCTA expressly provides "exclusive" remedies "with respect to regulation of rail transportation" and expressly preempts any other "remedies provided under Federal or State law." *I*d.

Griffioen v. Cedar Rapids & Iowa City Ry. Co., 914 N.W.2d 273, 277 (Iowa 2018), *reh'g denied* (July 18, 2018). The district court dismissed the plaintiffs' claims based upon the Federal statute. A majority of the Iowa Supreme Court affirmed. Justice Mansfield analyzed railroad preemption cases:

> These cases appear to stand for two propositions. First, the ICCTA can preempt traditional common-law damage causes of action, as well as state statutes that would regulate railroad transportation. This is consistent with United States Supreme Court precedent that express preemption of state "requirements" includes requirements imposed after-the-fact through common-law damages litigation. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324, 128 S.Ct. 999, 1008, 169 L.Ed.2d 892 (2008) ("[R]eference to a State's 'requirements' includes its common-law duties."); *Bates v. Dow Agroscis. LLC*, 544 U.S. 431, 439, 452, 125 S.Ct. 1788, 1795, 1803, 161 L.Ed.2d 687 (2005) (finding common law actions to be preempted by a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that said certain states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter" (quoting 7 U.S.C. § 136v (2000)); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 515, 521–22, 112 S.Ct. 2608, 2617, 2620, 120 L.Ed.2d 407 (1992) (determining common-law actions were preempted by a provision of the Public Health Cigarette Smoking Act of 1969 stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" whose packages were labeled in accordance with federal law (quoting 15 U.S.C. § 1334(b))). If a common-law damages action can impose a "requirement," it can also "regulate."
>
> The Supreme Court recently noted, "As we have recognized, state 'regulation can be ... effectively exerted through an award of damages,' and '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' " *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637, 132 S.Ct. 1261, 1269 (2012) (alteration in original) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)); see *Maynard*, 360 F.Supp.2d at 840 ("[S]everal federal circuit and district courts ... have consistently held that the ICCTA preempts state common law claims with respect to railroad operations."); *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R.*, 297 F.Supp.2d 326, 333 (D. Me. 2003) ("[T]his Court joins other courts in recognizing that awards of damages pursuant to state tort claims may qualify as state 'regulation' when applied to restrict or burden a rail carrier's operations."); see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (finding that the preemptive clause in the former version of the Federal Railroad Safety Act covering any state "law, rule, regulation, order, or standard relating to railroad safety" embraced "[l]egal duties imposed on railroads by the common law" (quoting 45 U.S.C. § 434 (repealed 1994))).
>
> Second, the ICCTA appears to protect railroads from tort damage liability to property owners under state law when the railroads are taking action to preserve their own transportation facilities. As the district court put it here, "[I]f a railroad is acting to protect

> its tracks and bridges from floodwaters and to keep the interstate shipment of goods moving, those actions are protected under federal law."

914 N.W.2d at 283–85. Appel, J. dissented. His dissent was joined by Hecht and Wiggins, JJ. Justice Appel focused on the lack of factual development of the case and the possibility that the actions of the railroads could be shown to have been unnecessary:

> In this case, there has been no factual development on the key issue. It is conceivable, for example, that a factual record might be developed that could show that the actions taken by the railroads were not only negligent, but entirely unnecessary even to protect the interests of the railroad. It could be, for instance, that other sensible alternatives were available that would have adequately protected the railroad's interests without causing dramatic adverse effects downstream and that the economic environment in which railroads operate would not be materially changed by the tort lawsuit. In short, it could well be that a tort result that says, "You cannot pile cars with rocks on railroad bridges during times of flooding," will not be a burden at all on future railroad operations because equally effective alternatives are available to the railroads. Even if the court were to adopt a broad view of implied preemption under the ICCTA, the plaintiffs are entitled to explore the issue further, and the motion to dismiss in this case, in my view, was improper.

914 N.W.2d at 292. Justice Appel concluded, "I would not run for the exit, but would reverse the holding of the district court." *Id.*

EMPLOYMENT

Decided June 22, 2018: Summary Judgment on Discrimination Claim Affirmed

Deeds v. City of Marion, 914 N.W.2d 330 (Iowa 2018)

Nolan Deeds applied to become a firefighter with the city of Marion. He had experience as a volunteer firefighter with the city of Coralville. He was diagnosed with MS, but it was in remission according to his doctors. He was offered a job as a firefighter by the city of Marion, subject to a health examination. The doctor who performed the examination upon learning that Deeds had an episode of MS symptoms within a year of the exam, and after consulting with a colleague[5] who had examined Deeds in connection with an application to become a Cedar Rapids

[5]The colleague had been a firefighter before obtaining his medical degree. When the colleague examined Deeds, he consulted Nat'l Fire Prot. Ass'n, *NFPA 1582 Standard on Comprehensive Occupational Medical Program for Fire Departments* §§ 3.3.13.1, 6.17.1 (2013 ed.). "NFPA 1582 labels '[m]ultiple sclerosis with activity or evidence of progression within previous 3 years' as a 'Category A' medical condition that 'preclude[s] a person from performing as a member in a training or emergency operational environment by presenting a significant risk to the safety and health of the person or others.' *Deeds v. City of Marion*, 914 N.W.2d 330, 336 (Iowa 2018). The colleague had earlier concluded that Deeds was not qualified for a firefighters

firefighter, determined that Deeds was not medically qualified.

Deeds filed a civil rights complaint against the city of Marion and others. He was permitted to proceed with a lawsuit. The district court granted defendants' Motions of Summary Judgment. Plaintiff appealed.

A majority of the court, Waterman, J., affirmed the district court. The majority opinion observed:

> When the City rescinded its job offer to Deeds, the City did not know he had MS. The City only knew that the physician reported Deeds was not medically qualified for the firefighter position. Deeds, however, knew the physician found him unqualified because of his MS and could have told the City he had that condition and requested an accommodation but failed to do so. Deeds also failed to engage in the interactive process offered by the City after his ICRA complaint to explore reasonable accommodations. We conclude that Deeds cannot show the City discriminated against him "because of" his disability.

Deeds v. City of Marion, 914 N.W.2d 330, 339–40 (Iowa 2018). It is noted that an applicant or employee has the burden to advise the employer of a disability. The city did not have a duty to investigate the reasons for Deeds' medical disqualification. Appel, J. dissented (joined by Wiggins, J.), asking these questions:

> A flat-out ban from employment on anyone with a recurrence of multiple sclerosis (MS) within the last three years is precisely the kind of stereotyping that the disability-discrimination provisions of the Iowa Civil Rights Act (ICRA) are designed to prevent. How is it that such stereotyping was applied to Nolan Deeds? The evasion of the ICRA was achieved when the employer contracted out the physical examination to a third party.
>
> Can it be that an employer can avoid responsibility for disability discrimination by contracting out the physical examination to a third party and simply following the third party's conclusory recommendation that the person is not qualified for the job because of a medical condition? I do not think so.

914 N.W.2d at 351–52.

Decided June 15, 2018: Direct Cause of Action under Iowa's Whistleblower Statute

Walsh v. Wahlert, 913 N.W.2d 517 (Iowa 2018)

Joseph Walsh was the chief administrative law judge of the Unemployment Insurance Appeals Bureau in Iowa Workforce Development (IDW). Theresa Wahlert was IDW director. Walsh

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position with the city of Cedar Rapids because of the MS diagnosis.

claimed that he was fired because he reached out to other government officials to prevent conversion of his position from merit to nonmerit. He claimed protection under of Iowa Code section 70A.28 (2014)[6]. Walsh claimed that Wahlert and other defendants retaliated against him by preventing him from obtaining other positions in state government. Walsh further claimed he was wrongfully terminated in violation of public policy.

The district court granted the state's Motion for Summary Judgment on the whistleblower claim, finding that Walsh failed to exhaust his administrative remedies, as well as on the wrongful termination claim (Again, the district court found that Walsh failed to exhaust his administrative remedies.). Walsh appealed.

The Iowa Supreme Court concluded in an opinion by Appel, J. that Walsh did not have to exhaust his administrative remedies to pursue his whistleblower claims. Section 70A.28(5)(6) of the Iowa Code outlines the available remedies:

> 5. **Subsection 2 may be enforced through a civil action**.
>
> a. A person who violates subsection 2 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs.
>
> b. When a person commits, is committing, or proposes to commit an act in violation of subsection 2, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or the attorney general.
>
> 6. Subsection 2 may also be enforced by an employee through an administrative action pursuant to the requirements of this subsection if the employee is not a merit system employee or an employee covered by a collective bargaining agreement. An employee eligible to pursue an administrative action pursuant to this subsection who is discharged, suspended, demoted, or otherwise receives a reduction in pay and who believes the adverse employment action was taken as a result of the employee's disclosure of information that was authorized pursuant to subsection 2, may file an appeal of the adverse employment action with the public employment relations board within thirty calendar days following the later of the effective date of the action or the date a finding is issued to the employee by the office of ombudsman pursuant to section 2C.11A. The findings issued by the ombudsman may be introduced as evidence before the public employment relations board. The employee has the right to a hearing closed to the public, but may request a public hearing. The hearing shall otherwise be conducted in accordance

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[6]Relevant portions of 70A.28(2) provide:

> A person shall not discharge an employee ... as a reprisal ... for a disclosure of any information by that employee to a member or employee of the general assembly ... or a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the information evidences a violation of law or rule ....

Iowa Code § 70A.28(2).

> with the rules of the public employment relations board and the Iowa administrative procedure Act, chapter 17A. If the public employment relations board finds that the action taken in regard to the employee was in violation of subsection 2, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action.

(Emphasis added). The Court considered *Worthington v. Kenkel*, 684 N.W.2d 228 (Iowa 2004) which upheld a merit employee's civil action to obtain injunctive relief. "It would be odd to allow merit employees to bring a civil action seeking an injunction under 70A.28(2) but not allow other remedies provided by the statute." 913 N.W.2d at 525. The Court further observed about the right to bring a civil action in this matter:

> Here, however, is an unusual case in which we have a statute that expressly creates an independent cause of action in the alternative to administrative remedies under Iowa Code chapter 17A. While common law claims and claims under statutes that merely authorize, structure, or limit agency actions must be challenged through judicial review of agency actions pursuant to Iowa Code chapter 17A, the remedies under statutes where the legislature has expressly created independent statutory causes of action in the alternative to chapter 17A-type review, judicial review of agency action under the administrative procedures act is not the exclusive means of obtaining judicial review. To hold otherwise would eliminate a choice of remedies that the legislature expressly created.

913 N.W.2d 525. Relying on *Van Baale v. City of Des Moines*, 550 N.W.2d 153 (1996), abrogated on other grounds by *Godfrey v. State*, 898 N.W.2d 844, 864, 872 (Iowa 2017)., the Court affirmed the district court decision denying the common law wrongful termination claims.

> With respect to common law claims of oral contract, promissory estoppel, and negligence, we held in *Van Baale* that a civil service statute that provides a comprehensive framework for the resolution of such claims provides the exclusive remedy. *Id.* Walsh emphasizes that this case involves a claim for wrongful termination in violation of public policy, a claim not raised in *Van Baale*. While this case does involve a common law claim not raised in *Van Baale*, we find the case indistinguishable.

913 N.W.2d at 526. The case was remanded for further proceedings based upon the whistleblower statute.

Decided June 15, 2018: Is the Tort of Wrongful Discharge in Violation of Public Policy Categorically Reserved for At-Will Employees?

Ackerman v. State, 913 N.W.2d 610 (Iowa 2018)

Susan Ackerman served as an Administrative Law Judge for Iowa Workforce Development (IDW), working in the employment insurance appeals bureau. Ackerman was a member of the American Federation of State County and Municipal Employees (AFSCME). Her position was

subject to a collective bargaining agreement (CBA). "The CBA provided that employees may not be suspended, disciplined, or discharged without proper cause. The contract also protected employees from adverse employment actions taken in retaliation for whistleblowing. The agreement further provided for a grievance procedure." *Ackerman v. State*, 913 N.W.2d 610, 613 (Iowa 2018).

Ackerman was subpoenaed to testify before Iowa Senate Government Oversight Committee where she testified "about a hostile work environment and the pressure she perceived by Wahlert [Theresa Wahlert, IDW director] to issue decisions in favor of employers. She said she felt powerless to stop Wahlert from improperly influencing the decisions issued by the bureau." 913 N.W.2d at 613. Several months after her testimony, Ackerman was suspended by Wahlert, pending an investigation. Ackerman was terminated from her employment in January 2015. She filed a lawsuit alleging

> the defendants (1) retaliated against her for disclosing information to public officials in violation of Iowa Code section 70A.28 (2015); (2) defamed her; (3) intentionally interfered with contractual relations; (4) breached the State of Iowa's Manager and Supervisors Manual, of which she is a third-party beneficiary; (5) disclosed confidential personnel records in violation of Iowa Code section 22.7; (6) violated her constitutional rights under the First Amendment; (7) intentionally inflicted emotional distress, and (8) wrongfully discharged her in violation of public policy.

913 N.W.2d at 613–14. Defendants moved to dismiss the retaliatory discharge claim, asserting that it is reserved specifically for at-will employees. The district court dismissed the claim. Ackerman appealed. The court of appeals reversed. The Supreme Court granted further appeal.

Cady, C.J. wrote that the case presented an issue of first impression: "whether the tort of wrongful discharge in violation of public policy is categorically reserved for at-will employees, such that a contract employee may not state a claim." 913 N.W.2d at 615. The Court noted that there are discrete rationales underlying contract and tort remedies.

> "If an employee is discharged for refusing to violate a public policy requirement, a breach of contract action satisfies private contractual interests but fails to vindicate the violated public interest or to provide a deterrent against future violations." *Keveney*, 304 S.W.3d at 103. When an employer's adverse action "violate[s] not only the employment contract but also clear and substantial public policy, the 'employer is liable for two breaches, one in contract and one in tort.' It follows that the employer must bear the consequences of its actions." *Id.* (quoting *Retherford*, 844 P.2d at 960). Indeed, when an employee is wrongfully discharged, "society is equally aggrieved whether the employee is 'at will' or can be discharged only for 'just cause.' " *Davies v. Am. Airlines, Inc.*, 971 F.2d 463, 469 (10th Cir. 1992) (applying Oklahoma law).

913 N.W.2d at 618–19. The Court gave various factors for recognizing that a person covered by an employment contract to prosecute a tort action for wrongful termination in violation of public policy:

> While the absence of a remedy to correct a wrong was an important factor in creating the tort for retaliatory discharge thirty years ago, it does not drive us so much in deciding whether to extend the tort to contract employees today. Instead, we are driven by other factors, such as ensuring that victims of intentional torts are fully compensated and that legislative schemes and public policy are not undermined. Accordingly, we hold contract employees may bring common law claims alleging wrongful termination in violation of public policy.

913 N.W.2d at 621. The Court noted that Ackerman also has rights under the Iowa whistleblower statute:

> Iowa Code section 70A.28 provides a direct cause of action for state employees who suffer adverse employment actions in retaliation for whistleblowing. Iowa Code § 70A.28. The statute permits a wronged employee to seek "affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs." Id. § 70A.28(5)(a). Ackerman therefore is already provided additional tort remedies for a purportedly wrongful termination in retaliation for whistleblowing and indeed brought a claim under section 70A.28 in her petition.

913 N.W.2d at 621–22. The state's contention that section 70A.28 is Ackerman's exclusive remedy is rejected (The state did not raise this issue before the district court, and as a result, its position was not preserved.). The case was returned to district court for further proceedings.

Waterman, J., joined by Mansfield, J., dissented. Justice Waterman argued that Ackerman's case was the wrong one with which to determine whether or not an individual with an employment contract may bring an action in tort for wrongful discharge in violation of public policy.

> I would affirm the district court's ruling dismissing Ackerman's common law claim. Ackerman may pursue contract remedies under the public employee union collective bargaining agreement (CBA). She may also proceed with her statutory right of action under Iowa Code section 70A.28. There is no need to create a third avenue of recovery, especially one that is at odds with the governing legislative enactment—section 70A.28. This is not a case involving a wrong without a remedy that cries out for a judicially created common law tort. Ackerman already has statutory as well as contractual remedies.

913 N.W.2d at 623. Justice Waterman further writes that contract employees have remedies under contract law, and that because of the union contract covering Ackerman and statutory remedies available to her, she did not need a common law tort remedy.

MEDICAL MALPRACTICE/IMPLIED CONSENT

Decided June 15, 2018: Medical Malpractice/Informed Consent; Case Returned for New Trial on Informed Consent Issue

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

Alan Anderson agreed to allow Dr. Sohit Khanna to perform a Bentall procedure on his heart. There were complications. Anderson was in a coma; had a second heart procedure, and; finally, had a heart transplant. Anderson claimed that Dr. Khanna failed to obtain informed consent for the procedure. The focus of this claim was that Dr. Khanna did not advise Anderson about his lack of experience with the procedure, as well as the risks involved, given the nature of Anderson's heart. Anderson also claimed specific negligence. The district court granted partial summary judgement on the informed consent claims; trial was held on the specific negligence allegations, and; a jury found for the defendants. Anderson appealed. The court of appeals affirmed the district court. The Supreme Court granted further review.

Justice Wiggins authored the court's majority opinion and first observed:

> Four issues will resolve this appeal. First, we must decide whether the district court erred in granting partial summary judgment when it decided under Iowa law a physician does not have a duty to disclose information about the physician's inexperience or lack of training. Next is whether the district court erred when it did not allow Andersen to proceed on the informed-consent claim based on Khanna's failure to disclose the risk of the surgery considering the bad condition of Andersen's heart. Third is whether a finding by the jury that Khanna was not negligent precludes Andersen's informed-consent claims. Lastly is whether the district court erred when it denied Andersen's request to amend a jury instruction to include an additional, separate specification of negligence.

Andersen v. Khanna, 913 N.W.2d 526, 535 (Iowa 2018). On the issue of Dr. Khanna's duty to disclose information about his experience, the opinion observed:

> The duty to disclose under Iowa's informed-consent law turns on whether a reasonable person in the patient's position would consider the information at issue to be material to the decision of whether to undergo the proposed treatment. *Pauscher*, 408 N.W.2d at 359, 361–62. We have never categorically excluded a particular type of information, such as a physician's personal characteristics. Instead, our practice has been to apply the objective reasonable-patient standard to the undisclosed information at issue in a particular case to determine if the failure to disclose that information breached the physician's duty. E.g., *Doe*, 476 N.W.2d at 31–32; *Pauscher*, 408 N.W.2d at 360–62; see *Bray v. Hill*, 517 N.W.2d 223, 225–26 (Iowa Ct. App. 1994) (en banc). We see no reason to change that approach as it applies to information that can be categorized as personal characteristics of the physician. Accordingly, we conclude the district court erred when it found, as a matter of law, there is no duty to disclose personal characteristics, such as experience and training, under Iowa law.

913 N.W.2d at 537. The court concluded that Anderson should have been allowed to contest the lack of informed consent:

> The record reveals a Bentall heart procedure is a very complicated procedure. The experts characterized a Bentall heart procedure as being harder to perform than a heart transplant. It is reasonable that anyone undergoing such a procedure would want to know his or her physician's experience and training, or lack thereof, before consenting to such a procedure by that physician. Under these circumstances, we cannot conclude as a matter of law that no reasonable person in Andersen's position would find such information immaterial to his or her decision to have the surgery before consulting another physician.

913 N.W.2d at 542. The district court was in error when it refused to allow plaintiff's attorney to question one of defendant's experts on whether or not there was informed consent given by Anderson based upon a failure by Dr. Khanna to advise of the risks associated with the surgery because of Anderson had a "bad" heart.

> The effect of the court's erroneous refusal to allow Andersen to adduce evidence in support of the informed-consent claim based on Khanna's failure to disclose the risk of the surgery considering Andersen's bad heart was prejudicial to Andersen. Under the evidentiary analysis, Dr. Cuenoud's anticipated testimony that the presurgery condition of Andersen's heart increased the risk of death to twenty-five percent was the only expert testimony quantifying the increased risk. Our caselaw requires the patient "to present expert testimony relating to the nature of the risk and the likelihood of its occurrence" whenever the undisclosed information involves a risk. *Pauscher*, 408 N.W.2d at 360. Without Dr. Cuenoud's testimony that there was a twenty-five percent chance Andersen would not make it, Andersen would not be able to meet this requirement. Additionally, Dr. Cuenoud's testimony was the only anticipated testimony discussing a physician informing the patient of such an increase in risk. Dr. Cuenoud's anticipated testimony was necessary to Andersen's informed-consent claim based on Khanna's failure to disclose the risk of the surgery considering Andersen's bad heart, and Andersen was prejudiced by the court's ruling.

913 N.W.2d at 544. Defendants argued that the adverse jury verdict on Anderson's other negligence claims should have put the case to an end and preclude him from litigating the informed consent issues. The court disagreed:

> Here, the court removed Andersen's informed-consent claims from the case prior to Andersen developing his damage claims arising from Khanna's failure to obtain *548 informed consent. However, it is clear that in regard to Andersen's informed-consent claim based on Khanna's failure to disclose the risk of the surgery considering Andersen's bad heart, the risk Khanna should have disclosed was the exact injury he suffered regardless of whether Khanna performed the procedure pursuant to the applicable standard of care. As for the informed-consent claim based on Khanna's lack of experience, Andersen should have the opportunity to develop his theory of injury and damages before we summarily dismiss those claims. Accordingly, under this record the

> appropriate remedy is to remand the case for further proceedings on the informed-consent claims.

913 N.W.2d at 547–48. The court rejected plaintiff's claim that the district court should have given an instruction on Dr. Khanna's lack of training and experience. The judgment on the specific negligence claims was affirmed. The case was returned to the district court for further proceedings on the informed consent issues.

Waterman, J., Cady, C.J., and Mansfield, J. concurred in part and dissented in part. Justice Waterman wrote that any risks from Dr. Khanna's lack of experience never materialized. He met the standard of care in performing the surgery upon Anderson. The jury's findings of a lack of specific negligence should preclude informed consent claims based upon Dr. Khanna's lack of experience. ". . . [I]f a physician fails to disclose a known material risk and the risk occurs, the patient can recover for the harm resulting from the risk. But if the physician fails to disclose a risk that never materializes, the patient cannot recover for this nonevent." 913 N.W.2d at 549.

POST CONVICTION RELIEF

Decided June 22, 2018: Post Conviction Relief – Conviction Overturned – State Improperly Obtained an Order Freezing Defendant's Assets

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018)

On March 13, 2009, Robert Krogmann shot his former girl friend, Jean Smith, three times. Krogmann had a history of bipolar mental illness. Shortly after his arrest, the state filed a motion, which was granted, to freeze Krogmann's assets (Krogmann had $3,000,000.00 in assets, most of which was farmland.). The application did not cite any legal authority to support the application. Krogmann's attorneys attempted to object to the ex parte order entered freezing the assets; the district court did not rule; the Supreme Court denied an application for interlocutory appeal. Krogmann was incarcerated prior to trial (bail was increased to $1,000,000.00 cash only). Krogmann was limited in his access to assets to help prepare for trial. Jury found Krogmann guilty of attempted murder and willful injury causing serious injury. Krogmann was sentenced to

> an indeterminate term of twenty-five years in prison with a mandatory minimum of 17.5 years before being parole or work release eligible. For the willful injury conviction, the court sentenced him to an indeterminate term of ten years and applied Iowa Code section 902.7's dangerous-weapon enhancement to impose a mandatory minimum of five years. The court ordered the sentences to run consecutively. The court ordered Krogmann to pay $35,570.14 in victim restitution to Smith and $18,219.54 in restitution to the Delaware County Sheriff's Department and the State.

Krogmann v. State, 914 N.W.2d 293, 300–01 (Iowa 2018). On appeal Krogmann challenged the constitutionality of the asset freeze order and contended the prosecutor engaged in misconduct when he asked Krogmann, ""Shot anybody today?" The Supreme Court affirmed Krogmann's

conviction. *State v. Krogmann*, 804 N.W.2d 518 (Iowa 2011). Krogmann then filed a Post Conviction Relief (PCR) petition contending

> his defense counsel provided constitutionally ineffective assistance under the Sixth Amendment of the United States Constitution and article I, section 10 of the Iowa Constitution by failing to challenge and preserve an objection to the freeze order; by failing to challenge as prosecutorial misconduct the prosecutor's asset-freeze application, "continued involvement in the handling of [Krogmann's] assets and presentation of his defense," and question of "Shot anybody today?"; in pursuing Krogmann's defense, specifically the defense of diminished responsibility; and by failing to object as a violation of double jeopardy and the merger doctrine the consecutive sentences for attempted murder and willful injury.

914 N.W.2d at 301. The district court held an extensive evidentiary hearing on the PCR petition and denied Krogmann's application. The district court did not rule on Krogmann's motion to enlarge and amend. Krogmann appealed. The court of appeals affirmed the district court. The Supreme Court granted further appeal.

A majority of the Supreme Court (Appel, J.) stated, "Krogmann's most powerful claim is that his lawyers provided ineffective assistance under the Iowa and United States Constitutions by failing to properly object to the court-ordered asset freeze." 914 N.W.2d at 306. The effect of the asset freeze and its application was that Krogmann could not access his assets and could not use his money and assets for lawful purposes without court approval. Krogmann was unable to post bond; his request to purchase phone cards so that he could make calls from the jail was denied; he wanted to hire a jury consultant, the state objected contending a jury consultant was a luxury (the request was denied), and; Krogmann wanted to find other defense counsel but was unable to do so.

> The bottom line is clear: the State in this case was playing on both sides of the line of scrimmage. It not only structured its own case, but it unjustifiably crossed the line and prevented Krogmann from mounting the kind of defense he otherwise would have been able to. See *Stein II*, 541 F.3d at 157 (finding constitutional violation where defendants were forced to limit their defenses, which they would not have done but for the government's unjustifiable interference); cf. *McCoy*, —— U.S. at ——, 138 S.Ct. at 1509 (noting defense counsel must develop a trial strategy but that if the defendant disagrees with the proposed strategy, defense counsel cannot usurp control). The cumulative effect of the State's actions was to limit Krogmann's ability to spend his own assets on his own defense from almost the beginning of the criminal proceedings. No doubt the State believed Krogmann was guilty and did not deserve anything other than pretrial punishment. But that is not the way our adversary system works. See, e.g., Iowa Code § 811.2(1) (enumerating conditions of pretrial release that can be imposed based on whichever conditions will assure only the defendant's appearance and that the defendant's release will not jeopardize the safety of others); *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 1872, 60 L.Ed.2d 447 (1979) ("For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due

process of law."); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 Minn. L. Rev. 335, 357 (1990) ("The rule that the state may not punish an offender without a complete trial and due process of law is the most basic constitutional principle relating to criminal law."); cf. *Escobedo v. Illinois*, 378 U.S. 478, 490, 84 S.Ct. 1758, 1764–65, 12 L.Ed.2d 977 (1964) ("If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."). And where the defendant is deprived of his right to personally conduct his defense, structural error is present. See, e.g., *McCoy*, —— U.S. at ——, 138 S.Ct. at 1511 ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'...."); *Gonzalez–Lopez*, 548 U.S. at 150, 126 S.Ct. at 2564–65; *McKaskle*, 465 U.S. at 177 n.8, 104 S.Ct. at 950 n.8; see also *Luis*, 598 U.S. at ——, 136 S.Ct. at 1094; *Faretta*, 422 U.S. at 820–21, 95 S.Ct. at 2533–34 (emphasizing counsel is merely a defense tool to aid a defendant willing to use such a tool).

A case involving an unlawful, total freeze of the criminal defendant's assets that impairs the defendant's ability to be the master of his or her own defense is ordinarily the kind of case where prejudice should be presumed. See, e.g., *McCoy*, —— U.S. at ——, 138 S.Ct. at 1511 (noting an error may be considered structural and thereby presumptively prejudicial " 'if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as 'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty' " (quoting *Weaver*, 582 U.S. at ——, 137 S.Ct. at 1908)); *Stein I*, 435 F.Supp.2d at 371–72 (finding structural error because the government's efforts "limited what the KPMG Defendants can pay their lawyers to do" and "government interference with those resources that a defendant does have or legally may obtain fundamentally alters the structure of the adversary process"). Based on his testimony at trial, Krogmann admitted shooting the victim. His defense at trial was diminished responsibility, which can negate specific intent. The crimes with which Krogmann was charged—attempted murder and willful injury causing serious injury—are both specific intent crimes. See *State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004) (attempted murder); *State v. Hickman*, 623 N.W.2d 847, 852 (Iowa 2001) (en banc) (willful injury causing serious injury). We simply have no way of knowing whether Krogmann would have hired different lawyers, what kind of evidentiary presentation might have been made if Krogmann was out on bail and more able to participate in his defense, what kind of or how many experts he would have hired, and what kind of jury would have been selected had Krogmann not been stymied by the asset freeze and allowed to be master of his own defense. See, e.g., *McCoy*, —— U.S. at ——, 138 S.Ct. at 1511 (noting an error may be structural and thereby presumptively prejudicial "when its effects are too hard to measure").

914 N.W.2d at 321–22. The majority held that Krogmann was entitled to a new trial with full, lawful access to his assets in preparing his defense.

The asset freeze in this case was unlawful and Krogmann's counsel's failure to properly

> challenge the freeze breached an essential duty. The consequences of the asset freeze violated Krogmann's constitutional right to be master of his defense, which is a structural error. Under the circumstances giving rise to this type of structural error in this case, we presume prejudice from Krogmann's counsel's breach. Accordingly, we conclude Krogmann is entitled to a new trial with full, lawful access to his assets to use in preparing, presenting, and handling his defense.

914 N.W.2d at 326. Mansfield, J., joined by Waterman, J. dissented, agreeing with the majority that the asset freeze was improper. "But it didn't prevent Robert Krogmann from hiring the counsel of his choice, paying his counsel's bills, and mounting a vigorous trial defense. There was no structural error, and no reason exists for Krogmann to receive a second trial." 914 N.W.2d at 326.

Decided June 29, 2018: Post Conviction Relief – Does Three Year Statute of Limitations Apply to a Second PCR Petition Alleging Counsel on the First PCR Case was Ineffective

Allison v. State, 914 N.W.2d 866 (Iowa 2018)

Brian Allison was found guilty by a jury on three charges of sexual abuse in the third degree. His post trial motion for a new trial based upon the weight of the evidence under Iowa Rule of Criminal Procedure 2.24(2)(b)(6) was denied. The court of appeals affirmed Allison's conviction. A Post Conviction Relief (PCR) Petition was filed alleging that trial counsel was ineffective for failing to investigate Allison's contention that one of the juror's was biased. Allison contended that he observed a juror waive at his former wife, Tina (who was the mother of Allison's victim). The district court denied relief, finding there was no evidence to establish the claims Allison made. The court of appeals affirmed the district court. Allison acting pro se filed a second PCR Petition more than three years after procedendo issued on his conviction. In the second PCR Petition Allison alleged his first PCR attorney was ineffective for failing to investigate and present evidence about the alleged juror bias. The state filed a Motion to Dismiss, citing *Dible v. State*, 557 N.W.2d 881 (Iowa 1996)("In *Dible*, a 5–4 majority of this court held that ineffective assistance of counsel was not a 'ground of fact' under Iowa Code section 822.3 that would allow a PCR petition to be filed more than three years after a conviction became final. 557 N.W.2d at 886.") *Allison v. State*, 914 N.W.2d 866, 869 (Iowa 2018). In the wake of the Motion to Dismiss, Allison's new PCR counsel filed a Motion to Amend which was intended to address the statute of limitations issues. In granting the Motion to Dismiss, the district court noted that the Motion to Amend had been filed. The court of appeals affirmed the dismissal noting that it did not have authority to overturn Dible. The court of appeals also held that Allison failed to preserve error on the other issues raised in the Amended PCR Petition, and the Amended PCR Petition were not sufficient to meet the statute of limitations defense. The Supreme Court granted further review.

In one of the opening paragraphs of the opinion, Appel, J., writing for the majority, stated, "The easy path would be to simply state a smooth-as-ice conclusion that there is no right to counsel in PCR. Yet close analysis reveals substantial constitutional and statutory issues. So the question is this: Is the smooth-as-ice approach strong enough to withstand weighty constitutional and

statutory right-to-counsel challenges?" 914 N.W.2d at 870. Earlier Iowa cases regarding right to counsel in PCR claims are described as flawed, and the opinion reviewed the Iowa Constitution's guarantees regarding assistance of an attorney and held that it is more expansive than the Sixth Amendment:

> . . . [A]rticle I, section 10 of the Iowa Constitution provides, "In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right ... to have the assistance of counsel." Iowa Const. art. I, § 10 (emphasis added). Plainly and indisputably, the language of article I, section 10 is more expansive than the "all criminal prosecutions" language of the Sixth Amendment. In addition to all criminal cases, the Iowa Constitution extends the right to counsel in all cases involving life and liberty. Id. Lawyers and judges who believe constitutional text matters must give the additional Iowa constitutional language its full meaning.
>
> . . . [T]he expansive language in article I, section 10 arose in the historical context of a fierce battle over enforcement of the Fugitive Slave Act in Iowa and across the nation. See 2 The Debates of the Constitutional Convention of the State of Iowa 737 (W. Blair Lord rep., 1857), publications.iowa.gov/7313/2/The_Debates_of_the_Constitutional_Convention_Vol%23 2.pdf (recording that delegate Clark defended the "all cases involving the life, or liberty" language as necessary to allow an alleged fugitive slave to have the right to counsel). See generally *State v. Senn*, 882 N.W.2d 1, 36–46 (Iowa 2016) (Wiggins, J., dissenting). Proceedings to enforce the Fugitive Slave Act against alleged fugitive slaves were, of course, civil and not criminal in nature. *Young*, 863 N.W.2d at 278–79. Thus, the law-by-label conclusion that the right to counsel does not extend to PCR actions because they are civil in nature may apply under the Sixth Amendment, but it has no application at all under article I, section 10 of the Iowa Constitution, which was expressly designed to cover civil proceedings where "life, or liberty" is involved.

914 N.W.2d at 884. The majority opinion then reviewed the history of the *Dible* decision, focusing on the four member dissent written by then Chief Justice Arthur McGiverin:

> . . . [T]he dissenters pointed out that under the majority's narrow approach to section 822.3, Dible was "effectively denie[d] ... any opportunity to have his postconviction claims heard." *Id.* The dissenters noted that Dible's application for PCR was dismissed because of the failure of his counsel to prosecute the claim and that counsel failed to communicate the dismissal to Dible. *Id.* Thus, although Dible had a right to the effective assistance of counsel in his PCR proceeding, Dible never got a hearing on his issues and had "no opportunity to test the validity of the conviction in relation to the ground of fact or law" alleged in his first postconviction action. *Id.* (quoting *Wilkins*, 522 N.W.2d at 824). The dissenters argued that the legislature did not intend for PCR applicants to be precluded from bringing claims, "unless any untimeliness was due to their own inaction." *Id.*
>
> The dissenters also challenged the majority's assertion that there is a distinction between

> ineffective assistance of counsel at trial and ineffective assistance of appellate or PCR counsel. *Id.* According to the dissent, ineffective assistance of appellate or postconviction counsel could change the result in the underlying trial and, as a result, an applicant could not be precluded from bringing a claim based upon their ineffectiveness. *Id.* at 887.

914 N.W.2d at 887–88. After its analysis of *Dible*, the court majority concluded:

> We think the best approach is to qualify *Dible*. While *Dible* engaged in textual and functional analysis of section 822.3, it gave no consideration to the fundamental constitutional interests at stake when an accused alleges ineffective assistance of trial counsel and the PCR proceeding is the first opportunity to raise the issue. In that setting, the posture is precisely the same as in *Douglas*, namely, the first appeal as a matter of right. Where the defendant essentially invokes a first appeal as a matter of right in an initial-review PCR proceeding, application of the equal protection principles in *Douglas* would require appointment of counsel even under the Federal Constitution. Further, the rationales for not providing counsel under the Sixth Amendment—the distinction between criminal and civil proceedings and the diluting influences of federalism—have less application under article I, section 10 of the Iowa Constitution.
>
> Decided in 1996, *Dible* did not have the benefit of the subsequent development in cases of the United States Supreme Court which focused on the peculiar problem of initial-review collateral proceedings. Further, *Dible* made no effort to consider the expansive right-to-counsel provisions of the Iowa Constitution in which the distinction between civil and criminal cases has no linguistic or historical support.
>
> In order to avoid the difficult constitutional position that would result in denying a remedy where defense counsel allegedly provided ineffective assistance at trial and postconviction counsel is ineffective in raising that claim, we think the best approach is to hold that where a PCR petition alleging ineffective assistance of trial counsel has been timely filed per section 822.3 and there is a successive PCR petition alleging postconviction counsel was ineffective in presenting the ineffective-assistance-of-trial-counsel claim, the timing of the filing of the second PCR petition relates back to the timing of the filing of the original PCR petition for purposes of Iowa Code section 822.3 if the successive PCR petition is filed promptly after the conclusion of the first PCR action. The doctrine of relation back is used "to preserve rights as of the earlier date, or otherwise to avoid injustice." *Windey v. N. Star Farmers Mut. Ins.*, 231 Minn. 279, 43 N.W.2d 99, 102 (1950). Here, the application of the relation-back doctrine ensures that the right to effective assistance of counsel in PCR is not cut off by the running of the statute of limitations in situations like the one in this case.

914 N.W.2d at 890-91. There is also discussion by the Court majority regarding the Amended PCR Petition, and the majority holds that the claims alleged should not have been dismissed. The decision of the court of appeals is vacated, judgment of the district court is reversed, and the case is returned to district court for further proceedings. Waterman, J., joined by Mansfield and

Zager, JJ., dissented stating the court of appeals should have been affirmed because of the *Dible* decision.

Decided November 9, 2018: Court of Appeals was in Error when it Denied Appellant's Ineffective Assistance of Counsel Claim

State v. Harris, ----- N.W.2d ----- (Iowa 2018) No. 17-0118

Anthony Antoine Harris was found guilty in Polk County on charges of possession of methamphetamine with intent to deliver and delivery of a controlled substance (methamphetamine). He appealed. The court of appeals affirmed, holding the evidence at trial was sufficient to support the conviction. Harris also claimed ineffective assistance of counsel at trial; counsel failed to object to hearsay at trial. The court of appeals refused to consider the ineffective assistance of counsel claim and denied the hearsay claim on its merits holding error had not been preserved. The Supreme Court granted further review.

In a per curiam opinion the Court upheld the court of appeals' decision on sufficiency of the evidence, but it considered the ineffective assistance of counsel decision.

> Here the court of appeals found Harris did not preserve error on his challenge to the implied hearsay testimony. Moreover, it rejected his argument that if error was not preserved, his trial counsel was ineffective. Specifically, the court of appeals found Harris waived his ineffective assistance claim by only including a cursory discussion of ineffective assistance in a footnote. Upon our de novo review, we find this is error.
>
> If the development of the ineffective-assistance claim in the appellate brief was insufficient to allow its consideration, the court of appeals should not consider the claim, but it should not outright reject it. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010) (holding "a defendant is [not] required to demonstrate the potential viability of any ineffective-assistance claim raised on direct appeal in order to preserve the claim for postconviction relief" and "[if] the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding"). Therefore, we vacate that part of the court of appeals decision deciding the ineffective-assistance-of-counsel hearsay claim.

Harris was advised in the opinion that he has a right to seek relief through a Post Conviction Relief (PCR) action.

Decided June 22, 2018: Juvenile Convicted of Felony Murder; Sentence Included Eligibility for Parole; Conviction and Sentence Affirmed

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)

Keyon Harrison, who was 16, was charged with felony murder of Aaron McHenry in connection with a marijuana deal that went bad. "At the conclusion of the trial, the jury returned a

unanimous verdict finding Harrison guilty of first-degree murder in violation of Iowa Code sections 707.1 and 707.2(1)(b) for killing McHenry while participating in a forcible felony, the robbery. Harrison was sentenced to life in prison with immediate parole eligibility. Harrison filed a timely appeal, which we [the Iowa Supreme Court] retained. *State v. Harrison*, 914 N.W.2d 178, 187 (Iowa 2018).

Harrison presented a number of claims on appeal.

> First, he maintains the felony-murder rule violates the Due Process Clause of both the Iowa and United States Constitutions when it is applied to juvenile offenders pursuant to a theory of aiding and abetting. Second, Harrison argues a sentence of life with the possibility of immediate parole eligibility for a juvenile offender convicted of first-degree murder under the felony-murder rule is unconstitutional both as applied to him and on its face under the Cruel and Unusual Punishment Clauses of the Iowa and United States Constitutions. Third, Harrison claims the trial court did not provide proper jury instructions on the specific types of assault necessary to establish a felonious robbery. Finally, Harrison advances ineffective-assistance-of-counsel claims alleging his trial counsel breached essential duties that resulted in prejudice by failing to request certain jury instructions and failing to object to certain evidence presented at trial.

914 N.W.2d at 188. A majority of the Court, Zager, J., affirmed the conviction of Harrison and preserved his claims of ineffective assistance of counsel for a Post Conviction Relief (PCR) proceeding. The majority opinion provides an extensive review of juvenile sentencing jurisprudence. It also addresses Harrison's challenges to the felony-murder rule.

> [F]elony robbery is a distinct crime that necessitates the showing of a different intent from the killing. Under Iowa Code section 711.1(1), robbery requires a showing that the defendant had the "intent to commit a theft" and that the defendant committed an assault "to assist or further the commission of the intended theft or the person's escape from the scene thereof." Iowa Code § 711.1(1). Therefore, the concern that, absent the merger doctrine, all felony robberies "that immediately precede a killing would bootstrap the killing into first-degree murder, and all distinctions between first-degree and second-degree murder would be eliminated" is not implicated here as it was with felonious assaults in *Heemstra*. *Heemstra*, 721 N.W.2d at 557. Moreover, robbery—unlike willful injury—is expressly listed as a forcible felony under section 702.11(1) to qualify as a basis for felony murder. See Iowa Code § 702.11(1). Based on the fundamental differences between felony robbery and felony assault in the felony-murder context, in addition to the merger rule jurisprudence in Iowa, it can hardly be said that trial counsel in this case "performed below the standard demanded of a reasonably competent attorney." *Ledezma*, 626 N.W.2d at 142.

914 N.W.2d at 208. Appel, J., joined by Wiggins, J., dissented. The focus of the dissent is the felony-murder rule and whether it should continue to be a viable legal proposition and the result that Harrison was sentenced to life in prison with immediate eligibility for parole:

> Although the Iowa felony-murder statute has been limited in important ways, it is still very broad. Any person who simply participates in a robbery may be found guilty of felony murder, even if that person did not bring a weapon to the scene, had no knowledge that weapons would be present at the scene, and had nothing to do with the murder. Also, Harrison was seventeen at the time of the crime. And, instead of being exposed to the sanction for the crime he clearly was guilty of committing, robbery, which carries a term of years sentence, Harrison was sentenced to life in prison with possibility of parole. There seems little doubt that Harrison's prison sentence under felony murder will be geometrically longer than that which would have resulted if he had been convicted only of robbery.
>
> It is true, of course, that Harrison is eligible for parole. That, of course, might be a mitigating factor, particularly if eligibility for parole is considered soon after he has reached full maturity and correctional authorities have an opportunity to evaluate his rehabilitation. And a meaningful opportunity to be heard must mean more than a paper review but must involve a serious assessment of the maturity and rehabilitation of the defendant. Even so, however, the difference between a sentence of life in prison with a meaningful opportunity to show rehabilitation and maturity after a decade in prison is substantially more severe than a mere conviction for robbery.

914 N.W.2d at 223. Justice Appel concluded, "I would hold that in this case, a life sentence with the possibility of parole, the harshest sentence available to a child, is grossly disproportional to what he deserves, namely, a sentence for robbery or perhaps involuntary manslaughter." 914 N.W.2d at 223.