2019 CIVIL PROCEDURE/ TRIAL PRACTICE UPDATE

Drake University General Practice Review

Sarah E. Crane

District Court Judge, Polk County (5C)

I. General Practice Pointers.

a. Proposed orders.

b. Indicate whether the opposing party consents or opposes the motion.

c. Notices do not show up in the judge's queue.

d. Include case number in communication to court/court staff.

e. If you have a standardized practice (e.g. debt collection) ensure that assertions in pleadings are verified prior to filing.

f. Importance of jury instructions.

II. Court Rules.

a. Electronic Exhibits. Electronic exhibits rules take effect January 1, 2020. Generally require parties to submit electronic exhibits prior to trial/hearing. Effort to move to all electronic exhibits.

b. Rule 1.904 Motions.

i. Amendment effective March 1, 2017 changed the language of Rule 1.904 to expressly allow motions to reconsider. The comment states the purpose of the amendment was to "supersede prior case law that held a timely rule 1.904(2) motion must also have been 'proper' to extend the time for appeal." The Comment then expressly cites Hedlund v. State, 875 N.W.2d 720 (Iowa 2016) as an example of prior case law to be superseded.

c. Business Court.

i. As of January 15, 2019, agreement of all parties is no longer required to transfer to business court. Party may now file motion to transfer, to be ruled upon by Chief Judge of the judicial district where filed.

ii. Judge Kurt Stoebe (District 2B) and I were appointed to Business Court. We join existing Business Court Judges John Telleen (District 7), Sean McPartland (District 6), and Larry McLellan (District 5C).

iii. Each case receives assigned trial judge and assigned settlement conference judge. Cases remain venued where filed.

III. TOPICAL ISSUES AND CASELAW UPDATE

a. Employment Matter – Separate Whistleblower Claims.

i. Hedlund v. State, 930 N.W.2d 707 (Iowa 2019). Iowa Code § 70A.28(2),(5) creates a separate civil action for state employees who allege retaliation for making a whistleblower disclosure. Does not require exhaustion of administrative remedies under Iowa Code § 80.15, which provides for employment appeals board hearing.

ii. Whistleblower claim applies to disclosure of information to "public official or law enforcement agency" and employee must reasonably believe "the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

iii. Affirmative relief afforded is equitable (reinstatement, back pay, other equitable relief, attorney fees and costs).

b. Employment Matter - McDonnell Douglas Burden Shifting or Price Waterhouse Motivating Standard/Same Decision Defense.

i. McDonnell Douglas: Plaintiff has initial prima facie burden, Defendant articulates legitimate nondiscriminatory reason for action, Plaintiff must demonstrate that proffered reason is mere pretext.

ii. Price Waterhouse: Plaintiff has burden to show unlawful basis was a motivating factor (not only factor). Employer may prove defense that it would have made same decision in the absence of the discriminatory motive. Sometimes referred to as mixed-motive caess.

iii. Hawkins v. Grinnell Regional Medical Center, 929 N.W.2d 261, 272 (Iowa 2019).

> "[I]n discrimination and retaliation cases under ICRA, we apply the Price Waterhouse motivating-factor standard in instructing the jury and the defendant is entitled to an instruction on the same-decision defense recognized in Price Waterhouse if properly pled and proved. … To clarify, we no longer rely on the McDonnell Douglas burden-shifting analysis and determining-factor standard when instructing the jury."

iv. Hedlund v. State, 930 N.W.2d 707 (Iowa 2019).

1. Footnote 8 notes that Hawkins only expressly applied to instructions at trial.

2. As to question of whether McDonnell Douglas continues to apply at summary judgment: "We do not need to decide this issue because, either way, we conclude that Hedlund has failed to raise a genuine issue of material fact."

c. **Employment – Disability Accomodation.**

i. Slaughter v. Des Moines University College of Osteopathic Medicine, 925 N.W.2d 793 (Iowa 2019). Former medical student suffering severe depression alleged DMU failed to accommodate her mental disability. District Court granted summary judgment and Supreme Court affirmed.

1. Where Plaintiff brings claim of failure to accommodate, bears initial burden of demonstrating a request for reasonable accommodation / that reasonable accommodation is possible.

2. Court notes DMU "interacted extensively" with Plaintiff, offered a program that Plaintiff refused, and that Plaintiff did not identify any reasonable accommodation she requested and DMU refused.

3. Dissent: Would deny summary judgment. Argues DMU failed to offer accommodations targeted to Plaintiff's disability as opposed to general assistance available to any student struggling academically.

4. Dissent also raises issue of timing regarding employer participation in interactive process: "An employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation." (citing Taylor v. Phoenixville School Dist., 184 F.3d 296, 317 (3d Cir. 1999), abrogated on other grounds in the ADAAA).

d. **Comparative Fault/Negligence Jury Instructions.**

i. Mumm v. Jennie Edmundson Memorial Hospital, 924 N.W.2d 512 (Iowa 2019). Jury instructions on comparative fault should include instruction to the jury on effect of the jury's answers. Suggests approval of language in stock instructions that the Court will apply allocation or reduce recovery by percentage. However, no prejudice because jury answered no on liability and, therefore, did not reach allocation portion of the verdict form.

ii. Whitlow v. McConnaha, et al., __ N.W.2d __, 2009 WL 5849003 (Iowa Nov. 8, 2019). Illustrates importance of the bracketed instructions after questions on verdict form. Plaintiff motorcycle passenger brought claim

against tractor driver. Tractor driver third-partied in motorcycle driver and Plaintiff amended to assert direct claim against motorcycle driver. Jury found tractor driver was not negligent and verdict form incorrectly instructed jury to stop without considering fault of motorcycle driver.

1. Plaintiff had proposed correct verdict form. All counsel and court overlooked the error in the utilizing the verdict form submitted to Court. (FN 4)

2. Retrial would not include exonerated tractor driver. The error with regard to motorcycle driver would not taint determination as to tractor driver. No error in instructions as to tractor driver.

3. Footnote 5 contains two instructions: 1) trial courts and counsel should scrutinize verdict forms closely, and 2) trial court should not discharge jury prior to ensuring verdict is complete and without inaccuracies.

iii. Eisenhauer ex rel. T.D. v. Henry County Health Center, __ N.W.2d __, 2019 WL 5460622 (Iowa Oct. 25, 2019). Infant's shoulder stuck in mother's pelvis during birth. Child survived, but with permanent damage to arm. Brought suit against doctor, doctor's employer, and hospital. Jury returned defense verdict finding no negligence.

1. Plaintiff proposed multiple specifications of negligence. District Court narrowed down to two for doctor and one for nurses. Supreme Court found instructions "adequately encompassed" the Plaintiff's legal theories of negligence.

e. **Insurance.**

i. De Dios v. Indemnity Insurance Company of North America, 927 N.W.2d 611 (Iowa 2019). Workers' compensation bad faith claim brought against work comp insurer and third party administrator (TPA). Iowa recognizes first-party bad faith claims in workers' compensation arena, given obligations placed on insurer under Iowa law.

1. Holds that plaintiff cannot bring bad faith claim against TPA. Iowa law does not impose affirmative obligations on TPAs. Also, no privity between insured and TPA. Court not concerned about lack of accountability: 1) if TPA is agent, vicarious liability attaches to insurer and 2) nondelegable duties in Iowa law remain on insurer.

ii. Clark et. al. v. Ins. Co. State of Pennsylvania, 927 N.W.2d 180 (Iowa 2019). Holds Iowa statute (Iowa Code §517.5) providing immunity for insurance company inspections of workplace is constitutional. Part of workers' compensation "grand bargain" and survives rational basis review.

f. **Administrative Procedure Act - Service.**

i. Ortiz v. Loyd Roling Construction, 928 N.W.2d 651 (Iowa 2019). Petition for judicial review of Iowa Workers' Compensation Commission decision. Claimant's attorney filed petition and emailed a file-stamped copy to the employer's attorney.

"Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional. The delivery by personal service or mailing referred to in this subsection may be made upon the party's attorney of record in the proceeding before the agency. A mailing shall be addressed to the parties or their attorney of record at their last known mailing address." Iowa Code § 17A.19(2).

ii. Holding appears limited to when service is made upon the attorney of record. Opinion finds that because email is general method of communication between attorneys today, email was substantial compliance.

g. Motions Relating to Types of Argument - Reptile Theory, Personal Vouching.

i. Frequently raised in motions in limine or in closing arguments. Bronner v. Reicks Farms, Inc., 919 N.W.2d 766 (Iowa Ct. App. June 6, 2018).

1. Case relating to motor vehicle accident. Past medical expenses were $59,189.67. Jury awarded $1,559,189.00. District Court granted a new trial. Court of Appeals upheld grant of a new trial based on statements in closing argument.

a. District Court wasn't precluded from granting new trial where Defense had not objected during Plaintiff's counsel's closing statement.

b. Court of Appeals focused on concerns of improper vouching in the closing arguments.

h. **Future Damages and Expert Testimony.**

i. Question is often whether the treating physician can provide opinion without disclosure:

"the paramount criterion is whether this evidence, irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it

represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation."

Hansen v. Cent. Iowa Hosp. Corp., 686 N.W.2d 476, 482 (Iowa 2004) (citation omitted).

ii. Holst v. Stapleton, 924 N.W.2d 875 (Iowa Ct. App. Oct. 24, 2018).

1. Affirmed grant of judgment notwithstanding the verdict on future damages.

2. Held medical testimony was insufficient to support future damages to a reasonable degree of medical certainty. Treating provider testified with regard to permanency "I don't know that I can comment on that" and that plaintiff "might" need to continue physical therapy or continue with pain clinic.

3. Court also held injury was not the type of severe, serious injury that can be submitted without expert testimony.

i. **Termination of Parental Rights- Notice and Participation.**

i. In re the Interest of M.D., K.T., G.A., and S.A., 921 N.W.2d 229 (Iowa Marc. 5, 2019, as amended). Juvenile court permitted incarcerated parent to participate in hearing by telephone only to testify. Holds procedural due process requires that incarcerated parent entitled to participate in entire hearing.

1. Not an abuse of discretion to deny motion to continue.

2. If prison officials refuse to cooperate, requires expedited transcript.

3. Concurrence: agrees in result, would hold failure of juvenile court to allow participation in entire hearing was lack of sound judicial administration but not violation of due process. Raises practical concerns.

ii. In re the Interest of M.S., 924 N.W.2d 537 (Iowa Ct. App. Sept. 26, 2018). Reverses termination of parental rights where record did not reflect parent had received notice of information required by section 600A.6(3), including notice of right to counsel. Order setting hearing included that information but he wasn't personally served with that order.

j. Incarcerated Individuals.

i. In re Marriage of Frick, 758 N.W.2d 841 (Iowa Ct. App. Sept. 17, 2008). Wife incarcerated in county jail awaiting sentencing on pending federal charge. Default judgment in divorce entered. Question of whether 1.211

includes a county jail. Court of appeals reversed with instructions to appoint guardian ad litem, finding controlling issue was that wife's incarceration prevented her from appearing and defending.

ii. In re Marriage of Downs, 885 N.W.2d 220 (Iowa Ct. App. June 15, 2016). Husband was in county jail at time of trial, participated by phone, and a decree was entered. Court refused to vacate divorce decree because husband was allowed to appear telephonically and participated in the trial from the jail. Did not have counsel because he chose not to retain a new one after his original counsel withdrew.

k. Post Conviction Relief. 2019 legislative changes.

i. 822.3 amended to provide that a ground of fact includes DNA profiling and does not include prior ineffective assistance of PCR counsel (legislative abrogation of Allison v. State, 914 N.W.2d 866 (Iowa 2018).)

ii. 822.3B provides Court shall not consider pro se filings by petitioners who are represented by counsel.

iii. 822.6A and B provides for underlying criminal court file to be automatically part of record, requires the clerk to convert to electronic format.