defense UPDATE

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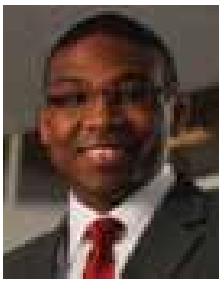
J. MCINTYRE MACHINERY AND *GOODYEAR DUNLOP*: THE U.S. SUPREME COURT GIVES RENEWED VITALITY TO THE "NO PERSONAL JURISDICTION" DEFENSE

By Kevin M. Reynolds and William C. Scales, Whitfield & Eddy, PLC, Des Moines, IA

Kevin M. Reynolds



William C. Scales

A. Introduction.

Two cases decided by the United States Supreme Court on June 27, 2011 suggest renewed vitality for the time-honored defense of lack of personal (or *in personam*) jurisdiction. The law in this area has been in flux since the Court's confusing, multi-opinion decision in *Asahi Metal Industry, Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). In *J. McIntyre Machinery, Ltd. v. Nicastro*, yet another fractured 6-3 decision, a plurality of the Court re-focused the personal jurisdiction analysis onto the manifested intent of the defendant to subject itself to the jurisdiction of the state court. Ultimately, the Court overturned the New Jersey Supreme Court's finding of personal jurisdiction over a British manufacturer whose goods were sold through an independent distributor in the United States.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, a 9-0 Supreme Court determined that the "stream of commerce" test is not applicable to the "general jurisdiction" personal jurisdiction analysis. 131 S. Ct. 2816 (2011). The Court found that foreign subsidiaries of an American parent corporation were not amenable to suit in a state court on claims unrelated to the activity of the subsidiary in the forum. The case, which sought damages for a bus crash occurring in France, was filed in North Carolina. The Court overruled the North Carolina Court of Appeals' decision which found that the state had general personal jurisdiction over the foreign subsidiary because some of the tires that were manufactured abroad, by a foreign subsidiary of the defendant, found their way to North Carolina through the "stream of commerce." In doing so, the Court refused to accept a "stream of commerce" theory of general jurisdiction - limiting that analysis solely to the specific jurisdiction inquiry.

As a result of both of these cases, and particularly the unanimous *Goodyear Dunlop* decision, the defense of "no personal jurisdiction" has been strengthened and given new vitality. In addition, as a result of these cases, the sufficient minimum contacts constitutional analysis has been further defined and delineated. In some situations, especially where the applicable statute of limitations has run, winning the personal jurisdiction argument may mean complete dismissal of the case for the defendant.

Both of these cases are important to Iowa defense practitioners because the analysis for determining the existence of "sufficient minimum contacts," in both federal and state court cases, is based on U.S. Supreme Court interpretations of Due Process. This article will review the *J. McIntyre and Goodyear Dunlop* decisions and then apply this new precedent to recent Iowa precedent and established law. Our purpose is to provide defense lawyers with a roadmap to use when confronted with a case involving personal jurisdiction issues implicating a plaintiff's failure to meet the sufficient minimum contacts test.

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A. *J. McIntyre Machinery Co. v. Nicastro*, __U.S. __, 131 S. Ct. 2780, 180 L.Ed.2d 765 (2011).

In *J. McIntyre Machinery*, a British manufacturer of a metal shearing machine moved to dismiss a consumer's product liability suit, arguing lack of personal jurisdiction. The worker, Nicastro, injured his hand in the machine. Nicastro filed suit in New Jersey where the accident occurred. Using a "stream of commerce" theory, the New Jersey Supreme Court held that the Fourteenth Amendment's Due Process Clause was not violated by the state court's exercise of jurisdiction. In a 6-3 decision with one concurring opinion and one dissent, the U.S. Supreme Court reversed the state court's exercise of jurisdiction over the foreign manufacturer. As a factual matter, the manufacturer did not have a single contact with the state of New Jersey except that the industrial shearing machine ended up in New Jersey. The Court found that, under *International Shoe Company v. Washington*, 326 U.S. 310 (1945), a defendant's "purposeful availment" makes the exercise of jurisdiction consistent with "traditional notions of fair play and substantial justice." The transmission of goods into a state permits the exercise of jurisdiction only where the defendant has targeted the forum – generally, it is not enough that a defendant might have predicted its goods would reach the forum state. As a result, it is clear that a defendant must affirmatively and intentionally direct its conduct at a state in order to be amenable to suit in that jurisdiction.

In *J. McIntyre Machinery*, the separate concurrence by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia and Thomas, concluded that the New Jersey court did not have the power to adjudge the company's rights and liabilities and that the New Jersey court's exercise of jurisdiction would violate due process since the defendant never engaged in any activities in New Jersey that revealed an intent to invoke or benefit from the protection of the State's laws.

Moreover, the majority in *J. McIntyre* answered an important question left open by *Asahi Metal Industry* – the seminal 1987 decision in this area. "In *Asahi*, Justice Brennan's concurrence (joined by three other justices) discarded the central concept of sovereign authority in favor of fairness and foreseeability considerations on the theory that the defendant's ability to anticipate suit is the touchstone of jurisdiction." *J. McIntyre Machinery*, 131 S. Ct. at 2783. But, Justice O'Connor's separate concurring opinion in *Asahi* (also joined by three other justices) stated that "the substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State." *Id*. (quoting *Asahi*, 480 US at 112) Thus, in *Asahi Metal Industry*, Justice Brennan focused on a "foreseeability" test, while Justice O'Connor focused on conduct of a defendant purposefully directed at the forum state. Since *Asahi*, courts (with varying degree of success) have sought to reconcile these two positions. As Justice Kennedy clearly points out in *J.McIntyre Machinery*: "Today's conclusion that the authority to subject a defendant to judgment depends on purposeful availment is consistent with Justice O'Connor's *Asahi* opinion." 131 S. Ct. 2784. One could further argue that *J. McIntyre Machinery's* logic has diminished the viability of (if not completely done away with) the foreseeability analysis that was presented in Justice Brennan's concurring opinion in *Asahi Metal Industry*.

In *J. McIntyre Machinery*, Justices Breyer and Alito agreed that the New Jersey Supreme Court's judgment should be reversed, but concluded that since the case did not present issues arising from recent changes in commerce and communication, it was unwise to announce a rule of broad applicability without fully considering modern-day consequences.

Justices Ginsburg, Sotomayor and Kagan dissented, finding that sufficient minimum contacts existed under applicable precedent, such that the New Jersey courts could exercise jurisdiction over the defendant. The fact that three justices of the Court dissented on this issue underscores how this area of the law continues to be, at least to some extent, in a state of flux.

B. *Goodyear Dunlop Tires Operations v. Brown*, __U.S. __, 131 S. Ct. 2846, 180 L.Ed.2d 796 (2011).

Goodyear Dunlop was a suit that arose out of a bus accident that occurred in France. Two boys were killed in the accident. Blaming the accident on a tire that failed, their parents filed a products liability action in state court in North Carolina, where they lived. The suit alleged negligence in the design, construction, testing, and inspection of the tire, which was actually manufactured in Turkey. Three of the manufacturer's subsidiaries were incorporated in Turkey, Luxembourg and France, and those companies manufactured tires primarily for sale in Europe and Asia. A small percentage of tires were distributed within North Carolina by other affiliates. The state court relied on the subsidiaries' placement of their tires into the "stream of commerce" to justify the exercise of general jurisdiction over the subsidiaries by the court in North Carolina. The United States Supreme Court determined that the subsidiaries were not amenable to general jurisdiction in North Carolina courts, because their attenuated connections to the State fell far short of the "continuous and systematic" general business contacts necessary for North Carolina to allow a suit against them on claims unrelated to anything that connected them to the state. Further, the Court's unanimous decision found that the sporadic sale of the subsidiaries' tires in North Carolina, through interme-

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diaries, was insufficient to warrant the assertion of general jurisdiction. As a result, the Court reversed the decision of the North Carolina Supreme Court.

C. Noteworthy Iowa Personal Jurisdiction Cases.

A review of recent Iowa appellate cases on the "sufficient minimum contacts" issue is instructive. Many of these cases can be harmonized with *J. McIntyre Machinery* and *Goodyear Dunlop*. And to the extent prior Iowa cases rely on a "foreseeability" test, those authorities may now be called into question. The Iowa Court of Appeals in *Statler v. Faust* and *Aguirre*, No. 0-632 / 09-1917, 2010 Iowa App. LEXIS 1080 (Iowa Ct. App. 2010), held that a defendant's ability to foresee that a truck trailer he inspects might be traveling in Iowa, is insufficient to find the defendant subject to the jurisdiction of Iowa courts. *Statler* involved a suit against a California business that had safety-inspected an over-the-road trailer for a semi-truck that was later involved in an accident in Iowa. After the accident, a suit was filed alleging that the defendant was negligent in its inspection of the trailer and that this was a cause of the accident. Denying the defendant's motion to dismiss, the trial court found that it had personal jurisdiction since the defendant could have anticipated that the trailer would be used in Iowa. The trial court's analysis could be viewed as analogous to the "foreseeability" analysis used by Justice Brennan in his concurrence in *Asahi Metal Industry*. However, on an interlocutory appeal, the appellate court in *Statler* reversed the trial court and dismissed the defendant based on lack of *in personam* jurisdiction. In doing so, the court emphasized two elements of the sufficient minimum contacts analysis:

> Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [due process] is satisfied if the defendant has "purposefully directed" his activities at residents of the forum and the litigation results from alleged injuries that "arise out of or relate to" those activities.

2010 Iowa App. LEXIS 1080, at *8 (citations omitted). Thus, *Statler* is consistent with both *Goodyear-Dunlop* and *J. McIntyre Machinery* in that: 1) the mere fact that a product is placed into the "stream of commerce" is not enough to establish personal jurisdiction; and 2) that the mere fact that it is "foreseeable" that a product (or in *Statler's* case, a truck that had been serviced or maintained in another state) may end up in the forum state is not enough.

In *Pro Edge, L.P. v. Gue*, 374 F. Supp .2d 711 (N.D. Iowa 2005), *motion to amend denied*, 377 F. Supp. 2d 694, *modified* 411 F. Supp. 2d 1080 a federal district court sitting in Iowa noted that, in establishing personal jurisdiction, it is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

In *Wells Dairy, Inc. v. Food Movers Intern., Inc.*, 566 F. Supp. 2d 933 (N.D. Iowa 2008), *affirmed* 607 F.3d 515, *rehearing and rehearing en banc denied, certiorari denied* 131 S. Ct. 472, 178 L. Ed. 2d 289 (2010), the court held that exercising jurisdiction over a California buyer of an Iowa seller's products in Iowa would not offend traditional notions of fair play and substantial justice under due process, notwithstanding the buyer's lack of physical presence in the state. In *Wells Dairy, Inc.*, the defendant had initiated a business relationship with the Iowa seller, with knowledge that the products it ordered would be manufactured in Iowa, delivered in Iowa, and resold in Iowa to its own customers who picked up the products at the seller's plant in Iowa. The initiation of a series of contacts with an Iowa resident by an out-of-state party could certainly be viewed as "purposeful availment" or at least intentional conduct directed towards the forum state. In any case where *in personam* jurisdiction is in issue, the specific facts of the case will be critical, especially where aspects of the defendant's conduct tie it to the forum state in some significant respect.

In *Brown v. Kerkhoff*, 504 F. Supp. 2d 464 (S.D. Iowa 2007), the court found that business contacts between individual non-resident defendants and Iowa were insufficient to support the existence of specific personal jurisdiction under the Iowa long-arm statute. *Brown* was a civil conspiracy action where there was no connection alleged between those defendant's contacts with Iowa and the claims being made in the case. Each individual defendant in *Brown* visited Iowa between 4-12 times over the past decade to deliver speeches to promote a New York-based organization. This organization was allegedly involved in a nationwide conspiracy designed to induce patients to pay for unneeded or unnecessary chiropractic care. Each individual defendant authored materials directed into Iowa either through the mail or through the organization's websites.

In *Addison Ins. Co. v. Knight, Hoppe Co., Kurnik & Knight, LLC*, 734 N.W.2d 473 (Iowa 2007), the Iowa Supreme Court found that an Illinois law firm had sufficient minimum contacts with Iowa so as to give the district court personal jurisdiction over the firm in a malpractice action brought by a corporate client located in Iowa. The court in *Addison Ins.* so held regardless of the small number of personal visits by the firm's representatives to the client's Iowa headquarters. The law firm's attorneys had extensive contact with the client over the years and handled the client's Illinois claims. The court in *Addison Ins. Co.* concluded that the nature and quality of the firm's communications to Iowa were such that the law firm should have reasonably anticipated being haled into state court, and the malpractice action arose out of or was related to those contacts.

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D. Do *J.McIntyre Machinery* and *Goodyear Dunlop* change Iowa law?

J. McIntyre Machinery and *Goodyear Dunlop* are important legal precedent in this area of the law. A fundamental aspect of the *in personam* jurisdictional inquiry is the constitutional, due-process inquiry of "sufficient minimum contacts." This is true whether a case is filed in state or federal court, as the Fourteenth Amendment to the U.S. Constitution renders the due process requirements equally applicable to the states, as well as the federal government.

The authors submit that *J. McIntyre Machinery* and *Goodyear Dunlop* did not necessarily change existing Iowa law, but rather re-emphasized, especially in a products liability setting, that the mere placement of a product into the stream of commerce, without more, is not enough for a state court to exercise jurisdiction over a non-resident manufacturer or supplier. This emphasis is welcome given Justice Brennan's concurring opinion in *Asahi Metal Industry*, which argued that if it was foreseeable that a product might end up in the forum state, then sufficient minimum contacts (and thus personal jurisdiction) were established. Even older Iowa cases support the view that the *sine qua non* is "stream of commerce" *plus* "purposeful availment." For example, in *Smalley v. Dewberry*, 379 N.W.2d 922 (Iowa 1986), the court found that an operator of an automotive parts business in Tennessee, who sold a steering wheel to an Iowa resident who was stationed in the military in nearby Kentucky, did not have sufficient minimum contacts with Iowa to justify *in personam* jurisdiction over an action for injuries sustained in a truck accident allegedly resulting from defects in the steering wheel. In *Smalley*, there was no evidence the defendant had any other connection with Iowa. In *Smalley*, there was certainly no "purposeful availment" of the Iowa courts by the defendant. Because this element was absent, personal jurisdiction over the defendant was lacking.

The other significant take away in jurisdictional law from *J. McIntyre Machinery* is its watering down (if not downright elimination) of the foreseeability analysis. Now, if a defendant-manufacturer can merely "foresee" that its products will end up in Iowa, then sufficient minimum contacts have not been established. This could dictate a different result in a given case. For example, in *Svendsen v. Questor Corp*., 304 N.W.2d 428 (Iowa 1981), the court held that when a manufacturer voluntarily places its product in the stream of commerce, that the constitutional requirement of minimum contacts will be satisfied in all states where the manufacturer can foresee that the product will be marketed. After *J. McIntyre Machinery*, the emphasis should be on "purposeful availment" or intentional conduct directed at the forum state, instead of mere foreseeability. Justice Brennan's "foreseeability" test has now been rejected by at least a majority of the Court in *J. McIntyre Machinery*. Although there were three votes in dissent, a strong argument can be made that any Iowa precedent that relied on mere foreseeability is no longer good law.

Further, even though both *J. McIntyre Machinery* and *Goodyear Dunlop* were products liability cases, the "sufficient minimum contacts" test of personal jurisdiction applies to all cases and not just products liability cases. The same is true of the "purposeful availment" element of the test. For example, contract and other commercial litigation matters involving out-of-state parties or transactions are often grist for the mill of the law of personal jurisdiction, especially when a contract's or transaction's connections to the forum state are attenuated. *See, e.g., Capital Promotions, LLC v. Don King Productions, Inc*., 756 N.W.2d 828 (Iowa 2008) (phone calls from Iowa to out-of-state defendant initiated by party in Iowa would not be considered in determining sufficient minimum contacts with Iowa; only the out-of-state party's purposeful forum state contacts matter); *Nebraska Beef Ltd. v. KBK Financial*, 288 F. Supp. 2d 985 (S.D. Iowa 2003) (Iowa had no jurisdiction over a Texas lender under the long-arm statute; Nebraska party brought a suit alleging tortuous interference and conversion with its contract with an Iowa business; Iowa did not have any interest in providing a forum for the suit, the forum was not convenient for either party, and the claims in suit were unrelated to the lender's contacts with Iowa); and *Ross v. Thousand Adventures of Iowa, Inc*., 723 N.W.2d 449 (Iowa App. 2006) (FTC rule preserving borrower's causes of action did not grant Iowa personal jurisdiction over a non-resident mutual savings bank, which had merely been assigned campground membership purchaser's installment contracts; fact that contracts were assigned to the Bank was merely one factor in analyzing minimum contacts with Iowa, and was not a per se grant of jurisdiction). From this point of view *J. McIntyre Machinery* and *Goodyear Dunlop* merit close attention from any defense lawyer representing parties located outside of Iowa, but who are sued in Iowa.

E. A personal jurisdiction "checklist" for defense practitioners.

1. Has the method of service of process been properly effected?
   a. In state court:
      i. Have the requirements of Iowa R. Civ. P. 1.305 been met? *Webster Industries, Inc. v. Northwood Doors, Inc*., 244 F. Supp. 2d 998 (N.D. Iowa 2003) (personal service upon an individual did not satisfy the requirements of Iowa rule governing service

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upon a corporation); *Yellow Book Sales & Dist. Co. v. Walker*, No. 0-614 / 09-1308, 2010 Iowa App. LEXIS 1156 (Iowa Ct. App. Oct. 6, 2010) (discussing the requirements for "personal" service); *Plymat v. Anderson*, No. 05-554 / 09-1743, 2010 Iowa App. LEXIS 894 (Iowa Ct. App. Aug. 25, 2010) (delivery by ordinary mail is not a sufficient means of personal service); *Stockbauer v. Schake*, No. 0-405 / 09-1720, 2010 Iowa App. LEXIS 841 (Iowa Ct. App. Aug. 11, 2010) (default judgment void for lack of notice where substituted service on an agent was not proper).

ii. Have the requirements of Iowa R. Civ. P. 1.306 (formerly Iowa R. Civ. P. 56.2) been met? The rule provides, among other things, that every corporation, individual, personal representative, partnership, or association that has the necessary minimum contact with Iowa is subject to the jurisdiction in Iowa courts and expands Iowa's jurisdictional reach to the widest due process parameters allowed by the United States Constitution. *Hammond v. Florida Asset Financing Corp.*, 695 N.W.2d 1 (Iowa 2005); *Accord Capital Promotions, L.L.C. v. Don King Prods.*, 756 N.W.2d 828 (Iowa 2008).

iii. Have the requirements of Iowa Code § 617.3 (the long-arm statute) been met? Iowa's long-arm statute confers jurisdiction to the full extent permitted by the Constitution. *Principal Financial Services, Inc. v. Big Finance and Ins. Services, Inc.*, 426 F. Supp. 2d 976, *subsequent determination* 451 F. Supp. 2d 1046 (S.D. Iowa 2006). The long-arm statute provides an extraordinary method for securing jurisdiction; therefore, clear and complete compliance with its provisions is required. *Barrett v. Bryant*, 290 N.W.2d 917 (Iowa 1980).

1. Is there a contract to be performed in whole or in part in the state of Iowa? *Frontier Leasing Corp. v. Singh*, CV065002885S, 2009 Conn. Super. LEXIS 2104 (Conn. Super. July 30, 2009) (Iowa court had personal jurisdiction over the defendant in a suit by an equipment lease holder, as: (1) defendant made its lease payments in Iowa and the choice of forum clause in the lease gave jurisdiction to Iowa Courts; (2) it did not make any *forum non conveniens* objections to the Iowa action; (3) it was put on notice; and (4) there was no testimony of fraud); *Omnilingua, Inc. v. Great Golf Resorts of World, Inc.*, 500 N.W.2d 721, 723 (Iowa 1993) ("[Iowa Code section] 617.3 authorizes personal jurisdiction over a nonresident who has entered into a contract 'to be performed in whole or in part by either party in Iowa.'").

2. Has there been a tort committed in whole or in part in the state of Iowa? *Universal Coop., Inc. v. Tasco, Inc.*, 300 N.W. 2d 139 (Iowa 1981).

3. Has service properly been made on the Iowa Secretary of State's office ("substituted service")? *McCormick v. Meyer*, 582 N.W.2d 141 (Iowa 1998); *Eagle Leasing v. Amandus*, 476 N.W.2d 35 (Iowa 1991).

iv. Has the defendant been served in a timely fashion? See Iowa R. Civ. P. 1.302(5) (within 90 days of filing). *Palmer v. Hofman*, 745 N.W.2d 745 (Iowa App. 2008) (when there is no service within 90 days after filing the petition, and no order extending the time for service, the delay is presumptively abusive under the rule providing for timely service).

v. Has the defendant been properly named in the suit?

vi. If not, has the plaintiff effected service of process on the correct and correctly-named defendant within the applicable statute of limitations? *See* Iowa R. Civ. P. 1.402(5). If not, then any later amendment to "add" the correct party, even in cases of a "misnomer," will not relate back to the filing date of the original petition, for statute of limitations purposes. *Richardson v. Walgreens, Inc.*, 680 N.W.2d 379 (Iowa App. 2004) (misnomer situation; amended complaint did not "relate back" because proper party was not served with notice of the suit within the applicable statute of limitations).

b. In federal court:

i. Have the requirements of Fed. R. Civ. P. 4 been met?

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2. Regardless of whether the case is filed in state or federal court, has the due process, constitutional requirement of "sufficient minimum contacts" test been met? When a plaintiff asserts that the court has jurisdiction over the defendant, the plaintiff has the burden of proof to show that the defendant had the necessary minimum contacts with the state. *Curtis v. NID PTY, Ltd*., 248 F. Supp. 2d 836 (S.D. Iowa 2003);

   a. Is there general jurisdiction? *See e.g. Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011) (a court may assert general jurisdiction over foreign (sister state or foreign country) corporations to hear any and all claims against them when their affiliation with the state are so "continuous and systematic" as to render them essentially at home in the foreign state).

   b. Is there specific jurisdiction? *Id*. (specific jurisdiction depends upon an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulation).

   c. Has the putative defendant "purposefully availed" themselves of the protections of the forum state? *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

   d. Has the putative defendant placed a product "into the stream of commerce?" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

   e. If a product is involved, did the product end up in the forum state by chance, or did the defendant have an organized, deliberate distribution chain which targeted consumers in that state for potential sales or use?

   f. Is there a claim that a specific act unrelated to the claim in question gives the Court specific jurisdiction? If so, keep in mind that such acts will not support an exercise of general jurisdiction over the defendant. *See Goodyear Dunlop, 131 S. Ct. 2846 see also Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

   g. In determining whether there are sufficient minimum contacts, the following factors should be considered:

      i. The quantity of the contacts;

      ii. The nature and quality of the contacts;

      iii. The source and connection of the cause of action with those contacts;

      iv. The interest of the forum state; and

      v. The convenience of the parties.

      Hammond v. Florida Asset Financing Corp., 695 N.W.2d 1 (Iowa 2005).

   h. Is the case a putative class action? If so, does the court have jurisdiction over each individual claim of the plaintiffs versus the defendant? The claims of all potential class members in a proposed class action against a Florida corporation could not be considered in determining whether the court has personal jurisdiction; if the court lacks jurisdiction over the individual claims, it also lacks jurisdiction over the defendant for purposes of certifying a class action. *Id. Hammond v. Florida Asset Financing Corp*., 695 N.W.2d 1 (Iowa 2005).

   i. Even if there is personal jurisdiction, should the case be transferred to another venue based on *forum non conveniens*? *Nebraska Beef Ltd. v. KBK Financial*, 288 F. Supp. 2d 985 (S.D. Iowa 2003) (fact that forum was not convenient for either party factored into decision to decline to exercise personal jurisdiction).

F. Conclusion.

In any case where the absence of personal jurisdiction due to lack of sufficient minimum contacts may come into play, a close examination of the recent U.S. Supreme Court cases of *J. McIntyre Machinery and Goodyear Dunlop* should be made. Even if general jurisdiction exists, this alone will not support the exercise of specific jurisdiction under the authority of *Goodyear Dunlop* for actions or conduct wholly unrelated to those general activities. Although *J. McIntyre Machinery* dismissed the case against the defendant, it unfortunately continues the tradition of divided courts weighing in on personal jurisdiction in the product liability context, which began in 1981 with *Asahi Metal Industry*. For further clarification in this area we must await future decisions by the Court. "Purposeful availment" has become more important as a consideration, and the mere foreseeability that a product might ultimately end up in the forum state is not enough. The authors would expect further clarification of the law in this area to appear much sooner than the more-than one quarter of a century it took the Court to build upon and refine *Asahi Metal Industry*. ■

MESSAGE FROM THE PRESIDENT

Greg G. Barntsen

STEPS TAKEN TO IMPROVE STRENGTH OF IOWA DEFENSE COUNSEL ASSOCIATION

I am pleased to report that since my last President's Letter members of the IDCA Board of Directors and several past Presidents had a meeting to take the first step to improve the strength of the IDCA and improve the benefits provided to its members.

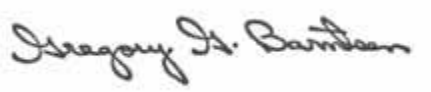
The Board's meeting on December 2, 2011, was scheduled as a Strategic Planning Meeting to determine the goals of the organization and how to achieve those goals as we move forward. The Board has determined that the IDCA should be a trusted professional voice for the defense of civil litigants. The organization seeks to protect and promote a balanced civil justice system.

In order to accomplish these goals the Board will seek to have IDCA members develop and support policies and procedures that ensure a fair and effective civil justice system through participating in affirmative legislative agenda, increasing its communication with its members; advocating the court system to maintain adequate funding; and ensuring the interest of IDCA members are represented on the court and all relevant committees. The Board and its task forces and committees will seek to increase its membership and continue to deliver high quality, relevant continuing legal education for individuals and organizations that engage in the defense of civil litigants. The Board believes that each member of the IDCA is important to the success of the organization and efforts will be made to increase member engagement and increase benefits to members of the organization.

On February 10, 2012 the Board of Directors adopted its Strategic Plan to assist the organization in becoming more effective by providing more opportunities to its members to be involved on committees and task forces.

I encourage each of you, as members of the IDCA, to become involved on an individual basis with the organization through involvement in its activities. If you have a desire to become involved with the IDCA, please contact me at: ggbarntsen@smithpeterson.com; in your email, please list your areas of interest and involvement. Feel free to contact me to provide me with any suggestions you may have to make the IDCA a better organization to serve your interests.

Sincerely,



Gregory G. Barntsen, President

IOWA DEFENSE COUNSEL ASSOCIATION

STRATEGIC PLAN 2012 – 2016

MISSION To remain the trusted professional voice for the defense of civil litigants.

VISION IDCA protects and promotes a balanced civil justice system.

GOALS & STRATEGIES

Goal 1 Advocacy

IDCA members develop and support policies and procedures that ensure a fair and effective civil justice system.

Strategies

1. Promote excellence in the defense of civil litigants.
2. Maintain an effective presence with the Executive, Judicial and Legislative branches of the Iowa government.
3. Develop a consistent voice for the organization.
4. Promote and engage members in the development of an affirmative legislative agenda.
5. Increase the effectiveness of IDCA's communications on policy related to our legislative agenda to our members.
6. Be an advocate for the court system to ensure adequate funding.
7. Represent IDCA member interest to the court and all relevant committees.

Goal 2 Membership Growth

Grow membership to create a more powerful voice to promote IDCA's advocacy initiatives and ensure the financial viability of the organization.

Strategies

1. Appoint a Membership Committee to analyze current membership strategies and develop recommendations to increase membership and expand member benefits options.

Goal 3 Education

IDCA delivers quality, timely, relevant continuing legal education for individuals and organizations involved in the defense of civil litigants.

Strategies

1. Energize the CLE Committee to maximize growth and opportunity for IDCA CLE.

Goal 4 Increase Member Participation

IDCA provides opportunities for members to contribute to the success of the organization.

Strategies

1. Refine the current committee structure.
2. Define objectives for each committee and task force.
3. Invite and encourage member participation in the growth of IDCA.
4. Promote opportunities to members on how they can participate in the activities of IDCA.
5. Improve communications between members and leaders.

SMOKE ON THE WATER: INTERPRETATION AND APPLICATION OF THE LONGSHOREMAN AND HARBOR WORKER'S COMPENSATION ACT, THE JONES ACT AND THE IOWA WORKERS' COMPENSATION ACT

By Sara L. Haas and Brent Ruther, Aspelmeier Fisch Power Engberg & Helling P.L.C., Burlington, IA

The waters of workers' compensation are murky when an injury occurs on or near navigable water. In a recent Iowa Court of Appeals Case, the Court was confronted with the issue of whether a claimant's deceased husband was covered under the Iowa Workers' Compensation Act or the Longshoreman and Harbor Worker's Act ("LHWCA). *Bluff Harbor v. Wunnenberg*, 801 N.W.2d 627, No. 10-1237, 2011 WL 2041833 (Iowa Ct. App. May 25, 2011). Although, the jurisdiction of the Iowa Workers' Compensation Act and the LHWCA is supposed to be mutually exclusive, coverage issues remain unclear. Moreover, the exclusive remedy provisions under the LHWCA do not preclude an injured employee from seeking recovery under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 85, 112 S.Ct. 486, 489, 116 L.Ed.2d 405 (1991). The Iowa Workers' Compensation Act specifies that an employee is not covered under the Iowa Workers' Compensation Act when the individual is covered by any federal acts. *Harvey's Casino v. Isenhour*, 713 N.W.2d 247 (Iowa Ct. App. 2006) aff'd 724 N.W.2d 705 (Iowa 2006) (stating "Iowa Code section 85.1(6) (2001) provides that injured workers covered by a method of compensation established by the Congress of the United States are exempt from coverage by Iowa's workers' compensation law."). So long as the employee is covered by the federal Jones Act or LHWCA, the employee is not covered under the Iowa Workers' Compensation Act.

The coverage issues under the LHWCA have continually evolved through legislative amendments as well as interpretations by state and federal courts. The LHWCA was enacted in 1927 and applied to employees engaged in maritime employment. *U.S. Cas. Co. v. Taylor*, 64 F.2d 521, 523 (4th Cir. 1933). The LHWCA was amended in 1972 to cover some land based employees. *Department of Labor v. Perini*, *North River Associates*, 459 U.S. 297, 313, 103 S. Ct. 634, 645 (1983). The Amendments include "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." LHWCA Amendments of 1972. Pub.L. No. 92-576 (codified at 33 U.S. C. § 903(a)). It was a consequence of the Amendment that the "status" of the employee requirement became necessary along with the consideration of the "situs of the injury." *Perini*, 459 U.S. at 317, 103 S. Ct. at 647. Prior to 1972, an employee injured on navigable waters was covered under the LHWCA, arguably, without regard to the employee's job requirements or position. *See*, *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941). The "status" requirement, however, requires consideration of the call of the employee. *Perini*, 459 U.S. at 317. Despite the existence of the status requirement, the Supreme Court held that 1972 amendments enacted by Congress were not intended to withdraw coverage from any employee who would have been covered before 1972. *Perini*, 459 U.S. at 315. The individuals that were covered before 1972 were the employees that were still intended to be covered.

In 1984, the LHWCA was further amended redefining certain employees and specifically exempting certain employees and classes of employees. 33 U.S.C § 902(3). Suffice it to say, certain portions of those exemptions, as drafted by lawmakers, create further confusion and areas of argument. The LHWCA provides for compensation to any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, who is accidentally injured or killed in the course of employment, or contracts an occupational disease or infection naturally arising out of employment or who receives an injury caused by the willful act of a third person directed against an employee because of his employment. 33 U.S.C. § 902.

Under the LHWCA, those employers required to provide such compensation are those "whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C § 902(4). The LHWCA does exclude some employees from coverage. 33 U.S.C. § 902(3)(A-H). Those excluded from coverage are as follows:

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
(E) aquaculture workers;
(F) individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel;

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(G) a master or member of a crew of any vessel; or
(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C.A. § 902(3). Looking at the excluded employees, it appears that the legislature's intent was to exclude those employees who were not engaged in longshoring operations.

These exclusions provide some clarifications as to which employees are excluded from the Act, but raise questions and areas ripe for interpretation and common law modification with regard to certain areas and classes of employees. Additionally, because the Court in *Perini* left open coverage for workers who would have been covered under the Act prior to 1972, the issue of which employees are covered is an area for argument.

In the recent Iowa Court of Appeals Case, *Bluff Harbor v. Wunnenberg*, the facts were unique in that the claimant, the surviving spouse of a recreational marina manager, was seeking to recover under the Iowa Workers' Compensation Act rather than the LHWCA. 801 N.W.2d 627, No. 10-1237, 2011 WL 2041833 (Iowa Ct. App. May 25, 2011). The decedent worked at the Bluff Harbor Marina part-time as a manager. *Wunnenberg*, 2011 WL 201833, *1. His full-time job was as chief of police of Burlington, Iowa. *Id*. The decedent was paid an hourly wage for his work at the marina. *Id*. Based upon these facts, the claimant spouse would receive more benefits under the Iowa Workers' Compensation Act rather than the LHWCA because of the formula under the two Acts used to calculate part-time employees benefits who also have full-time employment. More importantly, while the Iowa Workers' Compensation Act will allow the claimant to request a full or partial commutation, whereas the LHWCA provides no such avenue of relief. In a death case such as the *Wunnenberg* matter, this opens up substantial exposure due to the fact that under both Acts, the claimant's benefits would terminate upon her death or remarriage. However, a full or partial commutation of the weekly benefits would provide immediate payment of future benefits not otherwise payable should the payee die. Clearly, under the facts above, the claimant obtains a much greater benefit under the Iowa Act. The circumstances of the employee's death raised issues regarding coverage. Although the exclusions in section 33 U.S.C. 902(3)(C) apply to marina workers, the exclusion does not apply if the individual is engaged in construction, replacement or expansion of such marina (except for routine maintenance). At the time of decedent's death, he was using a mini-excavator to remove an old cover on a boat slip. *Wunnenberg*, 2011 WL 201833, 2. The decedent died when the mini-excavator he was trying to load onto a small barge fell into the water and trapped him inside. *Wunnenberg*, 2011 WL 201833, 1. The issue of whether the decedent was engaged in routine maintenance or construction, replacement or expansion of the marina was extensively debated. *Wunnenberg*, 2011 WL 201833, 3. Ultimately, the Iowa Court of Appeals affirmed the Iowa Workers' Compensation Commissioner's finding that a greater weight of the evidence was that the decedent was conducting routine maintenance at the time of his death and thus excluded under the LHWCA, thus entitling his widow to compensation under the Iowa Act. *Id*.

Due to the evolution of the LHWCA, it may be unclear as to whether an employee would be eligible to recover under the LHWCA and, as such, there is a concern that pursuing one avenue of compensation under the LHWCA over another avenue under the Iowa Workers' Compensation Act would result in jeopardizing a claim due to the statute of limitations. From a defense stand point, the issue is if an employee files under the LHWCA and is not found to be entitled to benefits, can the statute of limitations be used to prevent the employee from recovering under the Iowa Workers' Compensation Act? If a claim is erroneously filed under a state workers' compensation act it is not clear whether that tolls the one year statute of limitations of the LHWCA. 14 Am. Jur.2d Trials 23, *Handling Claims for Injuries to Longshoremen*, § 17 (April 2011). However cases suggest that if a claim is erroneously filed under the Federal Employers' Liability Act or the Jones Act and the LHWCA is held to apply, the statute of limitations is tolled until the termination of the erroneously filed claim. 14 Am. Jur.2d Trials 23, *Handling Claims for Injuries to Longshoremen*, § 17 (April 2011). Therefore the statue of limitations can be argued if the claimant files under the Iowa Workers' Compensation Act outside the two year period after failing to recover under the LHWCA.

The exclusive remedy provisions under the LHWCA do not preclude an injured employee from seeking recovery under the Jones Act. *Gizoni*, 502 U.S. 81. The exclusivity or liability provision under the LHWCA "in part states that the liability of an employer 'shall be exclusive and in place of all other liability of such employer to an employee...'" *Gizoni*, 502 U.S. at 86, (quoting 33 U.S.C. § 905(a)). "The term 'employee' as defined in the LHWCA does not include a 'master or member of a crew of any vessel.'" Gizoni, 502 U.S. at 86-87, (quoting 33 U.S.C. § 902(3)(G)). "[T]he Jones Act provides that '[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway

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employees shall apply. . .” *Gizoni*, 502 U.S. at 86, (quoting 46 U.S.C. App. § 688(a)). In *Gizoni*, “the Supreme Court defined the issue before it as ‘whether a maritime worker whose occupation is one of those enumerated in the Longshore and Harbor Workers’ Compensation Act (LHWCA) . . . may yet be a ‘seaman’ within the meaning of the Jones Act . . ., and thus be entitled to bring suit under that statute.’” *Figueroa v. Campbell Industries*, 45 F.3d 311, 314 (9th Cir. 1995) (quoting *Gizoni*, 502 U.S. at 85. The Supreme Court held that the maritime worker covered by the LHWCA could pursue an action under the Jones Act. *Gizoni*, 502 U.S. at 85. In other words, some maritime workers may be Jones Act seamen performing a job specifically enumerated under the LHWCA. *Gizoni*, 502 U.S. at 89.

In situations where the employee receives voluntary payment under the LHWCA without a formal award the employee can still seek relief under the Jones Act. *Gizoni*, 502 U.S. at 91. The reasoning behind this conclusion is that “although the two acts are mutually exclusive, some maritime workers may be Jones Act seamen who are injured while also performing a job enumerated under the LHWCA, and, therefore, are entitled to recovery under both statutes.” *Figueroa v. Campbell Industries*, 45 F.3d 311, 314 (9th Cir. 1995). In situations where the payments are made voluntarily under the LHWCA or the jurisdictional issue of coverage “was not contested and no finding was made at an administrative level, a plaintiff is not stopped from bringing a Jones Act claim.” *Figueroa*, 45 F.3d at 316 (citing *Guidry v. Ocean Drilling and Exploration Co*., 244 F. Supp. 691 (W.D.La. 1965); *Biggs v. Norfolk Dredging Co*., 360 F.2d 360 (4th Cir. 1966)). The LHWCA provides that “any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA.” *Gizoni*, 502 U.S. at 91-92, (citing 33 U.S.C. § 903(e)).

The Jones Act’s purpose is to provide benefits for seamen that are similar to those provided to railroad workers under the Federal Employers’ Liability Act. 14AA Fed. Prac. & Proc. Juris. § 3677 *Cases Involving Maritime Torts-Jurisdiction under the Jones Act* (4th ed. 2011). The Jones Act created an action for negligence that could be filed by the seaman injured in the course of employment by his employer’s negligence. *Id*. Although the term “seaman” is not defined under the Jones Act, “the Supreme Court has articulated two ‘essential elements’ for seaman status under the Jones Act: First, … ‘an employee’s duties must ‘contribut[e] to the function of the vessel or to the accomplishment of its mission.’ . . . Second, . . . a seaman must have a connection to a vessel in navigation (or to an identified group of such vessels) that is substantial in terms of both its duration and nature.” *Harvey’s Casino v. Isenhour*, 724 N.W.2d 705, 707 (Iowa 2006) (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S. Ct. 2172, 2190, 132 L.Ed. 2d 314, 337 (1995)(quoting *McDermott Int’l*, 498 U.S. 337, 355, 111 S.Ct. 807, 817, 112 L.Ed.2d 866, 882 (1991)). The employee must have a “substantial connection to a ‘vessel’” and “contribute to the function of the vessel or to the accomplishment of its mission.” *Harvey’s Casino*, 724 N.W.2d at 707. “The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.” *Chandris*, 515 U.S. at 368. “If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied.” *Chandris*, 515 U.S. at 368-69, (quoting 1B A.Jenner, Benedict on Admirality § 11a, at 2-10.1 to 2.11 (7th ed. 1994)). In general, “a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.” *Chandris*, 515 U.S. at 371.

Based upon the fact that Iowa is bordered for its entire length on both sides of the State by what would be defined as navigable waterways under the federal law and businesses abound along the shores of both the Missouri and Mississippi rivers, it is important for employers to understand and analyze the interplay between these various laws. However, as can be seen, the answers regarding coverage and applicability can be unclear, and can substantially affect recovery and exposure for employers. ■

KOEPPEL V. SPEIRS, 2011 WL 6543059 (IOWA 2011) (DECEMBER 23, 2011)

By Stephanie Legislador, Crawford Sullivan Read & Roemerman PC, Cedar Rapids, IA

Stephanie Legislador

The Iowa Supreme Court was called upon, as a matter of first impression, to determine whether surveillance equipment installed in a bathroom can support a claim of invasion of privacy when equipment could not be operated after it was discovered to produce identifiable images. The first impression aspect of the case was that it is the first to deal with the quantum of proof necessary to establish an intrusion under the "unreasonable intrusion upon the seclusion of another" prong of the invasion of privacy tort.

Factual Background: Independent contractor (Plaintiff) working for insurance agent (Defendant) discovered camera hidden in office bathroom. Camera was connected to receiver in Defendant's office. Defendant claimed that he placed the camera in the bathroom after suspicion arose concerning possible drug use by Plaintiff. Defendant claimed that the camera never produced identifiable images and was inoperable. Police were unable to get the equipment to produce clear images but were able to briefly produce a grainy image upon installation of fresh batteries.

Procedural Background: Motion for Summary Judgment by Defendant. District Court granted Motion, finding that there must be an *actual* rather than *attempted* intrusion in order to maintain action for invasion of privacy.

Court of Appeals reversed District Court's grant of summary judgment to Defendant, finding that Plaintiff had set forth sufficient evidence to establish genuine issue of material fact as to intrusion.

Defendant: The recording device was not working and did not allow him to actually record employees/persons in the bathroom. Therefore, there can be no "intrusion" as required for the tort of invasion of privacy as a matter of law.

Plaintiff: There is some evidence that the recording equipment was operable to some degree, and regardless, it was nevertheless an intrusion because it was placed there to capture images of employees/persons in a place where they had an expectation of privacy.

Court: The Court found that this case called upon it to develop a standard for a jury to apply in determining when electronic devices intrude into privacy. The Court denied summary judgment to the defendant because the plaintiff submitted some evidence that the camera was *capable* of working when a fresh battery was in place.

The Court noted that nationally, courts are divided as to whether a defendant can be held to "intrude" without actually viewing or recording the victim. **The *Koeppel* Court adopts the majority view which holds that actual viewing/recording is not required for there to be an intrusion.**

In adopting the *Restatement*/majority approach, the Iowa Supreme Court, in *Koeppel*, notes that it is important to keep in mind that the tort is meant to protect against acts that **interfere with a person's mental well being by intentionally exposing the person in an area cloaked with privacy**. *Koeppel*, 2011 WL 6543059 at ✱7 (Iowa 2011).

The Court's decision, in *Koeppel*, does indicate **some limits** to a finding of intrusion as: concerns electronic recording/transmission devices, where the Court states, "it would be inconsistent with the policy of the tort to find an intrusion when the privacy of the plaintiff *could not have been exposed in any way*. Thus, a belief by a plaintiff that a person invaded his or her privacy by placing an apparent recording advice in a private area *does not establish an intrusion if the device was not capable of being configured or operated to transmit or record in any conceivable way*. Accordingly, proof [that] the equipment is functional is an ingredient in the inquiry." *Koeppel*, 2011 WL 6543059 at ✱7.

I. Pre-Cursor Cases (as Identified by the *Koeppel* Court):

The Court examined the history of the invasion of privacy tort in Iowa, noting that Iowa adopted the *Restatement* version of the tort in 1956 in the case of *Bremmer v. Journal-Tribune Publ'g Co*., 76 N.W.2d 762, 765 (Iowa 1956) (adopting *Restatement* (Second) of Torts §652A). Notable *Restatement* examples, according to the Court, included a newspaper employee taking photos of a woman sick with a rare disease in her hospital room, and a private detective in an adjacent building taking intimate photos of activities within another's bedroom.

The Court also examined the policy history behind the tort of invasion of privacy, noting that (1) conduct intruding into privacy gives rise to liability because it can cause a reasonable person 'mental suffering, shame, or humiliation,' inconsistent with the general rules of civility and autonomy recognized in our society; and (2) *liability is imposed* ***based upon a particular method of obtaining information, not the content*** *of the information obtained,* ***or even the use*** *put to the information by the intruder following the intrusion*.

In re. Marriage of Tigges, 758 N.W.2d 824 (Iowa 2008)
Dissolution of marriage action. Wife sues husband for invasion of privacy after discovering that he had installed secret camera/

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audio in their bedroom. Conflicting evidence as to whether they were both residing in the home at the time. Activities taped were "unremarkable" but wife "felt violated." Husband asserted that wife had no reasonable expectation of privacy in the marital home. The court disagreed and upheld judgment in favor of wife, stating, "Whether or not [husband and wife] were residing together in the dwelling at the time, we conclude [wife] had a reasonable expectation that her activities in the bedroom of the home were private when she was alone in that room."

Court notes that, to be actionable, a plaintiff must demonstrate that (1) the defendant intentionally intruded upon the seclusion that the plaintiff has thrown about [his or her] personal affairs; and (2) the intrusion would be highly offensive to a reasonable person. *Tigges*, 758 N.W. 2d at 829 (citing *Stessman v. American Black Hawk Broadcasting Co*., 416 N.W.2d 685, 687 (Iowa 1987) (quoting *Restatement* (*Second*) *of Torts* § 652B cmt. c; *Winegard v. Larson*, 260 N.W.2d 816, 822 (Iowa 1977)).

"The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that [Plaintiff's] activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy." *Tigges*, 758 N.W.2d at 829-30.

Amati v. City of Woodstock, 829 F. Supp. 998 (N.D. Ill. 1993)
A "private" line at a police station was actually tapped, unbeknownst to the employees. Defendant asserted that because the plaintiffs were unable to establish that anyone overheard their communications (except for one), there could be no finding of "intrusion."

Court rejected Defendant's argument, as a matter of first impression, relying on *Restatement* (*Second*) *of Torts*. Proof that a recorded conversation in a tapped line was actually overheard is not required. *Amati*, 829 F. Supp. at 1009-1010. The Court specifically took note of the *Restatement* example of §652B: "W✱✱hen 'A' taps 'B's telephone wires and installs a recording device to make a record of 'B's conversations, 'A' has invaded 'B's privacy." *Amati*, 829 F. Supp. at 1010 (citing *Restatement* (Second) of Torts §652B, 379, illustration 3 (1977)).

Phillips v. Smalley Maint. Servs., Inc., 435 So.2d 705, 709 (Ala. 1983)
Defendant, who was Plaintiff's employer/supervisor, continuously made employee come into his office, where he locked the door and questioned employee repeatedly about her sex life and demanded that she perform oral sex on him (which she refused and he became assaultive toward her and then fired her). Among other things, Plaintiff-employee sued Defendant for invasion of privacy. The Court held that acquisition of information (she refused to answer his questions) was not a requisite element of a §652B cause of action. *Phillips*, 435 So. 2d at 709. There is likewise no requirement of communication or publication by a defendant to a third party of private information elicited from a plaintiff.

Is it a requirement that the defendant invade some physically defined area or place as opposed to one's "personality" or "psychological integrity" in order to trigger liability under §652B? NO. "One's emotional sanctum is certainly due the same expectations of privacy as one's physical environment." *Phillips*, 435 So.2d at 711.ail to

Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964)
Landlord placed recording device in tenant's bedroom. The Court recognized the tort of invasion of privacy as a matter of first impression. "The tort of intrusion upon seclusion is not limited to a physical invasion of his home or his room. . . [but] beyond such physical intrusion and extended to eavesdropping upon private conversations by means of wiretapping and microphones." *Hamberger*, 206 A.2d at 241. The defendant argued that no one listened or overheard any sounds/voices, so could not be an intrusion. The Court rejected this argument, stating that the tort does not require publicity and communication to third parties, although such would affect the amount of damages. "Whether actual or potential such publicity with respect to private matters is an injury to personality. It impairs the mental peace and comfort of the individual."

II. Holding (of *Koeppel*) and Implications for Practice:

A. Holding

"If the fact finder finds from the evidence that the device could not have intruded into the privacy of the plaintiff in *any manner*, the tort of invasion of privacy has not been committed. If the fact finder finds from the evidence that the device could have intruded into the privacy of the plaintiff, the element of intrusion is satisfied." *Koeppel*, 2011 WL 6543059 at ✱7.

"Under the standard we adopt in this case, a reasonable fact finder could conclude the camera was capable of exposing the plaintiff's activities in the bathroom . . . Importantly there was evidence the camera was capable of operation and there was evidence it operated in the past from a different location in the office." *Koeppel*, 2011 WL 6543059 at ✱ 8.

B. Possible Implications for Practice from *Koeppel*:

1. The defendant having not watched/listened to the recorded/transmitted information to a third party is not a viable defense.

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2. Summary judgment is not likely in cases of electronic recording/transmitting devices if there is any evidence that the device ***could,* as opposed to *actually,*** record or transmit images/sounds of someone in a place where they had an expectation of privacy. (Here, the Court notes among other things that to require the plaintiff to show direct evidence that an actual viewing occurred would place too difficult a burden on the plaintiff and such a rule would also encourage manipulation/selective incapacitation of equipment by the defendant).

3. It appears that there are some limits to the Court's willingness to find an intrusion absent dissemination or viewing…the Court is clearly not willing to go as far as stating that anything that makes a reasonable person feel intruded upon would suffice, but rather chooses a standard that does require a showing that the private information could have been viewed or disseminated.

4. Query whether or not the Court's citation to the Alabama case of *Phillips v. Smalley Maint. Servs., Inc.*, 435 So.2d 705, 709 (Ala. 1983) is an indication that defendants in sexual harassment cases of the type in *Phillips* could be liable in Iowa for the tort of invasion of privacy if part of their harassment includes the attempted eliciting of private information. Potentially worth examining for (plaintiff) counsel in cases where federal or Iowa discrimination law does not reach the employer and/or in independent contractor cases. ■

IDCA SCHEDULE OF EVENTS

May 3, 2012
IDCA CLE Webinar
Noon – 1:00 pm
Watch for details in your inbox

September 13 – 14, 2012
48th Annual Meeting & Seminar
8:00 a.m. – 5:00 p.m.
Watch for details in Summer 2012.

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