TORTS AND CIVIL PROCEDURE—In an Action For Reckless Misrepresentation of Material Facts in a Non-Culpable Defendant's Pleadings and Discovery, Plaintiff must Prove a Culpable Defendant is Not Estopped From Asserting the Statute of Limitations, That Judgment Would Have Been Collected From the Culpable Defendant and That the Plaintiff's Personal Injuries Are Legally Compensable Before He May Recover Damages From a Non-Culpable Defendant.—*Beeck v. Aquaslide 'n' Dive Corp.* (Iowa 1984).

On July 15, 1972, Jerry A. Beeck attended a social gathering sponsored by his employer[1] at Kimberly Village in Davenport, Iowa. Jerry's neck was fractured when he went down a slide at the Kimberly Village swimming pool and struck his head.[2] The accident rendered him a quadraplegic.[3]

Investigation into the accident indicated that Defendant Aquaslide 'n' Dive Corporation (Aquaslide) had manufactured the swimming pool slide which Jerry had used.[4] Aquaslide was notified of the accident by the insurer of Kimberly Village after its investigator identified the slide as an Aquaslide product.[5] Aquaslide's insurer then investigated the accident, and its local claims representative reported to the insurer "that the slide 'was definitely manufactured by Aquaslide.' "[6]

Jerry and his wife, Judy A. Beeck, filed a Complaint in the United States District Court for the Southern District of Iowa against Aquaslide alleging that it had designed and manufactured the swimming pool slide on which Jerry was injured.[7] Aquaslide admitted in its answer to the Beecks' claims and in its answers to interrogatories that it had manufactured the slide in question.[8]

In February 1975, however, Carl R. Meyer, the president of Aquaslide, visited the scene of the mishap while he was in Iowa for a deposition and discovered that the slide was not manufactured by his corporation.[9] The

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1. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149, 154 (Iowa 1984).
2. *Id.*
3. *Id.*
4. Beeck v. Aquaslide 'n' Dive Corp., 67 F.R.D. 411, 413 (S.D. Iowa 1975), *aff'd*, F.2d 537 (8th Cir. 1977). Investigators for the insurers of Kimberly Village and Harker Wholesale Meats, Inc., (Beeck's employer) each concluded the slide was manufactured by Aquaslide. *Id.*
5. Beeck v. Kapalis, 302 N.W.2d 90, 92 (Iowa 1981). Roger Boynge, the investigator for Kimberly Village's insuror, identified the slide in question as an Aquaslide Queen Model Q-3d.
6. *Id.* "Aquaslides' insuror, The Hartford Insurance Group, then investigated. Based on an investigation by James J. Kapalis, Robert C. Fasick, one of Hartford's claims representatives, reported to Hartford that the slide 'was definitely manufactured by [Aquaslide].' " *Id.*
7. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 154.
8. *Id.*
9. Beeck v. Aquaslide 'n' Dive Corp., 562 F.2d at 539.

statute of limitations for a personal injury claim had expired on July 15, 1974 pursuant to section 614.1(2) of the 1973 Code of Iowa.[10] Aquaslide's motion for leave to amend its answer to deny manufacturing the slide was granted.[11] Subsequently a jury found that Aquaslide was not the manufacturer in a separate trial on the sole issue of manufacture.[12] Aquaslide's motion for summary judgment was then granted by the United States district court.[13]

While the appeal of that decision was pending in the Eighth Circuit Court of Appeals,[14] the Beecks brought suit in the Polk County district court against Aquaslide, Hartford Insurance Group (Aquaslide's insurer), and three Hartford employees claiming fraud and misrepresentation in the admission and statement made by Aquaslide that it had manufactured the slide.[15] The district court granted summary judgment in favor of all defendants.[16] The Iowa Supreme Court affirmed as to all defendants except Aquaslide, which was kept in the suit to determine on remand whether the president made a reckless misrepresentation concerning the manufacture of the slide.[17]

On remand to the Polk County district court, the case was tried without a jury.[18] The district court found that: 1) the statute of limitations had expired on June 15, 1974;[19] 2) the admission and statement concerning the manufacture of the slide were material and reckless;[20] and 3) the Beecks met the burden of proof in demonstrating that they would have been successful

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10. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 154. Iowa Code § 614.1(2) provides:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: . . . 2. *Injuries to person or reputation—relative rights—statute penalty.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

IOWA CODE § 614.1(2)(1973) (emphasis added).

11. *Id.*

12. *Id.*

13. *Id.*

14. Beeck v. Aquaslide 'n' Dive Corp., 562 F.2d 537 (8th Cir. 1977).

15. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 154. Hartford employees James J. Kapalis, Robert C. Fasick, and J.A. Gervais conducted the investigation for Aquaslide's insurer and incorrectly identified the slide; the Iowa Supreme Court held, however, that while they "might not have been as careful as they should have . . . this is not enough to find the statement was made with reckless disregard for its truth." Beeck v. Kapalis, 302 N.W.2d at 95.

16. *Id.*

17. *Id.*

18. Both Aquaslide and the Beecks waived their right to a jury. Findings Conclusions and Order, Aquaslide 'n' Dive Corp., No. 17-9545 (D. Polk Co. May 20, 1982).

19. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 157.

20. Findings Conclusions and Order, Beeck v. Aquaslide 'n' Dive Corp., No. 17-9545 (D. Polk Co. May 20, 1982). The Iowa Supreme Court stated that the elements of materiality and misrepresentation were not contested. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 155.

in a products liability suit against the actual manufacturer.[21]

After making these findings and emphasizing the injuries suffered by the Beecks,[22] the district court entered judgment for Jerry in the amount of $3,116,317.87 and for Judy in the amount of $65,000 plus interest and costs for both.[23] A cross-claim by Aquaslide for contribution was dismissed,[24] and all parties appealed.[25] The Iowa Supreme Court *held*, affirmed in part, reversed in part, and remanded with instructions.[26] In an action for reckless misrepresentation of material facts in a non-culpable defendant's pleadings and discovery plaintiff must prove a culpable defendant is not estopped from asserting the statute of limitations,[27] that judgment would have been collected from the culpable defendant,[28] and that the plaintiff's personal injuries are legally compensable[29] before he may recover damages from a non-culpable defendant. *Beeck v. Aquaslide 'n' Dive Corp.*, 350 N.W.2d 149 (Iowa 1984).

Early in the opinion Justice Uhlenhopp reiterated the Iowa Supreme Court's implicit holding in *Beeck v. Kapalis*,[30] "that a party making reckless misrepresentations during litigation is not immune from civil liability for damages."[31] Although there are several collateral issues discussed by the court,[32] the most significant impact of the opinion is the court's explanation that it was necessary in the initial remand[33] for the Beecks to prove by a preponderance of the evidence each of the elements of fraud. The elements

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21. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 159. After examining the record as it pertained to the Beecks' possibility for success in a products liability suit against the true manufacturer, the court found that the plaintiffs would have won such a suit. *Id.* Their failure to introduce substantial evidence of collectibility from the culpable manufacturer, however, required a remand. *Id.* at 159-60.

22. The plight of quadraplegic individuals generally, and of Jerry Beeck specifically, was detailed at great length to demonstrate the damages suffered by Jerry and Judy Beeck. *Id.* at 164-65. Chief among the court's description is the need for continual custodial care including daily medicine injections, bathing assistance, and meal preparation. *Id.*

23. *Id.* at 154.

24. *Id.* The court stated later in the opinion "that Aquaslide's recklessness [in admitting material facts without following its own standard procedures for verifying them] was of sufficient culpability to disqualify it from contribution." *Id.* at 170.

25. *Id.* at 154.

26. *Id.* at 171.

27. *Id.* at 159.

28. *Id.* at 159-60.

29. *Id.* at 160.

30. 302 N.W.2d 90 (Iowa 1981).

31. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 155.

32. Principal of these collateral issues are: 1) the effectiveness of the purported preservation of Judy Beeck's claim for loss of consortium in the couples' 1976 divorce decree, 2) the effect of an amendment to the petition increasing the prayer for monetary relief on calculation of pre-judgment interest, and 3) sufficiency of reckless behavior in meeting the "malice" requirement for an award of punitive damages. *Id.* at 167.

33. *Id.* at 155.

of fraud are: " '(1) a material misrepresentation,[34] (2) made knowingly (scienter),[35] (3) with intent to induce the plaintiff to act or refrain from acting,[36] (4) upon which the plaintiff justifiably relies,[37] (5) with damages suffered.' "[38]

Justice Uhlenhopp painstakingly detailed the acts and omissions of Aquaslide President Carl R. Meyer,[39] which resulted in the admission in Aquaslide's answer,[40] and the statement in its answers to interrogatories,[41] that the corporation had manufactured the slide Jerry Beeck was using when he was injured.[42] The purpose of this thorough examination was to determine whether the Beecks had proven the elements of scienter and intent to deceive, which " 'are shown not only when the speaker has knowledge of the falsity of his representations but also when he speaks in reckless disregard of whether his representations are true or false.' "[43]

The element identified by the court as presenting the greatest difficulty was "damage."[44] The Beecks attempted to try their cause to the court with the mistaken notion that their damage need consist only of Jerry's personal injuries and their resulting hardship.[45] The court explained that the element of damage required a showing beyond, and in addition to, proof of the extent of personal injury,[46] including: "inquiry into whether (1) the statute of limitations barred the Beecks' cause of action against the true manufacturer, (2) the Beecks would have been successful in obtaining damages from the

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34. *See supra* note 20 and accompanying text.

35. "The requirement of scienter is met 'when the evidence shows [the] representations were made in reckless disregard of their truth or falsity.' " Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 155 (quoting B&B Asphalt v. T.S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1974)).

36. " 'A false statement innocently but mistakenly made will not establish intent to defraud, but, when recklessly asserted, it will imply an intent to defraud.' " *Id.* at 155 (quoting Grefe v. Ross, 231 N.W.2d 863, 867 (Iowa 1975)).

37. The court found that the Beecks' reliance on the statements of Aquaslide was reasonable. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 157.

38. *Id.* at 155 (quoting Beeck v. Kapalis, 302 N.W.2d at 94; Hall v. Wright, 261 Iowa 758, 766, 156 N.W.2d 661, 666 (1968)); RESTATEMENT (SECOND) OF TORTS § 525 (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 105 (4th Ed. 1971).

39. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 155-56. Meyer, Aquaslide's president, had implemented a program whereby he personally examined photographs of all slides involved in personal injury accidents which were alleged to be Aquaslide slides and those of its competitors. *Id.* at 156. Meyer admittedly did not follow this procedure after Jerry Beeck's accident. *Id.* A simple inspection by someone familiar with Aquaslide's product would have revealed that the slide was not manufactured by Aquaslide because of the distinctive color, ladder steps and logo found on Aquaslide products. *Id.*

40. *Id.* at 154.

41. *Id.*

42. *Id.* at 156.

43. *Id.* at 155 (quoting Grefe v. Ross, 231 N.W.2d at 867).

44. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 157.

45. *Id.*

46. *Id.*

true manufacturer, and (3) the damages awarded by the trial court for the personal injuries have a legal foundation."[47]

As to the first consideration, the Beecks intially had the burden of proving the operation of the statute of limitations as a bar to any action for damages recoverable from the actual manufacturer.[48] The only evidence introduced by the Beecks to meet this burden of proof was that the injury occurred on July 15, 1972, and that Aquaslide president Carl R. Meyer discovered Aquaslide was not the manufacturer in February of 1975.[49] There is a two-year statute of limitations on personal injury claims in Iowa.[50] Based upon that evidence, the Polk County district court, on the first remand, found that the plaintiffs' claim against the actual manufacturer was barred by the statute of limitations.[51] The Iowa Supreme Court, however, held that the showing of the two dates was sufficient, subject to presentation of other evidence requiring a contrary conclusion.[52]

Aquaslide undertook to demonstrate that the Beecks could have effectively prevented the actual manufacturer from raising a statute of limitations defense by asserting the doctrine of equitable estoppel.[53] One claiming such an exception to a statute of limitations defense, however, has the burden of proving the basis for that exception.[54] To show that the statute of limitations did not operate as a bar to the Beecks' claims, it was necessary for Aquaslide to first prove the identity of the true manufacturer of the slide used by Jerry Beeck when he was injured.[55] The Supreme Court of Iowa held that due to the manner in which the parties litigated the issue of manufacture in the separate trial in the United States district court,[56] it had been necessarily determined that S.R. Smith Co., an Aquaslide competitor,

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47. *Id.*

48. *Id.*

49. *Id.*

50. *See supra* note 10 and accompanying text.

51. Beeck v. Aquaslide 'n' Dive Corp., 340 N.W.2d at 157.

> The Beecks introduced these facts: the accident occurred on July 15, 1972, and the discovery about the manufacturer was not made until February 1975. The Beecks presented no other evidence on the issue. The statute of limitations, of course, ran on July 15, 1974. Based on this showing, the trial court found that the Beecks lost their cause of action against the true manufacturer by passage of time.

Id.

52. *Id.*

53. *Id.* at 157-58; *see also* Beeck v. Aquaslide 'n' Dive Corp., 67 F.R.D. at 411. Aquaslide attempted to show that Kimberly Village had in fact ordered an Aquaslide product, but a supplier had substituted a slide of another manufacturer. Beeck v. Aquaslide 'n' Dive Corp., 340 N.W.2d at 157-58. Aquaslide contended that the statute of limitations would not run until two years after the Beecks discovered the identity of the true manufacturer. *Id.*

54. *Id.* (citing Franzen v. Deere & Co., 334 N.W.2d 730, 732 (Iowa 1983); Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981)).

55. *Id.* at 158.

56. Beeck v. Kapalis, 302 N.W.2d at 92-93.

was the actual manufacturer.[57]

In connection with the statute of limitations element of damages, Aquaslide was further required to prove each element of equitable estoppel:[58] "(1) that Smith falsely represented or concealed its identity as the true manufacturer and that its identity was a material fact; (2) that the Beecks lacked knowledge of the identity of the true manufacturer; . . . and (3) that the Beecks relied upon this concealment to their prejudice."[59] False representation or concealment was the only element that the court found unsupported by adequate evidence in the record.[60] Since the Beecks had not sufficiently proven the compound element of "damages,"[61] under normal circumstances judgment would be entered for the defendant.[62] The court, however, opted to remand the cause once again for further evidence on the issue of collectibility "in the interest of justice."[63]

As guidance for the Polk County district court in reviewing this issue on remand, Justice Uhlenhopp pointed out that the trial court, as trier of fact, could find that the S.R. Smith Co. committed a fraudulent concealment if: (1) the swimming pool slide retailer (from which Kimberly Village purchased the slide) filled the order for an Aquaslide product with an S.R. Smith Co. slide; (2) S.R. Smith Co. had knowledge of the substitution or recklessly disregarded it; and (3) S.R. Smith Co. failed to reveal the substitution[64] (presumably, to the purchaser of the slide, Kimberly Village).

The second consideration in the element of "damages" was whether the Beecks would have successfully recovered a judgment from the true manufacturer.[65] The Beecks contended a judgment against S.R. Smith Co. would have been awarded based upon strict liability in tort,[66] and as previously discussed, the Polk County district court so found on the first remand.[67]

In its determination of the same issue the Iowa Supreme Court focused on two problematical aspects of strict liability in tort: "Whether the product was in a defective condition and whether that condition was unreasonably dangerous when the product was used in a reasonably foreseeable man-

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57. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 158 (citing Hubby v. State, 331 N.W.2d 690, 695 (Iowa 1983)).

58. *Id.*

59. *Id.* According to the court, "the latter three elements have substantial evidentiary support but the first element, false representation or concealment, presents problems." *Id.*

60. *Id.*

61. *Id.* at 157.

62. *Id.* at 162.

63. *Id.*

64. *Id.* at 159.

65. *Id.* This involves examination of two factors: 1) whether a judgment on the merits could have been secured by the Beecks, and 2) whether such a judgment would have been collectible from S.R. Smith Co., the true manufacturer. *Id.*

66. *Id.*

67. *See supra* note 21 and accompanying text.

ner."[68] After an examination of the record on these two points, the court held that there was sufficient evidence to support the two troublesome elements, and that remand on the issue was unnecessary.[69]

That determination left the thorniest issue of the litigation remaining for consideration: "whether the Beecks would have been able to collect a judgment against Smith."[70] The Beecks had offered no such evidence at trial.[71] Further, they argued that proof of collectibility is not required under Iowa law, that it would not be possible to show whether a judgment against S.R. Smith Co. would have been collectible, and finally, that Aquaslide failed to properly preserve the issue for appeal.[72] In the first remand, the trial court stated that the Iowa Supreme Court's opinion in *Beeck v. Kapalis*[73] did "not mandate that solvency or collectibility . . . be an issue."[74] The trial court also found that the issue of collectibility was not raised by Aquaslide in a timely fashion.[75]

Justice Uhlenhopp admitted that there had been no ruling on the issue of collectibility in the first review of the case by the Iowa Supreme Court;[76] nevertheless, in its second review the court held that the Beecks must prove a judgment against S.R. Smith Co. would have been collectible.[77] In support of this holding, the court analogized the seemingly incongruous rule requiring proof of collectibility in lawyer malpractice "[c]ases in which plaintiff claims a defendant caused him to lose an otherwise valid cause of action because of the running of the statute of limitations."[78]

As a rationale for requiring proof of collectibility the court made refer-

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68. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 159 (citing RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965); 72 C.J.S. *Products Liability* § 29 (Supp. 1975)).

69. *Id.* The record contained evidence that Jerry Beeck's injury occurred because he went down the slide head first and expert testimony that this was a foreseeable use. *Id.*

70. *Id.*

71. *Id.* at 160.

72. *Id.* The Beecks claim that the court's failure to mention collectibility in *Beeck v. Kapalis* precluded the imposition of that requirement here. *Id.* It appears to have been the Beeck's contention that the difficulty in determining the collectibility of a judgment from S.R. Smith Co. made the task impossible. *Id.* at 161. The Beecks also argued that Aquaslide failed to raise collectibility as an affirmative defense to their action, so review of the issue would be precluded. *Id.* at 161-62.

73. 302 N.W.2d 90 (Iowa 1981).

74. Findings Conclusions and Order, Beeck v. Aquaslide 'n' Dive Corp., No. 17-9545 (D. Polk Co. May 20, 1982). The trial court states that the supreme court's opinion in *Beeck v. Kapalis* did not specifically mandate proof of collectibility and that the reference to legal malpractice cases is inapposite to the issue of collectibility in reckless misrepresentation cases. *Id.*

75. *Id.* "[S]ince the matter [of collectibility] was not raised at the trial court it could not be raised on appeal." *Id.*

76. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 160. "In our prior opinion [*Beeck v. Kapalis*] we did not deal with the Iowa law on the issue on collectibility, or with a number of other issues litigated at the present trial." *Id.*

77. *Id.*

78. *Id.*

ence to a hypothetical situation described in the article, *Legal Malpractice in Massachusetts*.[79] In this article, a claimant who has lost a valid cause of action against a defendant with limited financial resources because of the claimant's lawyer's malpractice is not allowed to collect the full amount of the previously possible judgment. The author reasoned that "otherwise the client would be placed in a better position as a result of the lawyer's malpractice than he would have been in had the attorney not been negligent."[80]

The social policy requiring proof of collectibility is apparently that " 'a contrary rule might furnish an incentive for claimants to engage incompetent counsel with large malpractice insurance policies for the purposes of suing judgment-proof tortfeasors in order to obtain a larger recovery in the malpractice action than could have been recovered in the underlying suit.' "[81] Although the Beecks would certainly be in a better financial position if they were allowed to collect against Aquaslide, even though S.R. Smith Co. might be judgment-proof, the logic of the court's rationale is not nearly as compelling in the context of a fraudulent misrepresentation case as it is in a legal malpractice situation. The malpractice insurance of an incompetent attorney seems to be a much more likely target of this sharp practice than innocent manufacturers.

None of the several cases cited by the court in support of requiring proof of collectibility contain an analysis of social policy. Nor is there any indication that proof of collectibilty should be or is an element to discourage unscrupulous claimholders from collecting damages from someone other than the party inflicting the actual personal injury.[82] Indeed, the best rationale for a rule requiring proof of collectibilty is, perhaps, the simplest: if the possible underlying judgment would have been uncollectible from S.R.

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79. Barry, *Legal Malpractice in Massachusetts*, 63 MASS. L. REV. 15 (1978).

80. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 161 (quoting Barry, *Legal Malpractice in Massachusetts*, 63 MASS. L. REV. 15, 19 (1978)).

81. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 161 (quoting Barry, *Legal Malpractice in Massachusetts*, 63 MASS. L. REV. 15, 19 (1978)).

82. *See also* Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524, 526 (Iowa 1983); Baker v. Beal, 225 N.W.2d 106, 113 (Iowa 1975); Sorrels v. Texas Bank & Trust Co., 597 F.2d 997, 1000 (5th Cir. 1979); Olsen v. Spomer, 192 Cal. App. 2d 99, 103, 13 Cal. Rptr. 392, 394 (1961); Floro v. Lawton, 187 Cal. App. 2d 657, ___, 10 Cal. Rptr. 98, 106 (1960); Campbell v. Magans, 184 Cal. App. 2d 751, ___, 8 Cal. Rptr. 32, 36 (1960); Lawson v. Sigfrid, 83 Colo. 116, ___, 262 P. 1018, 1019 (1927); Travelers Indem. Co. v. Jacobs, 402 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1981), *cert. denied*, 412 So. 2d 471 (Fla. 1982); McDow v. Dixon, 138 Ga. App. 338, 339, 226 S.E.2d 145, 147 (1976); Kohler v. Woolen, Brown & Hawkins, 15 Ill. App. 3d 455, ___, 304 N.E.2d 677, 679 (1973); Piper v. Green, 216 Ill. App. 590, 592 (1920); King v. Fourchy, 47 La. Ann. 354, ___, 16 So. 814, 815 (1895); Hoppe v. Ranzini, 158 N.J. Super. 158, ___, 385 A.2d 913, 916 (1978); Titsworth v. Mondo, 95 Misc. 2d 233, ___, 407 N.Y.S.2d 793, 799 (1978); Gross v. Eannace, 44 Misc. 2d 797, ___, 255 N.Y.S.2d 625, 626 (1964); Schmitt v. McMillan, 175 A.D. 799, ___, 162 N.Y.S. 437, 439 (1916); Hammons v. Schrunk, 209 Or. 127, ___, 305 P.2d 405, 409 (1956); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27, 29 (S.D. 1983); Coolier v. Putnam, 81 Tenn. 114, 116-17 (1884); Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Civ. App. 1974); Staples' Ex'r's v. Staples, 85 Va. 76, ___, 7 S.E. 203, ___ (1888).

Smith Co., the Beecks have incurred no loss from the actions of Carl R. Meyer and Aquaslide.[83]

There was, quite obviously, an absence of illicit motive in the Beecks' decision to bring action against Aquaslide, as the decision was made after investigators from three insurance companies had mistakenly identified the slide as an Aquaslide product.[84] Considerations of social policy intended to discourage misuse of the legal system seem out of place in a situation where the still uncompensated victims were suffering from such serious injuries.[85]

In addressing the issue raised by the Beecks, that it would not be possible to prove collectibility, the court cited to an earlier opinion dealing with attorney malpractice and stated:

> if the prior defendant [S.R. Smith] was an individual or other entity whose solvency is not known beyond question, the client [Beecks] must introduce substantial evidence from which a jury could reasonably find that a prior judgment would have been collectible in full, or could reasonably find the portion of the judgment which would have been collectible.[86]

The court also held that S.R. Smith Co. was an "entity whose solvency is not known beyond question."[87] The "impossibility" argument[88] was rejected by the court because the ability of S.R. Smith Co. to have paid a judgment was discoverable under the Iowa Rules of Civil Procedure,[89] and because the amount of a judgment against Aquaslide depended entirely upon the value of a potential judgment against S.R. Smith Co.[90] The court expressed some compassion for the plight of the Beecks, but said, "[t]his process may be difficult, but 'difficulty in procuring evidence does not excuse the party upon whom rests the burden of proof from making his case.' "[91] Moreover, the court gave little weight to the Beecks' argument that it "is an element of a

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83. "If the underlying defendant was insolvent, plaintiffs recover no costs and expenses from her, hence could have lost nothing from defendant's negligence." Lawson v. Sigfrid, 83 Colo. at ___, 262 P.2d at 1019.

84. *See supra* note 4 and accompanying text.

85. *See supra* note 22 and accompanying text.

86. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 161 (quoting Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d at 526) (attorney malpractice claim in which trial court erred in failing to instruct on collectibility of the underlying claim).

87. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 161.

88. *See supra* note 72 and accompanying text.

89. *Id.* The court refers to: 1) Iowa R. Civ. P. 122(b) (Scope of Discovery, Insurance Agreements); 2) Iowa R. Civ. P. 131 (Action for Production or Entry Against Persons Not Parties); 3) Iowa R. Civ. P. 140(a) (Depositions Upon Oral Examination, When Depositions May Be Taken); 4) Iowa R. Civ. P. 147(a) and (e) (Oral Examination-Notice).

90. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 161. "The value of a present judgment wholly derives from the value of the underlying potential judgment." *Id.*

91. *Id.* (quoting City of Emmetsburg v. Central Iowa Tel. Co., 250 Iowa 768, 773, 96 N.W.2d 445, 448 (1959)).

plaintiff's cause of action;"[92] there was no requirement for Aquaslide to raise an element of the plaintiffs' theory of recovery as an affirmative defense.[93]

The Iowa Supreme Court, in this opinion, purports to only be explaining the existing tort of negligent misrepresentation.[94] This explanation of the tort, within the context of a party's statement which ultimately costs an injured party an otherwise valid cause of action, should prove to be a practical guide for attorneys either seeking redress for a client with this type of claim, or assessing the potential liability of a client for reckless statements made in the course of pleading or discovery in the underlying suit. None of the previous Iowa Supreme Court opinions cited as authority by the court in listing the elements of fraudulent misrepresentation dealt with statements during the pleading or discovery stage of litigation.[95]

The damages incurred by this type of misrepresentation are obviously of a different nature than many others constituting fraud (e.g. misrepresentation of property value).[96] This type requires a two-tiered proof of damages as detailed in the opinion.[97] This is undoubtedly an extreme burden to be placed upon an injured party (especially one so seriously injured as Jerry Beeck).[98] The court has attempted to allow for recovery of monetary damages by such a party while insuring against a windfall payment by the defendant in situations where there would have been no recovery from the culpable tortfeasor.

Bruce Anderson

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92. Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d at 161 (emphasis in original).

93. *Id.*

94. *Id.* at 155.

95. Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975) (defendant made reckless statements inducing plaintiff to purchase overvalued land franchise); Hall v. Wright, 261 Iowa 758, 156 N.W.2d 661 (1968) (defendant/attorney misrepresented to plaintiff/client that seller had clear title to property).

96. Grefe v. Ross, 231 N.W.2d at 865 (profitability of investment).

97. *See supra* note 47 and accompanying text.

98. *See supra* note 22 and accompanying text.