Dedicated to improving our civil justice system

IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

WINTER 2025 VOL. XXVII, No. 1

Find us on LinkedIn

The Federal Trade Commission's Final Non-Compete Rule: Eviscerating Non-Compete Clauses Across The Country

By Jason J. O'Rourke, Lane & Waterman LLP, Grace E. Mangieri, Lane & Waterman LLP and Andrew L. Thompson, Lane & Waterman LLP

WHAT DID THE FTC RULE ACTUALLY DO AND DOES IT IMPACT ALL NON-COMPETE CLAUSES?

The FTC has added subchapter J, part 910, to Chapter 1 of Title 16 of the Code of Federal Regulations. This subchapter contains Sections 910.01-910.6, which effectively ban non-competition agreements. The final rule is a result of a July 9, 2021 Biden Administration Executive Order, purportedly signed to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit work mobility."

Section 910.2 prohibits employers from requiring and using non-compete clauses with "workers," which is broadly defined to include employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors who provides a service to a person. Section 910.2 specifically make it an "unfair method of competition" for a person to: (1) enter into or attempt to enter into a non-compete clause; (2) enforce or attempt to enforce a non-compete clause; or (3) represent to a worker that he or she is subject to a non-compete clause. As discussed below, the only exception is senior executives who already have a non-compete in place.

Continued on page 3

EDITORS

Brent Ruther, Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C.
Joshua Strief, Elverson Vasey, LLP, Des Moines, IA
Susan M. Hess, Hammer Law Firm, P.L.C., Dubuque, IA
William H. Larson, The Klass Law Firm, LLP, Sioux City, IA
Zack A. Martin, Heidman Law firm, PLLC, Sioux City, IA
Benjamin J. Patterson, Lane & Waterman LLP, Davenport, IA
Kevin M. Reynolds, Whitfield & Eddy, P.L.C., Des Moines, IA
David C. Waterman, Lane & Waterman LLP, Davenport, IA
Frederic C. Hayer, Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C.

WHAT'S INSIDE

The Federal Trade Commission's Final Non-Compete Rule: Eviscerating Non-Compete Clauses Across The Country....1
IDCA President's Letter....2
Case Law Update....5
New Member Profile....10

IDCA President's Letter

Pat Sealey
IDCA President

GO FOR A WALK

In my last President's letter I encouraged everyone to get moving. Walking is the easiest form of exercise that almost all of us can do. It is important for anyone, but lawyers may need it even more than most.

We often think of medicine as something we get from a pill. We often forget that exercise is the most powerful medicine in the world. A pill will never be able to match the power of exercise. No pill will ever provide so many beneficial effects at so little cost as exercise.

Many of us feel like our bodies have become too deconditioned to exercise, or it is too hard so we do not enjoy it. Certainly, this can be true if you jumped right into biking long distances, running or lifting weights. All of those things, of course, provide immeasurable benefits to our organ systems. But, just walking provides similar benefits, especially if it has not been something you have previously incorporated into your daily life.

Runner's World gathered the studies on walking and summarized the following benefits:

- Stabilizing your blood sugar;
- Better sleep;
- Weight maintenance;
- Stress relief and mood regulation (ahem, maybe this is where us lawyers may see the most benefit);
- Reduces risk of dementia;
- Boosts recovery (for those doing other more intense exercises);
- Inspires us to move more (remember that movement is medicine); and
- It is easy to stay consistent.

Walking has virtually no limitations. You don't have to join a gym. You don't have to buy special equipment. You can do it with your loved ones.

If you do not currently walk—try it. Start with short but frequent sessions. At the beginning, simply go 10 minutes a day for 5-6 days a week. Make it a habit. Then, see what other adaptations you can make, from going more briskly, going up hills, adding some steps along the way.

We must each take responsibility for our own health. Start by going for a walk.

Continued from Page 1

Notably, the final rule does not prohibit non-solicitation or confidentiality agreements. If, however, such an agreement would effectively preclude the worker from obtaining other employment, it would likely be prohibited.

The prohibition does not apply to non-profit corporations, banks, savings and loans institutions, credit unions, common carriers, unions, air carriers or meat packers.

Nor does the ban prohibit a non-compete clause between a buyer and seller as part of a bona fide sale of a business. Those clauses will continue to be governed by state law.

Additionally, the final rule does not prohibit enforcement of an existing agreement where a cause of action accrues before September 4, 2024.

More details can be found at: https://www.ftc.gov/legal-library/browse/rules/noncompete-rule

DOES THE NON-COMPETE RULE INVALIDATE EXISTING CONTRACTS?

Yes. As of September 4, 2024, existing non-compete clauses will be unenforceable unless one of the exceptions discussed above applies.

DO EMPLOYERS NEED TO NOTIFY EMPLOYEES WHO HAVE NON-COMPETES REGARDING THE CHANGE?

No. The Rule requires employers to notify employees with non-compete agreements subject to the rule to notify the affected employees. However, while the rule is in legal limbo the notification requirement cannot be enforced. Employers should be prepared to send out notices if the current injunction is lifted. If the injunction is eventually lifted, the Federal Trade Commission will likely provide guidance on how to comply with the notice requirement.

The notice must identify the person/entity who entered into the non-compete clause with the worker, and be on paper delivered by hand to the worker, or by mail at the worker's last known personal address, or by email at an email address belonging to the worker, including worker's current work email address or last known personal email, or by text message at mobile number belonging to the worker.

There FTC has provided model language for the notice which should be used. It can be found on the FTC website at:

https://www.ftc.gov/legal-library/browse/rules/noncompete-rule

https://www.ftc.gov/system/files/ftc_gov/images/new-rule-image-noncompete-rulev3.png

WHAT ARE OTHER WAYS THAT EMPLOYERS CAN PROTECT TRADE SECRETS AND OTHER SENSITIVE INFORMATION?

Employers may still require confidentiality, non-disclosure and non-solicitation agreements. However, if they are so stringent that they would effectively preclude other employment the FTC could determine it to be a violation. Employers should work with their attorneys to craft appropriate language.

WHAT DOES THE RULE SAY ABOUT EXECUTIVE LEVEL NON-COMPETE CLAUSES?

Existing agreements with "senior executives" are enforceable if the executive is in a "policy making" position and receives annual compensation of at least $168,164. Although existing agreements remain enforceable, agreements made after September 4, 2024, may not be enforceable if courts lift the current injunction.

HOW SHOULD EMPLOYERS PREPARE NOW?

There are two outstanding appeals for cases challenging the rule, one in Texas and one in Florida. The Texas case is on appeal in the Fifth Circuit Court of Appeals, while the Florida case is being heard by the Eleventh Circuit. While both appeals are enjoining the rule, only the Texas case is stopping the law nationwide. The Florida case has a limited injunction only for the parties; the circuit was accepting amicus briefs as late as January 22, 2025, and only received the Federal Trade Commission's brief on January 2nd. The Texas case is unlikely to be resolved soon, the latest briefs in the case were submitted as recently as February 10, 2025.

While neither case will be resolved soon, the Texas case is the most important in the short term. If the Fifth Circuit reverses the temporary injunction then the FTC rule will become law nationwide. However, the Fifth Circuit has been hostile to agency action in recent years. Just last year the circuit issued major decisions curtailing the power of the Consumer Financial Protection Bureau and the Food and Drug Administration, two major federal agencies. It is unlikely the circuit will change course regarding the FTC rule. Some of these decisions were reversed by the Supreme Court.

Thus, immediate action is not necessary. That being said, even circuit courts can be unpredictable, and employers should start considering their options. For instance, if an employer presently has only non-compete agreements with its employees, it should consider working with its attorneys to modify those agreements

to include confidentiality and non-solicitation clauses that would be enforceable. Finally, in order to be ready to send the required notices if the court challenges fail, you should review which "workers" currently have non-compete clauses so you can be prepared to send out the required notices.

SHOULD EMPLOYERS WAIT TO PLAN UNTIL LEGAL ACTION IS FINALIZED?

No. Court decisions can change the state of the law on a dime. While these decisions will likely result in the injunction remaining in effect, final court decisions are never guaranteed.

2025 IDCA ANNUAL MEETING & SEMINAR

SAVE THE DATE
AND *NEW* LOCATION!

SEPTEMBER 18-19, 2025

Prairie Meadows Casino and Hotel,
Altoona, Iowa

Case Law Update

By Zack A. Martin
Heidman Law Firm, PLLC

Zack A. Martin

On November 8, 2024, the Iowa Supreme Court issued a decision overturned an historic $97.4 million-dollar jury verdict entered in a birth injury case in Johnson County in March 2022, reversing and remanding for a new trial. All six participating Justices agreed that a new trial was required based on the improper admission of hearsay in the form of a warning contained in the package insert that came with the vacuum used in the child's delivery. In a concurrence joined by Justice Waterman, Chief Justice Christensen wrote separately to address the misconduct committed by the plaintiff's counsel throughout trial. In a concurrence joined by four of the six Justices, the Court found that the defendants impliedly waived their right to dismissal under Iowa Code section 147.140 by failing to raise the issue before filing an appellate motion to reverse.

The decision of the Court and both concurrences have various implications worthy of review.

S.K. BY & THROUGH TARBOX V. OBSTETRIC & GYNECOLOGIC ASSOCS. OF IOWA CITY & CORALVILLE, P.C., 13 N.W.3D 546 (IOWA 2024)

FACTUAL & PROCEDURAL BACKGROUND

At 3:50 p.m. on August 11, 2018, the attending nursing called for the physician for delivery of a baby. The physician made two attempts to deliver the baby using forceps. Neither attempt was successful. The physician then used a vacuum. After one pull of the vacuum, the baby was delivered at 4:09 p.m. During the process of labor and delivery, the baby's skull was fractured, resulting in a brain injury. The baby spent the next forty-six days in the neonatal intensive care unit.

Suit was filed in 2019. The parties offered competing expert testimony regarding the defendants' negligence, the cause of the baby's injuries, and the extent of the child's future limitations. The experts also disagreed regarding whether the child suffered brain damage prior to delivery, caused by lack of blood and oxygen, resulting from the defendants negligently failing to deliver the baby earlier via cesarean section, in addition to the skull fracture. On the issue of causation of the skull fracture during delivery and over defendants' objections, the district court admitted the package insert that came with the vacuum used during delivery. Also during trial, plaintiff's counsel's conduct prompted at least seven motions for a mistrial.

In March 2022, the jury returned a verdict in favor of the plaintiff, awarding $97,402,549 in damages. This verdict was widely reported as the largest medical malpractice verdict in Iowa history. After denial of their post-trial motions, the defendants filed an appeal in August 2022. Defendants argued that a new trial was required for several reasons, including the admission of the package insert and the district court's failure to grant a mistrial in response to plaintiff's counsel's misconduct.

On July 31, 2024, while the appeal was still pending, defendants filed a motion to reverse judgment with the Supreme Court, based on the certificate of merit affidavit requirements in medical malpractice cases. Two months earlier, the Supreme Court held that a plaintiff failed to substantially comply with the requirement by providing a signed but unsworn certificate of merit affidavit, mandating dismissal of their case. Because plaintiff's certificate of merit affidavit was similarly unsworn, the defendants argued that the Supreme Court should reverse and remand for dismissal of the plaintiff's claims.

QUESTION PRESENTED

1. Were defendants entitled to a new trial based on one or more of their contentions of error?
2. Were defendants entitled to dismissal with prejudice of plaintiff's claims on remand due to plaintiff's failure to substantially comply with the certificate of merit affidavit requirements?

HOLDING

1. All six Justices held that erroneous admission of the package insert required the Court to grant a new trial. As a result, the majority opinion did not reach the defendants' other contentions of error. However, the concurrence of Chief Justice Christensen specifically addressed plaintiff's counsel's misconduct.

2. All six Justices also agreed that the defendant's motion to reverse on certificate of merit affidavit grounds should be denied. Justice May, writing the majority opinion, was joined by Justice Mansfield in concluding that the defendant did not preserve error by first raising the issue in the district court. In a four-Justice concurrence, Justice Waterman found that the defendants waived the right to dismissal through their "litigation conduct."

ANALYSIS

The at issue insert contained various "contraindications" for use of the vacuum and set forth potential "adverse events," including "fetal injuries." Applying Rule 5.801, the Court found that the package insert contained hearsay. The statements in the insert "were offered to prove that the vacuum should not be used when any of the listed 'contraindications' are present, particularly a 'failed forceps attempt,' which allegedly happened here." The insert was also offered "to prove that using the vacuum could cause the 'adverse events' listed on the insert, several of which match up with injuries that S.K. allegedly suffered."

The plaintiff argued that the package insert was nevertheless properly admitted because it fell within a recognized exception for hearsay. Specifically, plaintiff argued that the residual and market reports exceptions applied. The Court began by setting forth the elements of the residual exception to hearsay stated in Rule 5.807. The residual exception "is to be 'used very rarely'" and applies "only in 'exceptional circumstances.'" For the exception to apply, the district court must make five findings concerning the nature of the evidence: (1) trustworthiness; (2) materiality; (3) necessity; (4) notice; and (5) service of the interests of justice. All five of these criteria must be satisfied for the exception to apply. The defendant argued that the plaintiff had not satisfied the necessity requirement.

Agreeing with the defendants, the Court reviewed prior cases finding that the necessity requirement is satisfied only where the hearsay evidence is "*superior* to other available evidence." Finding that the insert was "not the best available evidence," the Court found that the instructions contained therein were merely "general guidelines" and said "nothing about the specific facts of this case." Moreover, the plaintiff's own expert's testimony was superior to the package insert. The experts addressed the same general topics as the insert, could address the specific facts of S.K.'s birth, and were subject to cross-examination.

Finding that the package insert was also not superior to other evidence the plaintiff could have obtained "through reasonable efforts," the Court noted how plaintiff "could have called a representative of the vacuum manufacturer," who would have then been subject to cross-examination. Despite acknowledging the plaintiff's argument that it was not reasonable to call a representative of the vacuum manufacturer to testify, the Court reiterated that it was plaintiff's burden to show no better evidence was available. There was nothing in the record indicating unsuccessful efforts to obtain this testimony. Addressing the trustworthiness of the information in the insert, the Court referenced the lack of evidence in the record that the FDA ever approved the insert and found that, even if the information was trustworthy, "trustworthiness alone does not satisfy the necessity requirement."

Turning to the market reports exception, Rule 5.803(17) permits hearsay in the form of "market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations." "Consistent with its wording, the market reports exception applies to documents that 'recite established factual information.'" In accordance with the scope of this exception, the Court cited a prior case finding it permitted the admission of labels on batteries and over-the-counter cold medication indicating that the batteries were AA lithium batteries and the cold medicine contained pseudoephedrine hydrochloride, consistent with the packaging and labeling of each. Contrarily, "the exception does not apply to statements that go beyond the recitation of 'relatively straightforward objective facts.'"

Finding that the vacuum insert did not fall within the market reports exception, the Court noted that the warnings contained therein "aren't the sort of 'relatively straightforward objective facts' that would fall within the exception." "Those warnings in the insert are based on the manufacturer's evaluation process which—naturally—may include its desire to avoid liability."

Because the insert was admitted, despite being hearsay for which no exception applied, the Court next considered whether the admission of the evidence was prejudicial such that the district court's erroneous admission required a new trial. Iowa precedent provides that a reviewing court presume prejudice when hearsay is improperly admitted. The plaintiff argued the presumption was overcome because (1) the insert was merely cumulative, (2) the insert was effectively irrelevant, and (3) the plaintiff's evidence was overwhelming.

Rejecting all three of these arguments, the Court first found that the information contained in the insert was not merely cumulative of plaintiff's expert's testimony, which quoted or paraphrased certain medical journals addressing increased risks of sequential use of forceps and a vacuum. The journal testimony did not convey an absolute prohibition against sequential use, whereas "the insert said 'do not' use the vacuum if there has been a prior failed forceps attempt." Moreover, the medical journals were only discussed and not admitted into evidence as a physical exhibit like the package insert.

On the issue of relevancy, plaintiff relied on the defendant-physician's testimony that she did not attempt to use forceps, rendering the "literal terms of the package-insert warning" irrelevant. However, the Court noted that plaintiff had argued the physician did attempt to use forceps twice, making the prohibition directly relevant. The Court also rejected plaintiff's argument that the insert was irrelevant because the large award of damages suggested the jury concluded S.K. suffered a serve birth-related injury prior to delivery and use of the vacuum. The Court found that no evidence was offered at trial specifying what portion of S.K.'s damages were caused by the vacuum rather than the alleged brain damage prior to delivery.

Disagreeing with plaintiff's final argument that the evidence of S.K.'s birth injury was overwhelming, rendering the hearsay non-prejudicial, the Court found that the evidence was offered specifically to show that the use of the vacuum was *a cause* of the birth injury. Also, given the competing expert testimony, the evidence of defendants' fault was not "overwhelming." In further support of its conclusion on prejudice, the Court noted defendant's concerns that: (1) the improperly admitted evidence addressed a hotly contested issue, (2) the admission of the insert suggested that a presumably neutral party would not have approved of the defendant-physician's use of the vacuum, (3) the jury was unfairly influenced by the "purportedly unbiased" contents of the insert, and (4) plaintiff substantial emphasized the insert during closing arguments.

Concurring specially, Chief Justice Christensen, joined by Justice Waterman, addressed plaintiff's counsel's misconduct. Characterizing the record as "replete" with examples of this misconduct, the Chief Justice focused only on counsel's closing argument and "the most egregious instances" therein. Chief Justice Christensen specifically addressed plaintiff's counsel vouching for evidence, disparaging the defense, and encouraging the jury to punish the defendants.

First addressing improper vouching, Chief Justice Christensen cited statements from the record that counsel had "not personally seen every case in the world, but this is certainly an interesting case in which the facts seem so unequivocal, so unanimous, the record is so voluminous" and suggesting that the defendant-physician would "say anything" and had "a script" during her testimony. Attorneys are prohibited from interjecting their personal beliefs into closing argument or otherwise vouching for credibility based on their experience or any other ground outside the evidence at trial. "When counsel engages in this kind of conduct during closing argument, it once again taints the jury's ability to do its job." "The presentation of this information as evidence may distract the jury from the evidence and facts they should be considering. It is also unfair to opposing counsel, who rightfully did not make these arguments, as the jurors may believe opposing counsel lacks the same experience or belief in the evidence."

The Chief Justice next addressed "several remarks throughout [plaintiff's counsel's] closing argument that disparaged the defense and their arguments." These remarks included characterizing the defense as "the most fantastical story that anybody could ever hear that in real life not one single doctor or hospital accepts as true," "preposterous," and "nonsensical." Plaintiff's counsel stated that he did not want "to give it lip service because when you start repeating a falsehood enough times, some people start to believe it," describing this as "a method of propaganda." "If you believe" the arguments of defense counsel, plaintiff's counsel told the jury, "then I've got a bridge to sell you in Brooklyn."

These personal opinions regarding the defense's arguments "mocked the idea that a jury could possibly find the defense truthful." Iowa's appellate courts had previously held that a defense counsel's argument should not be referred to as a "smoke screen" and that remarks similar to those of plaintiff's counsel warranted a new trial. This rhetoric "paints attorneys in a poor light," "undermine[s] the role of the defense in this trial and disrespected the counsel making the arguments," and is inconsistent with the principle that opposing counsel "can disagree" about the merits of a case "without being disagreeable."

Chief Justice Christensen concluded by reviewing "perhaps the most egregious conduct [] during closing argument when Fieger also improperly encouraged the jury to punish the defendants for failing to take responsibility for S.K.'s injuries." Plaintiff's counsel described what defendants had "put this family through for three and a half years" and how it was "time" for defendants to "take responsibility." As defendants had not taken responsibility, plaintiff's counsel encouraged the jurors to "now take responsibility." Defendants had not taken responsibility, according to plaintiff's counsel, "because the dollar is more important than . . . taking responsibility for what you've done." Plaintiff's counsel stated during his closing argument that the defendant-physician "didn't have time to do what was correct under the standard of care" during S.K.'s delivery, but she had "all sorts of time to sit in here, because the only thing we're doing here is money. Money."

Prior Supreme Court precedent precludes closing argument that the defendant "has chosen to spend exorbitant sums of money defending actions instead of compensating innocent victims." It is improper "to imply or argue that the mere act of defending oneself is reprehensible." These arguments, like the other improper comments in plaintiff's counsel's closing argument, encouraged the jurors to make decisions based on biases or feelings and punish the defendant.

In summation, the Chief Justice described plaintiff's counsel's conduct as "unacceptable." She noted the various admonishments he received from the district court judge "and a long history of similar conduct in other states," citing various cases. "Incivility and disrespect have damaging consequences for the attorney's reputation and the reputation of our court system." Addressing how such misconduct is also "costly," Chief Justice Christensen referenced "the time and resources the parties have spent to litigate Fieger's conduct through numerous motions for mistrial in the district court and now on appeal." In addition, his misconduct resulted in "risking a new trial and jeopardizing a substantial jury award for his own client." Plaintiff's counsel was "lucky" that the Court was reversing on other grounds. "His apologies ring hollow when he made no adjustments to his outlandish behavior." Courts should not be required to act as "'kindergarten cop' and referee a dispute between attorneys caused by one who either never learned or has forgotten the basic good manners others learned before first grade."

Denying defendants' appellate motion to reverse on the issue of plaintiff's unsworn certificate of merit affidavit, Justices May and Mansfield did not reach the merits, finding that defendants failed to preserve error. In *Miller v. Cath. Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024), the case decided two months earlier upon which the defendants relied, the Court "applied the plain language of [Iowa Code § 147.140] to hold that the expert's unsworn signature on the certificate of merit affidavit did not substantially comply with Iowa Code section 147.140, which unambiguously requires the expert to sign 'under oath.'" The *Miller* defendants filed dispositive motions in the district court challenging the certificate of merit affidavit. Based on the *S.K.* defendants never raising the issue in the district court, error was not preserved, and Justices May and Mansfield therefore would not have addressed the issue.

Choosing to address the issue of waiver due to the likelihood it would arise on remand, Justice Waterman, joined by the three other participating Justices, found that "the clinic impliedly waived its right to dismissal under section 147.140(6) by failing to raise the issue before final judgment, by the dispositive motion deadline, or indeed at any time during nearly four and a half years of litigation until its appellate motion to reverse." The four-Justice concurrence did "not decide today the precise point at which a motion challenging a certificate of merit affidavit becomes untimely." However, the Justices had "no trouble saying that it is too late once the district court issues its final judgment."

Justice Waterman began by summarizing *Miller*. The purpose of Iowa Code § 147.140 is to enable "quick" and "early" disposition of medical malpractices cases not supported by the requisite expert testimony, resulting in "cost-avoidance" for defendant-health care providers. Dismissal is allowed only "upon motion," making the requirement neither jurisdictional nor self-executing. However, the statute contains no deadline for a defendant to bring a motion pursuant thereto.

Justice Waterman turned to "the timeline in this case" and found it "show[ed] the clinic waited far too long to file a motion under section 147.140(6)." A certificate of merit affidavit was required within sixty days of the defendants' answer, or February 17, 2020. The statute of limitations for claims brought by S.K.'s parents expired in August 2020. The dispositive motion deadline expired on December 31, 2021. The case was tried in March 2022. The defendants filed their appeal in August 2022. In May 2023, the defendant filed their final briefs without raising the certificate of merit affidavit issue. Defendants raised the issue for the first time in a motion to reverse judgment on July 31, 2024.

Rejecting the defendant's reliance on *Miller*, finding that it was "easily distinguished from this case," Justice Waterman noted that the *Miller* defendants "filed dispositive motions within three months of the deadline for the certificate of merit affidavits that were not signed under oath or penalty of perjury." "By contrast, here the clinic waited over four years and well after trial to challenge the unsworn signatures." Justice Waterman found no Iowa appellate court decision allowing a defendant "to raise the issue for the first time after trial or after the pretrial dispositive motion deadline."

During the intervening years, "the parties incurred significant litigation expenses, tried the case to verdict, and fully briefed all the other issues for the appeal." Justice Waterman cited both Iowa and out-of-state authority for the proposition that this "litigation conduct" resulted in the defendant waiving any challenge to the unsworn certificate of merit affidavits. The statute at issue in the Texas Supreme Court case cited by Justice Waterman, like Iowa Code § 147.140, "has no deadline for filing a motion to dismiss." Nevertheless, the absence of a deadline did not preclude a finding of implied waiver by conduct where dismissal was not sought "until the eve of trial—1,219 days after suit was filed, nearly two years after the [defendants] answered, and long after the limitations periods had expired on the plaintiffs' claims." This result "align[ed] with Iowa precedent holding that parties can waive a right to arbitration under Iowa Code section 679A.2" where the defendant litigated the case in district court for eighteen months before moving to compel arbitration five days before trial. Pursuant to this precedent and the record in *S.K.*, the four-Justice concurrence held that "the clinic's no-deadline argument fails" and that "its prolonged litigation conduct waived its right to dismissal under Iowa Code section 147.140(6) as a matter of law."

Addressing *McHugh v. Smith*, 966 N.W.2d 285 (Iowa Ct. App. 2021), which rejected an argument that the defendant waived its

right to dismissal under Iowa Code § 147.140, Justice Waterman concluded that it, like *Miller*, was "easily distinguished." There, the motion to dismiss was filed "within several months" of the plaintiff missing her deadline to serve a substantial compliant certificate of merit affidavit. The plaintiff's waiver argument in *McHugh*, based on the defendants "serving written discovery and granting a one-month extension for discovery responses," was "correctly rejected" by the Court of Appeals. "Unlike the defendants in *McHugh*, the clinic litigated S.K.'s case through trial and appellate briefing before filing a motion under section 147.140(6) nearly four and a half years after the deadline for a sworn certificate of merit affidavit."

While recognizing that a defendant need not show prejudice resulting from a plaintiff's delay in serving a substantially compliant certificate of merit affidavit to avail itself of the right to dismissal under Iowa Code § 147.140, Justice Waterman noted that Iowa precedent in the arbitration statute context "consider[s] whether the *nonmoving* party was prejudiced by the moving party's delay in seeking arbitration, and consider[s] the added costs of litigation as prejudicial." "Another form of prejudice to the nonmoving party is an intervening expiration of the statute of limitations," particularly in light of the Supreme Court having previously "recognized the plaintiff's right to voluntarily dismiss without prejudice and refile within the statute of limitations to restart the clock for serving a properly sworn certificate of merit affidavit."

"The clinic had a right to seek a dismissal under section 147.140(6) as of February 17, 2020. The clinic waived that right by waiting until July 31, 2024, well after trial and final judgment, to raise the unsworn certificate of merit affidavit issue for the first time on appeal. A renewed motion by the clinic under section 147.140(6) in this case on remand must be denied on that ground."

WHY IT MATTERS

The principal opinion of the Court thoroughly addresses hearsay and its exceptions, finding that a product insert like that included with the vacuum used during S.K.'s delivery is hearsay for which no exception applies. This logic should extend to other cases where warning labeling is relevant, such as products liability cases, where the contents of the labeling offered "go beyond the recitation of 'relatively straightforward objective facts.'"

Chief Justice Christensen's concurrence serves as a stern rebuke of plaintiffs' attorneys who play fast and loose with the Iowa Rules of Professional Conduct. Though this concurrence was unfortunately only joined by one other Justice, the statement that plaintiff's counsel was "lucky" the case was being reversed on other grounds suggests the full Court may have reversed on the basis of his misconduct, had the issue been necessarily reached.

The strong language contained in this concurrence is excellent material for motions in limine when defending a case against similarly inclined plaintiffs' attorneys. Particular focus is given to misconduct during closing arguments, improper vouching for evidence, disparagement of the defense, and arguments that the jury should punish the defendant when awarding compensatory damages.

The concurrence of four out of the six participating Justices, authored by Justice Waterman, provides that there is a time at which a defendant's motion pursuant to a deficient certificate of merit affidavit becomes untimely. Declining to issue a bright-line rule, the outer bounds set by this concurrence are that a motion filed "within several months" of the plaintiff's deadline to serve a substantially compliant certificate of merit affidavit is no doubt timely, whereas filing four and a half years after the deadline and more than two years after trial is "too late." Despite the lack of an explicit rule, all indications suggest a motion pursuant to Iowa Code § 147.140 and filed within the dispositive motion deadline is timely and does not amount to waiver by a defendant.

New Member Profile

Parker Howe

Parker Howe is an associate attorney at Whitfield & Eddy, and works in the areas of civil litigation, construction disputes, and transportation matters.

Prior to becoming an attorney, Parker received his undergraduate degree from the University of Iowa before attending Drake University for his law degree. While attending law school, he worked at the Drake Entrepreneurial and Transactional Clinic where he completed the formation of various business entities, drafted internal governing documents, and advised on general intellectual property-related issues. Parker received his J.D. from the Drake University College of Law in 2022 with high honors.

Parker's fiancée, Hannah Hildahl, is a member of the UnityPoint Health Internal Medicine Residency Program. Together, they live in Des Moines.

JON A. VASEY
515-243-1914
jon.vasey@elversonlaw.com

MEDIATION

LIVE OR ZOOM • ANYWHERE IN IOWA
MEMBER OF AMERICAN ACADEMY OF ADR ATTORNEYS

BODILY INJURY • PRODUCTS LIABILITY • PROPERTY DAMAGE

DEPOSITION BOOTCAMP

Thursday, May 8, 2025 • 8:00 am – 5:00 pm

Sponsored by

MASTER THE ART OF DEPOSITIONS

Master the art of depositions at Deposition Bootcamp – a high-impact, one-day seminar presented by the Iowa Defense Counsel Association, where young attorneys gain critical skills through expert instruction and mock exercises.

DATE & TIME

Thursday, May 8, 2025
8:00 am – 5:00 pm
Lunch provided

Optional cocktail reception on Wednesday, May 7 at 7:00 pm – 8:00 pm

LOCATION

Grinnell Mutual Reinsurance Co. Conference Center

4215 Highway 146
Grinnell, Iowa 50112

Use south entrance.

REGISTRATION

Member Price: $250

You must be an IDCA member to attend. Register now!

QUESTIONS? Contact Jessica Thornton at **staff@iowadefensecounsel.org** or **(515) 334-1064**.

1255 SW Prairie Trail Parkway
Ankeny, IA 50023

2024-2025 Board of Directors

President Patrick L. Sealey
President-Elect Sean O'Brien
Secretary Joshua Strief
Treasurer Jace T. Bisgard
Past President Amanda Richards
District I Christopher C. Fry
District II Karla Shea
District III William H. Larson
District IV Tom Braddy
District V Jon A. Vasey
District VI Brenda Wallrichs
District VII Joshua J. McIntyre
District VIII Brent R. Ruther
At-Large Katie Gral
At-Large Bryn Hazelwonder
At-Large Michele Hoyne
At-Large Jason J. O'Rourke
At-Large Janice Thomas
New Lawyers Rep Blake Hanson
New Lawyers Rep Bryony Whitaker
DRI Representative Kami L. Holmes

Join IDCA

Do you know a colleague or a member of your firm that would benefit from joining IDCA?
Please encourage them to sign on with IDCA by contacting staff@iowadefensecounsel.org