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DEFENSE UPDATE

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Warning: Carefully Follow All Instructions—Changes and Rearranges In Iowa Civil Jury Instructions

By Josh Strief¹ of Elverson Vasey, Des Moines, Iowa



Josh Strief

The warning label that makes you wonder: who did that? The instruction manual that makes you question your faith in humanity. We've all seen them:

- Drain Cleaner: If you do not understand or cannot read all directions, cautions and warnings, do not use this product.
- Television: Do not pour liquids into your television set.
- Baby Stroller: Caution—Remove child before folding.
- Chainsaw: Danger—Do not hold the wrong end of chainsaw.

Jury trials also depend on instructions given by the judge to the jury. While less obvious than the above warnings, failure to follow new developments in Iowa Civil Jury Instructions can be similarly devastating to your client's case. During my 5+ years as a member of the Iowa State Bar

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IDCA President's Letter



Sean M. O'Brien
IDCA President

Dear Fellow IDCA Members,

We hope this edition of the Defense Update finds you well. As we look ahead to the upcoming IDCA Annual Meeting & Seminar, we are thrilled to share some highlights of what promises to be an outstanding program.

SEMINAR DETAILS

This year's Annual Meeting & Seminar will be held on September 10-11, 2026

at the historic Hotel Fort Des Moines. There will be 14 sessions offering 11.5 CLE credits and 1 ethics credit. These sessions will cover a range of topics designed to keep our members at the forefront of developments in defense practice.

FEATURED SPEAKERS

President Elect Jon Vasey has assembled an exceptional lineup of speakers and activities that we believe will provide tremendous value to our members. A sampling includes:

- Frank Ramos, who will present "Are Lawyers Obsolete? Advances in Use of Artificial Intelligence in Defending Your Clients." Frank is a renowned DRI speaker known for his engaging presentations, and he will continue our tradition of education in technology and the law.
- Robert Palmer, presenting on Iowa Legislative updates affecting the defense bar. Robert serves as our lobbyist, and he will share his thoughts on the past legislative session and efforts by the IDCA to advance affirmative legislation on behalf of the defense bar.
- Honorable Arthur E. Gamble, Honorable Mark W. Bennett, Honorable Robert B. Hanson, and Honorable Michael J. Moon will form a panel to discuss things to do and not to do to keep your trial judge happy. Judge Bennett will provide double duty as he also will sit on a panel with Paul Thune and Jeff Boehlert to discuss pros and cons for defense lawyers in mediation.

ACTIVITIES AND EVENTS

Beyond the educational programming, we have planned several opportunities for networking and fellowship:

- The IDCA Annual Meeting and Awards Luncheon will be held on September 10th at noon. The Board recently worked with Bill Boyd to update our corporate governance documents, and the business meeting agenda will include a consideration of amendments to our articles of incorporation.
- A Networking Reception will be on the evening of September 10th. The location is a bit of a secret, so stay tuned for details. The Hospital Suite will be open for business following the reception for those interested in continuing the conversation.
- We are fortunate to have a number of wonderful sponsors and exhibitors. Please take advantage of the time during breaks to visit with and learn more about their products and services.

REGISTRATION

I encourage each of you to register early and take advantage of early bird pricing available through September 1st. You can register online at the Iowa Defense Counsel Association website. If you encounter any difficulties, please reach out to Jessica Thorton, our Executive Director, at jessica@amplifymyassociation.com or (515) 244-2847.

CLOSING

The Annual Meeting & Seminar is always the highlight of our organization's year—a chance to sharpen our skills, reconnect with colleagues, and strengthen our commitment to the defense bar in Iowa. We look forward to seeing as many of you there as possible.

Thank you for your continued dedication to IDCA and the pursuit of excellence in the practice of law.

We are always looking for people interested in becoming more involved in the organization. There are many ways to participate. You could write an article for the Defense Update or serve on the Editorial Board. Perhaps you might be interested in coordinating IDCA Webinars or serving on the Reptile Theory Task Force. How about joining the Board of Directors? Please feel free to reach out at any time to discuss alternatives that would be a good fit for you.

Sincerely,

Sean

Continued from Page 1

Association's Iowa Jury Instructions Committee, I've been able to help shape some of the recent changes to Iowa's Civil Jury Instructions. In this article, I will highlight some of those changes.

SCOPE OF LIABILITY—WHAT DO DRAIN CLEANER AND SCOPE OF LIABILITY HAVE IN COMMON? WHEN USERS DON'T UNDERSTAND THE INSTRUCTIONS, THEY DON'T USE THE PRODUCT:

Since its introduction, Scope of Liability has been a difficult legal concept to understand and use, and it was similarly difficult to update. The Jury Instruction Committee worked on the instruction for multiple years before agreeing to the revisions, which were approved in July 2025. The revisions aimed to make the instruction easier to understand for jurors and litigants alike in a few ways. First, the instruction attempts to use simpler language. Second, the instruction format was changed to state the rule in the first paragraph and then use the second paragraph to clarify when conduct is and is not within the scope of liability. Third and finally, the instruction re-introduces the concept of foreseeability, which was largely lost after elimination of proximate cause instructions.

Old Version: 700.3A Scope of Liability—Defined. You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiffs claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.

Consider whether repetition of defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

New Version: 700.3A Scope of Liability—Defined. Harm is within the scope of a party's liability when it is among the type of reasonably foreseeable harms that made the party's conduct negligent.

If repeating the defendant's conduct would make it more likely for another person to suffer the same type of harm claimed by plaintiff, then the harm is foreseeable and within the scope of defendant's liability. If defendant's conduct merely places plaintiff in a situation where plaintiff sustains injury from an unrelated act or event, the claimed harm is not within the scope of defendant's liability.

DRAM SHOP—LIQUIDS POURED INTO THE MOUTH RATHER THAN THE TELEVISION:

Iowa's dram shop statute, Iowa Code § 123.92, has seen frequent and significant changes during the last twenty years, as it has undergone changes in 2009, 2013, 2016, 2018, 2022, and 2023. In 2024, the Committee updated the dram shop instructions to address the statutory changes to the extent it could do so. This involved a complete re-write of Chapter 1300 of the Iowa Civil Jury Instructions. Because the entire Chapter was re-written, I will not include it here for brevity's sake.

However, I do have one additional comment: while most of the changes were straightforward based on the statute and relevant case law, there was at least one item the Committee intentionally left vague: Instruction 1300.3—Definition of Intoxication. Iowa courts have not yet defined the phrase "visibly intoxicated," so the Committee did not feel it could set forth a brightline rule in the instruction defining intoxicated. The Comment to 1300.3 does refer to factors for "observable signs of intoxication" set forth in Banwart v. 50th Street Sports, L.L.C., 910 N.W.2d 540 (Iowa 2018), but those factors were arguably dicta and not meant to be a comprehensive, definitive, or universally applicable list of factors, so they were not included in the instruction itself. Litigants dealing with dram shop should be aware of the Banwart decision and make sure you consider arguments as to why the factors therein are or are not applicable to your specific case, as well as if other factors may be relevant to the "visibly intoxicated" analysis.

PREMISES LIABILITY—REMOVE THE BABY "DUTY" BEFORE IT GETS STUCK IN THE INSTRUCTION STROLLER:

Before 2017, Iowa law (and jury instructions) supported submitting an instruction for "Known or Obvious" conditions, which indicated a defendant was not liable for known or obvious conditions unless the harm should have been anticipated despite the knowledge or obviousness. That instruction specifically referenced Instruction 900.1(2), which concerned part of the existence/breach of duty analysis undertaken by the jury. In 2017, the Iowa Supreme Court in Ludman v. Davenport Assumption High School reiterated adoption of section 51 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm and analyzed the known or obvious danger instructions in that context. 895 N.W.2d 902, 914 (Iowa 2017). The Ludman Court held that whether a condition is open or obvious does not negate the possessor of land's duty; instead, the issue of whether a condition is open or obvious can be a factor in the "contributory negligence" analysis. Id.

In evaluating the effect of this decision, as well as Wieseler v. Sisters of Mercy Health Corp., 520 N.W.2d 445 (Iowa 1995), the Committee

determined the Comment for the Known or Obvious instruction should be revised. Now, the Comment indicates the "Known or Obvious" instruction *should not* be given if comparative fault is alleged, but whether a condition is known or obvious can be a factor in the comparative fault analysis in that circumstance. While I do not know that this Comment is ideal, it was preferable to other options like complete elimination of the "Known or Obvious" instructions.

Old Version: 900.6 Known Or Obvious. Concerning number 2 of Instruction No. [900.1], a defendant is not liable for injuries or damages caused by a condition that is known or obvious to a person in the plaintiff's position unless the defendant should anticipate the harm despite such knowledge or obviousness.

Authority

Wieseler v Sisters of Mercy Health Corp., 540 N.W.2d 445 (Iowa 1995)

Restatement (Second) of Torts, section 343A

New Version: 900.6 Known Or Obvious. Concerning number 2 of Instruction No. [900.1], a defendant is not liable for injuries or damages caused by a condition that is known or obvious to a person in the plaintiff's position unless the defendant should anticipate the harm despite such knowledge or obviousness.

Authority

Wieseler v Sisters of Mercy Health Corp., 540 N.W.2d 445 (Iowa 1995)

Restatement (Second) of Torts, section 343A

Comment

Note: Instruction 900.6 and Instruction 900. 7 should not be given if the defense of comparative fault under Iowa Code chapter 668 is asserted. See *Wieseler v Sisters of Mercy Health Corp.*, 540 N.W.2d 445 (Iowa 1995); *Ludman v. Davenport Assumption High School*, 895 N.W.2d 902 (Iowa 2017); *Restatement (Third) of Torts: Liability for Physical and Emotional Harms*, § 51, comment k). Rather, when comparative fault is alleged, whether a condition is known or obvious can be a factor in the comparative fault analysis.

EMPLOYMENT RIGHTS—LIKE STICKING A HAND IN THE WRONG END OF A CHAINSAW?

Ok, it's not nearly as bad as chainsaw fingers, but the process of revising Iowa's Employment Rights instructions is neither

simple nor easy. During my time on the Committee, the longest ongoing project has been revising and updating the Employment Rights instructions in Chapter 3100. Updating these instructions is difficult because they involve complex issues, an interplay between state and federal law at times, and frequent new decisions from appellate courts. Similar to the Dram Shop instructions, the number of recent revisions to the Employment Rights instructions are too numerous to set forth the prior and current versions of the revised instructions in full, but here is a list of recently changed or added instructions:

1. 3120.1 Workplace Harassment/Hostile Work Environment [Indirect Liability];
2. 3120.2 Workplace Harassment/Hostile Work Environment by a Supervisor;
3. 3120.3 Severe or Pervasive Conduct—Definition;
4. 3210.4 Supervisor Defined;
5. 3120.5 Unwelcome Conduct;
6. 3130.1 Constructive Discharge;
7. 3130.3 Intolerable Working Conditions—Definition;
8. 3140.1 Discrimination;
9. 3140.2 Adverse Action;
10. 3140.3 Retaliation;
11. 3140.4 Motivating Factor; and
12. 3140.5 Same Decision Affirmative Defense.

FUTURE CHANGES AND REARRANGES:

The Committee continues to review requests for updates and revisions to the Iowa Civil Jury Instructions upon receipt from judges and attorneys. I anticipate there will be ongoing work on Employment Rights instructions, along with other "hotbed" litigation areas like will contests. If you know of instructions that need to be updated or areas of law where no uniform instructions exist, I would encourage you to notify the Committee or get ahold of me with the request (joshua.strief@elversonlaw.com). More importantly, I encourage anybody interested in jury instructions and trying cases to apply to be on the Committee through the Iowa State Bar Association.

1. Josh Strief is a partner at Elverson Vasey, where his practice involves insurance defense and subrogation. Josh serves as Secretary on the IDCA Board of Governors. For more information about Josh, please visit: <https://www.elversonvasey.com/attorneys/joshua-strief>. Josh will also be presenting this paper at IDCA's upcoming Annual Meeting and Seminar.



New Member Profile



Diana Kenney

Diana graduated from Drake University Law School in 2023 and is a member of Dentons Davis Brown's Litigation Practice Group. She assists employers, businesses, and municipalities with a wide range of litigation matters and also represents health care providers before professional licensing boards, including the Iowa Board of Medicine. Prior to joining Dentons Davis Brown, Diana practiced medical malpractice defense, successfully trying five medical malpractice cases to verdict and securing defense victories in each.

Outside of being a lawyer, Diana enjoys experimenting with new recipes, spending time with her husband, and eagerly preparing to welcome the newest member of their family, expected in August 2026.



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Case Law Update

By Sean Jarvis



Sean Jarvis

OVERVIEW:

Iowa Code section 147.140 requires that a plaintiff who files a personal injury or a wrongful death action against a health care provider based on alleged negligence must provide a certificate of merit affidavit signed by an expert witness under oath, and that a failure to substantially comply with this requirement results in dismissal with prejudice.

In 2024, the Iowa Supreme Court held in *Miller v. Catholic Health Initiatives of Iowa, Corp.*, 7 N.W.3d 367 (Iowa 2024) that an expert's signed but unsworn report did not substantially comply with section 147.140's affidavit requirement. The Court, in the aftermath of the *Miller* decision has further clarified on what plaintiff's in medical malpractice lawsuits must do in order to substantially comply with Iowa Code section 147.140.

RARICK V. SMIDT, NO. 24-1704, 2026 WL 1441855 (IOWA MAY 22, 2026).

Richard Rarick was injured during a knee surgery he had in March 2022. Rarick's medical malpractice suit shortly followed, alleging that Dr. Wesley Smidt, and Des Moines Orthopedic Surgeons, P.C. ("DMOS") negligently caused his injury. On March 14, 2023, Rarick served his initial certificate of merit affidavit which stated "[t]he undersigned, being first duly sworn on oath, deposes and states as follows . . ." and ended in Rarick's expert, Dr. Gerlinger's signature. However, Rarick's certificate of merit did not include a notary stamp or jurat, and did not include the phrase "penalty or perjury" as required under Iowa Code section 622.1.

The lawsuit progressed and the parties engaged in discovery. Then, after the Court's decision in *Miller*, Rarick filed and served an amended certificate of merit affidavit in June 2024, which included a notary stamp and jurat. Rarick also served and filed another affidavit in which Dr. Gerlinger explained that when he had signed the 2023 certificate that he "firmly believed and understood that he was under oath" and that the "certificate was true under the penalty of perjury under the laws of the State of Iowa".

DMOS then filed a motion to dismiss based on the *Miller* decision, pointing out that Rarick's certificate was not a true affidavit or signed under the penalty of perjury, and could not be cured outside of the 60-day deadline. The district court granted DMOS's motion to dismiss and held that the 2023 certificate did not substantially comply with section 147.140's affidavit requirement and the 2024 affidavit did not comply with its deadlines. This appeal followed—with Rarick claiming that DMOS waived any defects in the affidavit, that the 2023 affidavit substantially complied with Iowa Code section 147.140, and dismissal violated the constitution. The Court in analyzing whether the 2023 affidavit substantially complied with the statutory requirements concluded that a plaintiff can only substantially comply by either strictly signing a true affidavit under oath or by containing the words "under penalty of perjury" pursuant to Iowa Code section 622.1. Specifically, the 2023 affidavit failed because it was not executed under oath in the presence of an authorized officer, and did not contain the phrase "penalty of perjury". The court further held that the fact that any falsehoods in the 2023 affidavit would subject Dr. Gerlinger to criminal liability and professional discipline, that he had a reasonably subjective belief he was under oath and subject to perjury, that he presented it by email to a notary public, and that it was titled as an affidavit and included the representation that "the undersigned, being first duly sworn on oath, deposed, and states as follows" does not substantially comply with the statute's requirements.

The Court then applied this standard to a number of other cases.

BUNCE V. HANSEN, NO. 24-2034, 2026 WL 1500902 (IOWA MAY 29, 2026)

In January 17, 2019, Michelle Bunce visited the emergency room at Iowa Lutheran Hospital in Polk County complaining of severe headaches and vomiting, was given anti-migraine medications and sent home. She was then seen on February 1, 2019 for the same symptoms, and received the same treatment, only the next day going back to Iowa Methodist Medical Center after experiencing an altered mental state and suffering a seizure at her home. She received no diagnosis, and her condition worsened. After an MRI, the doctors theorized she had some form of meningitis or encephalitis, however considered the differential diagnoses of posterior reversible encephalopathy syndrome ("PRES") and reversible cerebral vasoconstriction syndrome ("RCVS"). The physician, however, concluded that the imaging appearance was atypical, making a diagnosis of PRES and RCVS less likely.

Then on February 4, 2019, Michelle underwent a CT scan revealing arterial irregularities consistent with PRES and RCVS, and despite the indicators, the doctors decided to perform a brain biopsy to rule out cerebra vasculitis. Michelle suffered a brain bleed at the biopsy site, and was transferred to Mayo Clinic where she was diagnosed with PRES and RCVS, and allegedly due to the delays in treatment, suffered permanent brain damages and spastic quadriplegia. Michelle is wheelchair bound and requires constant nursing care.

Michelle filed her medical malpractice lawsuit on February 1, 2021, and filed her certificate of merit along with her petition. Michelle's expert, Dr. Rajat Dhar, included the language "[t]he undersigned, being first duly sworn on oath, deposes and states as follows", and concluded "[t]he above information is true and correct to the best of my knowledge and belief".

The court determined that this certificate of merit was defective for the same reasons as stated in *Rarick*.

LOFGREN V. SIMPSON, NO. 24–1972, 2026 WL 1500453 (IOWA MAY 29, 2026)

LL underwent surgery to have ear tubes implanted and adenoids removed at the Iowa City Ambulatory Surgery Center. LL's mother, Margaret, consented to have Dr. Thomas Simpson, an otolaryngologist to perform the surgery, however was not informed a 4th year medical resident would be involved in the procedure. During the surgery, LL began bleeding from his upper throat, which the doctors stitched, then sent him home.

Less than 24 hours later, the child went to the University of Iowa Hospitals & Clinics ("UIHC") pale and listless with black stool, which are symptoms of internal bleeding. UIHC doctors stabilized him with a blood transfusion, and he was sent home again. 5 days later, the child hemorrhaged, and died of blood loss. Later investigations revealed that the adenoid surgery caused the hemorrhage.

Margaret sued the defendants claiming that negligent care caused LL's death and the defendants failed to secure informed consent about the involvement of the resident. Margaret filed a certificate of merit signed by Dr. Charles Myuer, which neither stated that it was signed under the penalty of perjury, nor did it contain any jurat. Dr. Myuer proceeded to file a supplemental affidavit two years later, claiming he had signed the affidavit under oath, and was bound to tell the truth by his signature.

The defendants moved to dismiss under *Miller*, arguing the certificate of merit failed to substantially comply with 147.140. Margaret resisted claiming that there was substantial compliance, the defendants waited too long to contest it, and that no certificate of merit is required for a lack of informed consent case. While

the Court concluded that a certificate of merit is not required for claims alleging lack of informed consent, it clarified that the certificate of merit failed under the *Rarick* standard.

CONCLUSION:

The Court, albeit via a 4 to 3 majority, is applying Iowa Code section 147.140 strictly, mandating that plaintiffs in medical malpractice cases submit a certificate of merit utilizing the "penalty of perjury" language as allowed by Iowa Code section 622.1(2), or otherwise under oath as evidenced by a jurat in order to substantially comply with the statute and avoid dismissal with prejudice. For plaintiff's attorneys, the consequences of noncompliance with the *Rarick* standard is dire, and will bar recovery for plaintiffs despite even the most severe medical malpractice cases. Defendants, however, can benefit greatly, and should remain aware of certificates that do not satisfy this requirement.



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2026 IDCA ANNUAL MEETING & SEMINAR

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Thursday, September 10

7:45 AM	Welcome and Opening Remarks <i>Jon Vasey</i>
8:00 AM	Under the Microscope: Future Medical Cost Reports and Life Care Plans <i>Shelly Kinney and Amanda M. Richards</i>
9:00 AM	Pros and Mostly Cons for Defense Lawyers in Mediation <i>Honorable Mark W. Bennett, Paul Thune, and Jeffrey A. Boehlert</i>
10:00 AM	Break
10:15 AM	How To Win and Lose Your Next Case: Things NOT To Do in Trial <i>René Charles Lapierre, Kent A. Gummert, Mark J. Wiedenfeld, and Janice M. Thomas</i>
11:15 AM	Warning: Changes and Rearranges in Iowa Civil Jury Instructions <i>Joshua R. Strief</i>
12:00 PM	IDCA Annual Meeting and Lunch Break
1:00 PM	Case Law Update: Justice League of Iowa vs. Iowa Defense Counsel Association <i>TBD</i>
2:00 PM	Burning Down the House: Understanding Fire Dynamics, Investigation, and Causation <i>Mark H. Dooley</i>
2:45 PM	Break
3:00 PM	Requests for Admissions: Samurai Sword or Wet Noodle? <i>James W. Bryan</i>

3:45 PM	The Legal Landscape of Adverse Action in Employment Litigation <i>Maggie A. Hanson and Katelynn T. McCollough</i>
4:30 PM	Can We Get Some Help Down Here? Iowa Legislative Updates Affecting the Defense Bar <i>Robert L. Palmer</i>
6:00 PM	Networking Reception <i>Ends 8:00 pm</i>
8:00 PM	Hospitality Suite Open <i>Ends 10:00 pm</i>

Friday, September 11

8:00 AM	Are Lawyers Obsolete? Advances in Use of Artificial Intelligence in Defending Your Clients <i>Frank Ramos</i>
9:00 AM	That Injection Costs What?! Combating Outrageous Medical Expenses <i>Spencer Vasey Dirth</i>
9:30 AM	Time for a Change? Upcoming Changes to Iowa Rules of Civil Procedure <i>Justice Matthew McDermott</i>
10:00 AM	Break
10:15 AM	Judge Ye Not Let Ye Be Judged: Things To Do and NOT TO Do If You Want a Happy Judge <i>Honorables Arthur E. Gamble, Mark W. Bennett, Robert B. Hanson, and Michael J. Moon</i>
11:15 AM	Can I Say That? Ethics of Preparing Your Witness <i>Alison K. Guernsey</i>
12:15 PM	Adjourn



Venue/Location

Hotel Fort Des Moines (1000 Walnut Street, Des Moines, IA 50309)

Hotel Room Block

\$169/night + tax when you book before August 18, 2026 using group code 96J

Networking Reception

In Confidence cocktail lounge located inside Hotel Fort Des Moines

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