Dedicated to improving our civil justice system

IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

FALL 2017 VOL. XIX, No. 4

Find us on Facebook, Twitter & LinkedIn

Recent Changes to the Iowa Medical Malpractice Law

by Christine L. Conover and Jared Knight, Simmons Perrine Moyer Bergman PLC

Christine L. Conover

Jared Knight

During the 2017 session, the Iowa legislature enacted SF 465 [https://www.legis.iowa.gov/docs/publications/LGE/87/SF465.pdf], enacting new restrictions on medical malpractice lawsuits. The act's proponents claim its passage will reduce the cost of medical care and increase the number of health care providers wishing to locate in Iowa, while its detractors claim it creates unnecessary restrictions and hurdles in the place of injured patients. This article discusses the new provisions affecting medical malpractice claims as well as some of the practical consequences of the new legislation.

New Restrictions on Malpractice Claims

The act contains three major changes relevant for attorneys practicing in the medical malpractice area.

Continued on page 6

WHAT'S INSIDE

IDCA President's Letter

Kevin Reynolds
IDCA President

Climate Change Comes to Iowa

The leaves are falling but that's not the "climate change" that weighs on my mind. A scan of newspaper headlines over the past several months shows some of the challenges facing our clients (and ourselves) in the current litigation environment in Iowa. As a lonesome, scarred and broken-down defense attorney I am glad I am a member of IDCA; I would not want to face these challenges alone. I have never smoked but sometimes I think it would come in handy. Iowa, that idyllic place romanticized in the movie "Field of Dreams," that perennial bastion of conservatism, has seen some increasingly wild, out-of-control and head-scratching jury verdicts.

Please don't interpret my comments as a criticism of our courts or the jury system. Our jury system is the greatest invention for solving disputes ever devised by man. Please also do not interpret these remarks as a criticism of the particular judges, jurors or defense counsel involved. Hindsight is always 20-20 vision and we all know about Monday-morning quarterbacking.

With the caveats out of the way, let me run down a few notable examples. $25 million (yes, that's no mistype, $25M!) for worker's compensation bad faith in Pottawattamie County. Although the verdict was eventually reversed on appeal this past May, the scary thing is it shows what some Iowa jurors are ready, willing and able to do. The facts did not appear to be that egregious. The defendant insurance carrier had the audacity to put claimant to his proof on liability for permanent total disability. There was evidence that the paralyzed claimant could obtain vocational rehabilitation services (at no cost to him) and return to gainful employment activity. No benefits or medical services were withheld or unpaid by the carrier. The gall of the insurer to defend and require proof! Sounds like summary judgment material to me.

Or how about $4 million for a broken leg in an auto accident on a city street in Polk County. The Plaintiff was Shawn Johnson's aunt (I'm not quite sure of the relevance of this fact, although Shawn did put in a cameo appearance as a before-and-after, "well-wisher" witness). Perhaps people who are related to famous people deserve more money? True, the defendant teenage driver had been drinking, and part of the verdict was for punitive damages, but does this entitle the Plaintiff to a wheelbarrow full of money? Anything less than multi-millions, of course, would be "cheap" and would be "less than full value," or so plaintiff's counsel argued. If this were not distressing enough, in post-trial interviews the jurors thought they were actually doing the defense a *favor*. Since Plaintiff's counsel was asking for $16 million, the jury took the cue and showed how "conservative" they were by only awarding a measly 25% of that number. All of this begs the question: did Plaintiff's counsel commit malpractice by not asking for $100 million? Or how about $200 million?

Or maybe you heard about the $1.43 million verdict in Polk County for an administrator at the University of Iowa who was terminated, allegedly for her sexual orientation. Poor performance was carefully documented but the jury refused to be distracted by that. Appearing as a character witness for the university: Kirk Ferentz. Although Ferentz is the longest tenured Division I football coach in the NCAA, and embodies motherhood, apple pie and Iowa Hawkeye football, it didn't do any good. The verdict included a recovery for past and future emotional distress, unsupported by any physician testimony, in the amount of $1,056,000. Shortly after this verdict the Plaintiff's partner settled her own employment suit against the University for something reportedly north of $6 million (the settlement was public knowledge because the state was the defendant).

Or what about $2.2 million jury verdict in Polk County this summer for a state employee who was offended by inappropriate sexual comments at work. Now, I'm never going to defend such conduct, but she did get another job that actually paid her *more* money. A meat-and-potatoes defense attorney might ask, "[B]ut where are the damages? Does she actually owe us a refund? Do we get a rebate?" But she was *offended*, it made her feel *uncomfortable* and she *suffered emotional distress*. Again (and this is a common theme in these cases) there was no expert or physician testimony on emotional distress. This approach was discussed in detail at our recent Annual Seminar. This is an intentional strategy by plaintiffs: don't use a doctor and don't put into evidence any piddling medical bills for counseling and such, and don't sue for any "specials" on emotional distress; you are better off just "arguing it" and "shooting for the moon." "Send a message!"

argued the Plaintiff's attorney in the Polk County case, no doubt delivered with a suitable degree of righteous indignation. And this in a case that didn't allege a claim for punitive damages. Unfortunately for the State and its taxpayer citizens, it appears as though the jury followed his suggestion to a 't.'

As if these examples were not enough, how about a verdict of $4.5 million in Poweshiek County. Poweshiek County is a bucolic setting where the courthouse is in Montezuma, Iowa with a population of 1,424 salt-of-the-earth residents. I wonder how many lawyers have driven to Grinnell, Iowa, thinking that was the county seat, only to find out that the courthouse is in Montezuma? At any rate, an older fellow unfortunately became ill, missed a lot of work and was eventually let go by a hospital who needed a laboratory director who could show up for work and do the job. The job was a critical one for hospital operations. In this case a rural Iowa jury awarded $4,280,000 in past and future emotional distress damages, despite very limited expert testimony on that claim. And the jury box at the courthouse up on the square in "Monte" (as locals call it) wasn't packed chock full of Grinnell College liberal arts students or faculty.

Most recently, $10 million was awarded in a medical malpractice case for an 80-year-old plaintiff suffering from bladder cancer in Dubuque County who unfortunately died after surgery. He apparently aspirated food that he had eaten before surgery. After the verdict Plaintiff's counsel trumpeted to the media: "If life is negligently taken away, we need to put a brutally honest value on it, and it shouldn't be cheap." But honestly, $10 million for the death of an 80-year-old man who had a pre-existing fatal disease?

Let me point out that each and every one of these cases was skillfully tried by capable and competent defense counsel. People like you and me. When I was younger and more prone to fits of anger or irrationality, I might say: "How could this happen? How did the defense screw it up?" As I have grown older I find that I know a heckuva lot less, and my reaction has changed to "there but for the grace of God go I."

Verdicts like these and others should be of concern to the defense community. We are seeing very large plaintiff's verdicts that are untethered to facts and reality. If you handle personal injury cases, especially large ones, but even if you handle cases involving semi-serious injuries, a "bet the company" case may be playing at a theatre near you. I used to tell my clients that Iowa is a good, conservative jurisdiction to try products liability cases—do I need to change that schtick? Am I wrong when I say that Iowa is not the Rio Grande Valley of Texas or St. Louis County, Missouri? As Dorothy said to her companion after being swept up into the vortex of a midwestern tornado in "The Wizard of Oz," "Toto, we are not in Kansas anymore!"

An additional aspect of these verdicts is that when stuff like this happens at trial, it can be difficult, if not impossible, to fix the error on appeal. It's like trying to put toothpaste back into the tube. Who's to say what is "too much money" for one person's emotional distress? Is my distress the same as yours? Do each of us feel distress, or deal with it in the same way? Am I offended by what offends you? How does a trial judge substitute his or her judgment for that of the layperson jury on post-trial motions? How does an appellate judge do that when they don't even see the witnesses testify, and they are only looking at a cold, hard transcript and listening to long-winded lawyers wearing ill fitted, rumpled suits? When is the last time you got a personal injury verdict thrown out on the "shocking the judicial conscience" test? I mean, really?

The emotional distress or pain and suffering damages component of a personal injury case is inherently subjective; I would draw a parallel to damage to reputation in a defamation case. In defamation, at the end of the case the jury is essentially given an interrogatory that states: "We, the jury, find in favor of Plaintiff, and find that Plaintiff's damages are in the amount of $ [jury to fill in the number]." What is someone's reputation is worth? What is the test? Where does one go to get their reputation back? Who are we to say someone's reputation is not worth $2 million, $10 million, or $100 million? Emotional distress damages are similarly humanly impossible to quantify. We should acknowledge the "bind" that these claims put the jury (and the trial and appellate judge) in. At bottom, the recovery of emotional distress damages in a personal injury case is governed by no standard at all: it's a "standard-less standard."

Not only are jury verdicts shooting upwards, these big verdicts (by their very nature) garner a grossly disproportionate amount of publicity. All of this bodes poorly for our clients. In reality, for every multi-million dollar jury verdict there are probably 50 (or a 100 if not more) defense verdicts or grants of summary judgment or dismissal *that don't get any publicity at all*. A grizzled defense lawyer once told me: "I enjoy keeping my clients *out* of the newspaper." The dismissal of a meritless case may have been the best piece of legal defense work you did in your 40-year professional career, but there's one thing it is not: *scintillating news*. But the general public doesn't know about such things, they have limited information and they have no *context*. This means that the critical decision-makers in our cases, the jurors, are operating on only partial information, and are deciding cases in a vacuum.

Escalating verdicts also poison the well of potential future jurors because after all, they read the newspapers, too. Big verdicts desensitize them to large numbers, and impacts the evaluation

of cases at the mediation (and even back to the *claims*) stage. Consider the problems carriers have when there are relatively low limits ($100,000 or even $1 million these days) and an unanticipated big verdict occurs. God only knows what excess carriers think, or how they would even start to deal with these developments.

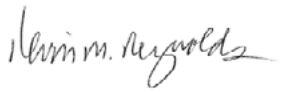
Given these challenges, how important is it for a defendant (or a small company, that may employ dozens of people, many of whom are your neighbors and friends, and supports families with good paying jobs with benefits) to have a good, solid defense lawyer with access to the information, technology, strategies, networking, research, education and collective wisdom that are embodied in the Iowa Defense Counsel Association's 350-plus members? To ask the question is to answer it.

Some of the verdicts previously discussed are a direct result of lizards showing up as noxious pests in Iowa courtrooms. These aggressors are not to be confused with old, curmudgeonly defense counsel, known as *dinosaurs*. Plaintiffs have employed the so-called "Reptile" litigation strategy and it is no longer something that you see "only on the coasts." If you don't know what "Reptile strategy" means in the context of personal injury litigation, then the IDCA is here to help and you have some serious homework to do. The Reptile strategy is largely based on junk science, but no one can doubt its apparent effectiveness. To summarize, it is a purposeful strategy designed to impel an unwitting lay person jury to decide a case based on sympathy and emotion, to the utter exclusion of the facts and the law. The same basic "lawyer argument" template is used with every case, no matter what kind of case and no matter the facts. For example, one technique that is used is the following: starting with jury selection, potential jurors are "conditioned" to hearing astronomical damages numbers. If a potential juror refuses to hypothetically commit to a potential award of millions of dollars, plaintiff's counsel gets the juror excused for cause. The jurors that remain are now desensitized to the huge numbers and the ones that may have had a problem with large numbers are gone on cause or peremptory challenges. What remains is a panel ready, willing and able to return an unreasonably big verdict in the millions of dollars. The typical result in these cases is a large verdict, out of proportion to the actual facts of the case or the damages involved.

But fear not; this challenge presents us with an opportunity. At the recent IDCA Annual Meeting, there was an excellent panel of experienced trial lawyers (former President Sharon Greer, Rene Lapierre and Mark Wiedenfeld) talking in depth, with actual real life examples about this very subject matter. Sharon, Rene and Mark discussed in detail various techniques and strategies they have used with success to combat the Reptile theory. Tom Foley (a former defense lawyer who has now gone over to the "dark side") also touched on this subject. Tom presented on this year's run of huge plaintiff's verdicts in employment cases. Confronting the tough issues that we face in defending our clients, such as the Reptile litigation strategy, is part of the *value* that IDCA provides to its members. Defending our clients against these tactics will be a challenge for the foreseeable future. As defense lawyers we need to ensure that a civil dispute is decided on the facts and the law, as it should be. I believe the Reptile approach fundamentally denies a civil defendant's constitutional right to a fair and impartial jury trial.

Lawyers have limited time and resources. We can belong to countless organizations. In an age of law firm billable hour requirements and tightening firm marketing budgets, time is money and a busy lawyer must be selective. Which organization provides actual value and carries the banner of the defense lawyer in Iowa? There can be only one answer: **the Iowa Defense Counsel Association! IDCA'S mission is to be "the trusted professional voice for the defense of civil litigants. We work toward our mission through advocacy, education and member engagement."** As a defense lawyer, you do not have to be a "voice in the wilderness"—you do not have to wrestle the alligators alone. You can get the collective benefit of years of experience by associating yourself with some really great Iowa defense trial lawyers, and join the IDCA. Get active, join a committee, get on the Board, write an article for "Defense Update," suggest a webinar on a "hot topic" or volunteer to author an amicus brief. I invite all of you to jump in with both feet, the water's fine! We are especially looking for young, new lawyers who are interested in kick-starting their practices and professional careers. Joining one of our committees is a very easy way to do that.

Thanks for your time and allowing me to vent a little. I look forward to this year and I hope to see you soon.



Kevin Reynolds

In Remembrance

Patrick M. Roby, IDCA Past President (1988-89)

1947–2017

Patrick M. Roby, 70, of Cedar Rapids, died Monday, September 25, 2017. Pat was born in Bremerhaven, Germany, on April 7, 1947, and spent much of his childhood in France. He spoke fluent French.

Pat graduated from Upper Iowa College (B.A. 1969) and received his law degree from the University of Iowa in 1972. He joined the firm of Shuttleworth and Ingersoll, where he became a partner in the firm. In 1993, he joined the firm of Elderkin and Pirnie as a senior partner. In 2000 his daughter, Paula, also joined the firm and they tried many cases together. He was a giant of a man, both in stature and spirit.

Pat's skills as a trial lawyer were unparalleled, and he mentored and inspired many lawyers during his practice. In addition to his membership in and presidency of the Iowa Defense Counsel Association, he was a proud Fellow of the Iowa Academy of Trial Lawyers and The American College of Trial Lawyers. He also was a member of the Advisory Committee Rules of Civil Procedure, Iowa Supreme Court, 1981–87; Special Committee on Discovery, 1986–88; Independent Counsel, Iowa Senate Ethics Committee, 1992; the Linn County, Iowa State and American Bar Associations; the International Association of Defense Counsel; the American Board of Trial Advocates (President, Iowa Chapter 1989–93); and the Defense Research Institute. He was frequently honored as a Superlawyer, and as one of the Best Lawyers in America.

Continued from Page 1

First, it creates "soft cap" on noneconomic damages recoverable in a malpractice action. Second, the act imposes stricter standards on who may serve as an expert witness. Finally, the new legislation requires a certificate of merit be filed by the plaintiff's expert at the outset of litigation.

CAP ON NONECONOMIC DAMAGES

Perhaps the legislation's most controversial component is a new $250,000 cap on noneconomic damages a plaintiff can recover in an action against a health care provider. "Noneconomic damages" are defined as "damages arising from pain, suffering, inconvenience, physical impairment, mental anguish, emotional pain and suffering, loss of chance, loss of consortium, or any other nonpecuniary damages." Iowa Code § 147.136A(1)(b). The new language specifically states that noneconomic damages may not exceed $250,000 "regardless of the number of plaintiffs, derivative claims, theories of liability, or defendants in the civil action." *Id.* § 147.136A(2). Therefore, a plaintiff under the new statute can recover only up to $250,000 in addition to medical costs not subject to Iowa Code § 147.136 and other economic damages.

This is not a "hard" cap on damages and is subject to an exception. If "the jury determines that there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death, which warrants a finding that [the $250,000 cap] would deprive the plaintiff of just compensation for the injuries sustained," a plaintiff may be awarded more than $250,000 in noneconomic damages. *Id.* Accordingly, in order for the exception to apply, a plaintiff must prove one of three conditions exist: (1) substantial or permanent loss or impairment of a bodily function; (2) substantial disfigurement; or (3) death. Additionally, the cap on noneconomic damages does not apply if the plaintiff proves the defendant's actions constituted actual malice. *Id.* § 147.136A(3).

EXPERT WITNESS STANDARDS

The new legislation also enacted new restrictions on plaintiff's expert witnesses. In order to qualify as an expert witness under the new law, the witness must meet the following four criteria:

1. the witness "is licensed to practice in the same or a substantially similar field as the defendant," is in good standing with each state of licensure, and has not been suspended in the last five years;

2. the witness must have "actively practiced in the same or a substantially similar field as the defendant," or was a "qualified instructor" at an accredited university in the same field as the defendant;

3. the witness must be board-certified in the same or a substantially similar specialty as the defendant if the defendant is board-certified in a specialty; and

4. if the defendant is a licensed physician or osteopathic physician under chapter 148, the witness must also be a licensed physician or osteopathic physician licensed in Iowa or another state.

Iowa Code § 147.139(1)–(4). While these new restrictions are intended to tighten the requirements for expert witnesses in medical malpractice case, they contain numerous ambiguities. For example, 147.139(2) permits a "qualified instructor" to serve as an expert witness, but leaves that term undefined, meaning who constitutes a "qualified" instructor will likely require determination by courts. Additionally, the statute does not define what constitutes "active practice" nor does it define in what time period the "active practice" occurred. In other words, if the expert practiced during the time period at issue in the case and then retired it is unclear whether the individual meets the statute's requirements (although the statute is drafted in the present tense). Further, the statute does not define a "substantially similar field" or a "substantially similar specialty," which will likely also require judicial interpretation.

CERTIFICATE OF MERIT

Another requirement imposed upon plaintiffs is the filing of a certificate of merit at the outset of litigation. The new legislation requires the plaintiff's expert to serve upon the defendant a "certificate of merit affidavit signed by an expert witness with respect to the standard of care and an alleged breach of the standard of care." Iowa Code § 147.140(1)(a). The certificate must be served "prior to the commencement of discovery in the case and within sixty days of the defendant's answer." *Id.* The statute requires a certificate of merit contain the following two pieces of information:

1. A statement that the expert witness is familiar with the applicable standard of care;

2. A statement that the applicable standard of care was breached by the defendant;

Id. § 147.140(1)(b). Additionally, the statute requires the certificate of merit "certify the purpose for calling the expert witness by providing under the oath of the expert witness" the foregoing two statements. *Id.* It is unclear what this provision means, especially in light of § 147.140(1)(a)'s language which indicates that the certificate be signed by "*an* expert witness." Theoretically, the statute permits a plaintiff to have one expert

witness for purposes of the certificate of merit and another expert witness for testifying at trial.

Notably, the certificate of merit does not appear to bind the plaintiff or the expert to any particular theory of liability or recovery, both because the statements required in the certificate will likely be conclusory and mirror the statute's text, and because the certificate of merit "does not preclude additional discovery and supplementation of the expert witness's opinions in accordance with the rules of civil procedure." *Id.* § 147.140(2). Finally, the new legislation goes on to provide that the parties by agreement, and the court upon a motion and good cause shown, may extend the timing provisions of the new statute.

EFFECTIVE DATE

The final sentence of the new legislation provides that it "applies to causes of action that *accrue* on or after the effective date" of the act. "In Iowa, a medical-malpractice cause of action accrues when all the necessary elements have occurred." *Lobberecht v. Chendrasekhar*, 744 N.W.2d 104, 108 (Iowa 2008). Therefore, while this provision will eventually be unimportant, attorneys defending medical malpractice claims will likely be practicing under the "old" procedure for several years until causes of action which "accrue" after July 1, 2017, are filed.

MISCELLANEOUS CHANGES

In addition to the more headline-grabbing changes mentioned above, the new law includes smaller, but potentially important, changes. First, the amended provisions largely remove phrases describing health care professionals and replace most mentions with the newly defined term, "health care provider." A "health care provider" is defined to include physicians, osteopathic physicians, chiropractors, podiatrists, physician assistants, licensed practical nurses, registered nurses, advanced registered nurse practitioners, dentists, optometrists, pharmacists, hospitals, health care facilities as defined in section 135C.1, and professional corporations under chapter 496C owned by persons licensed to practice in the aforementioned professions. Iowa Code § 147.136A(1)(a). For example, the prior version of Iowa Code § 147.139 discussed the "standard of care given by a physician and surgeon or an osteopathic physician and surgeon . . . , or a dentist," whereas the statute now discusses the "standard of care given by a health care provider."

The new statute also amends definitions in chapter 135P, relating to open, confidential, and inadmissible discussions between health care providers and patients. The new definition of "adverse health care incident" now omits the word "serious" in front of "physical injury," such that an "adverse health care incident" now presumably exists any time physical injury (regardless of seriousness) or death arises from or related to patient care. Additionally, the definition of "health care provider" in chapter 135P was amended to largely mirror the professions defined in § 147.136A(1)(a) (discussed in the preceding paragraph).

Practical Considerations

NONECONOMIC DAMAGES CAP HAS LIMITED APPLICATION

The new noneconomic damages cap has limited practical application. Plaintiffs who have not suffered substantial or permanent loss or impairment of a bodily function, substantial disfigurement, or death will not receive over $250,000 in noneconomic damages. Prior to this statute's enactment, those types of cases often did not garner verdicts or settlements over that range in any event. Thus, the exceptions likely swallow the general rule.

Presumably the question of whether an injury has resulted in a substantial or permanent loss or impairment of a bodily function, substantial disfigurement or death requires expert testimony and likely requires a new jury instruction that the plaintiff has the burden to prove one of these circumstances through expert testimony (particularly if this is a fighting issue in the case). Unless or until an acceptable uniform jury instruction is drafted and adopted, defense counsel should be prepared to submit one to the court for consideration.

EXPERT WITNESS STANDARDS COULD RESULT IN PLAINTIFFS RETAINING BETTER QUALIFIED EXPERTS

The new, generally stricter, requirements applicable to plaintiffs' expert witnesses may weed out a few marginal experts that plaintiffs would otherwise be tempted to retain.

In overlapping practice areas, such as a family practice physician who cares for obstetrical patients, or a neurologist who reads her own imaging studies, it is unclear in which practice area a plaintiff's expert must be qualified. Under prior standards, both plaintiffs and defendants frequently called in specialists to express standard of care opinions when the more general practitioner's care overlapped into specialty areas. The new statute likely leaves room for the same type of practice. In the previous examples, while a court could interpret the statute to require the plaintiff's expert be a family practice physician or a neurologist to align with the defendants' practice areas, the specialists are probably equally if not more qualified to express standard of care opinions.

CERTIFICATE OF MERIT REQUIREMENT COULD PROMPT EARLIER EXPERT WITNESS DISCLOSURES

The new legislation's requirement that a certificate of merit be filed within sixty days of the defendant's answer has the potential to result in new difficulties for defense attorneys at the outset of litigation. While the certificate of merit's statutory requirements require hardly any information, the requirement may have the effect of a plaintiff organizing their proof, i.e., written expert opinions, earlier in the litigation. In order to save costs, a plaintiff could submit the certificate of merit and the expert's full report at the same time. Under Iowa Code section 668.11 the defendant's expert designation and report is due within ninety days of the plaintiff's designation. This expedited timeline could be challenging to the defense, which has not had as much time to gather records and evaluate the facts as the plaintiff has had. Unless the parties can agree otherwise, a plaintiff's early expert witness designation could result in the defense more frequently needing to seek court intervention for additional time.

Finally, the familiar "substantial compliance" standard is incorporated into section 147.140(6), and may require judicial interpretation if plaintiffs miss the certificate of merit deadline by a small margin or do not have every "i" dotted and "t" crossed in the certificate of merit. *See* Iowa Code § 147.140(6) ("Failure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case.").

Conclusion

Iowa's new requirements on medical malpractice claims do not represent a sea change in medical malpractice litigation but defense attorneys should evaluate the statute's application to individual cases to see if there are new opportunities to move to strike an expert and/or move to dismiss a case if plaintiffs fail to comply with the new requirements.

Note: PDF Link to Bill:

https://www.legis.iowa.gov/docs/publications/LGE/87/SF465.pdf

Send Your Articles for Publication

The *Defense Update* is the vehicle we use to inform and educate our readers about new developments in the law so that our readers can better represent their clients. It is a publication that the Iowa Defense Counsel Association has used for this purpose since 1988. We have been very fortunate over the years in having authors, both members and non-members of the IDCA, contribute high quality articles that have been published in the quarterly issues of the *Defense Update*. We think that our *Defense Update* is one of the premier publications of state defense counsel organizations in the country.

But, we want to get even better. Our organization has many talented members who have many years of experience in the practice of law and who periodically encounter new and interesting legal issues that are worthy of sharing with the membership. After you deal with such an issue, what about submitting an article about it for publication in the *Defense Update*? Articles don't have to be terribly long works, larded with footnotes and analyzing every state and federal court decision where that particular issue came up. Nor do articles need to be written in a professorial style. Articles simply need to be authoritative and discuss the legal matter at hand for the betterment of the reader. The *Defense Update* is for the flow of information. It's not a law review.

Where might you find the beginnings of an article? Perhaps you wrote a brief recently on a particular topic and could rework that brief into an article. Perhaps you had an experience in court or in a deposition that you would like to share with us. Perhaps you simply would like to write about an area of law or a new piece of legislation that you think would be of interest and benefit to our members.

How do you go about submitting an article or an idea for an article? All you have to do is contact one of the members of the Board of Editors (their names are listed on the cover of the *Defense Update* and their e-mail addresses and phone numbers can be found easily on the internet). Just tell us you think an article on a particular topic would be worthwhile and that you'd like to submit an article for publication. Or, that you had an unusual situation come up that you'd like to share with our readers. We'll get right back to you.

So, let's hear from you, members. Send us an e-mail with your article idea and sharpen up your writing skills. (Yes, we proofread every article before it is published and if we have any editorial suggestions we'll pass them along to you before your article is published.) Soon, you, too, could have your photograph published in the *Defense Update* at the beginning of an article that you produced and that we proudly publish.

WANDLING ENGINEERING

A NATIONAL CONSULTING & FORENSIC SERVICE FIRM

EXPERIENCE, EXPERTISE AND EXCELLENCE SINCE 1976

WANDLING ENGINEERING

LOCATED IN AMES, IOWA, WANDLING ENGINEERING PROVIDES CONSULTING AND FORENSIC SERVICES NATIONWIDE.

WE ARE COMMITTED TO PROVIDING PROFESSIONAL AND SCIENTIFICALLY SOUND ENGINEERING SERVICES TO MEET THE NEEDS OF OUR CLIENTS.

OUR SERVICES

EXPERT TESTIMONY IN STATE AND FEDERAL COURTS

CONSULTING & FORENSIC SERVICES • PRODUCT DESIGN & FAILURE ANALYSIS

FIELD INVESTIGATION • ACCIDENT RECONSTRUCTION • COMPUTER GRAPHICS & ANIMATION

AREAS OF EXPERTISE

FIRES AND EXPLOSIONS • INDUSTRIAL SAFETY

MOTOR VEHICLE SYSTEMS • AGRICULTURE & CONSTRUCTION • CONSUMER PRODUCTS

923 N 2nd Street | Ames, Iowa 50010

wandling.com | 515-232-0158 | wandling@wandling.com

Looking Ahead to the 2018 Legislative Session

by Brad Epperly, IDCA Lobbyist, Nyemaster Goode PC, Des Moines, Iowa

Brad Epperly, IDCA Lobbyist

The 2017 session was possibly the most productive session in a generation. While we watch Congress fail time and again to pass any substantive policy legislation or even a budget for that matter, the 87th General Assembly passed somewhere in the range of 15 major policy bills in its first session. Where two or three major bills would be considered a busy session, the legislature passed reforms on collective bargaining for public employees, worker's compensation, medical malpractice, project labor agreements, gun rights and voter I.D. The Republican majorities also enacted legislation preempting local minimum wage ordinances, added restrictions on abortion, expanded the use of medical marijuana and legalized fireworks. When the session came to a close on the morning of April 22nd, only a few items remained on the list for the majority party.

Just over a month later on May 24th, Governor Branstad resigned as Governor and was sworn in as the United States Ambassador to China. Branstad had already become the nation's longest serving governor back in December of 2015 and when he resigned, had served 22 years, 3 months and 19 days as the Governor of Iowa, eclipsing George Clinton of New York who served during the Revolutionary War and beyond. Replacing Branstad is his Lieutenant Governor, now Governor Kim Reynolds, who became Iowa's first female Governor. Looking ahead to the 2018 session, Governor Reynolds listed four priorities: 1) tax reform; 2) innovating energy policy; 3) K-12 education – STEM; and 4) workforce training.

Among the few policies that the legislature did not accomplish in the 2017 session, tax reform had the broadest support among Republicans. Iowa's tax code ranks 41st in the nation by the Tax Foundation, which includes a corporate tax rate of 12 percent. Although Senate Ways & Means Chair Randy Feenstra worked on legislation throughout the 2017 session, the sheer volume of policy bills worked on and passed during the course of the session made it difficult to also take on such a major policy issue like tax reform in the same session. Thus, with majorities in both the House and the Senate, along with leadership from the Governor, it is expected that Republicans will take on the task of tax reform in 2018.

The primary challenge of tax reform is the current state of the budget. Revenues for the past two years have been coming in lower than projected by the Revenue Estimating Conference ("REC"). The 2017 session began with a de-appropriation of $117.8 mil, cutting this amount out of the existing fiscal year 2017 budget. This de-appropriation was not sufficient and additional monies had to be borrowed from the reserve funds before the end of session and again in the fall to close out the 2017 budget year. This further strains an already tight budget because the legislature committed to pay back this borrowed money within two years. The REC met in October and decreased its estimate from March by $127 million, which would project to be $7.237 billion, approximately $3 million less than actual fiscal year 2017. Despite the slowing tax revenues, I would not expect it deter tax reform efforts.

The other major policy issue likely to be considered this session is water quality. Water quality is one of those issues where there is significant bipartisan interest in addressing the problem. The highly-publicized lawsuit by the Des Moines Water Works in federal district court has created some difficulties for stakeholders working cooperatively. Despite this, water quality is a rare issue where all interested parties want to do something, it really comes down to what and to what extent.

The IDCA will again be working to amend the mitigation of damages limitation in code for failure to wear a seat belt. After our negotiated agreement of raising the limit from 5% to 20% with the ISBA and the Iowa Association for Justice last session, we look forward to finally enacting this needed change. Judicial Branch funding will again be a cooperative effort among the Bar groups. Funding for the judiciary continues to fall short and with a budget not likely to have any new money available, cuts will likely be proposed. We have reached a critical point after several years of insufficient funding and if this continues, the Judicial Branch may be forced to consider cuts. These cuts could involve the specialty courts designed to save money and could also bring into consideration the closure of certain court houses around the State's 99 counties.

One of the key components to successful legislative advocacy is grassroots. That means the involvement of rank and file members. As your legislative counsel, we are actively involved in all proposed legislation that affects IDCA's members, advocating for bills we support, monitoring other bills and working to defeat those measures opposed by the IDCA. In addition, IDCA members regularly support our efforts at the Capitol on specific legislation, meeting with legislators during session, discussing issues with leadership and when necessary, testifying in committee hearings. However, grassroots involves members engaging with the legislators in their districts throughout the State

So what can IDCA members do? It is as simple as establishing a relationship with your Senator and Representative. Iowa legislators are citizen legislators. They are not professional politicians. Developing relationships with them does not mean just showing up at their forums and asking them for something. They have plenty of groups and people asking them for something on a daily basis. Legislators do want to know their constituents and want to hear from them. So attend their forums from time to time. Introduce yourself, tell them what you do (they will likely ask) and thank them for their service. Regardless of your political affiliation, or lack thereof, you should still get to know your legislators. The people elected in your district are your legislators regardless of their party. Despite the appearance that seemingly everything is partisan, it is not. The judiciary budget is one such example. The importance of the judiciary, the services that are needed, are not Democrat or Republican issues.

Legislators have limited resources. Part of the role of the association and legislative counsel is to provide information and educate. When a legislator has a relationship with a constituent who is a member of an organization, there is a greater impact of the information already conveyed by the association. You can become a resource for your legislator. Local contact on an issue, for or against, is a very effective form of advocacy. Grassroots advocacy can reach more legislators quicker and in an environment (outside the Capitol) that is more conducive to an extended, in depth discussion.

IDCA Welcomes Our Newest Members!

Allyson Fawcett Aden
Lederer Weston Craig PLC
4401 Westown Parkway
Suite 212
Des Moines, IA 50266
Phone: (515) 224-3911
aaden@lwclawyers.com

Nicholas Crosby
Cartwright, Druker & Ryden
112 W Church St
Marshalltown, IA 50158-2863
Phone: (319) 213-8736
nick@cdrlaw.com

Tyler Ernst
Klass Law Firm, L.L.P.
4280 Sergeant Road
Suite 290
Sioux City, IA 51106
Phone: 712-252-1866 ext 214
ernst@klasslaw.com

Thais Ann Folta
Miller, Pearson, Gloe, Burns,
Beatty & Parrish, PLC
301 W Broadway St
Decorah, IA 52101-1739
Phone: (563) 382-4226
tfolta@millerlawdecorah.com

Venue, Forum Shopping and the Case of the Split County

by Brent Ruther, Aspelmeier, Fisch, Power, Engberg & Helling, PLC, Burlington, Iowa

Brent Ruther

"The sun is 'rize the sun is set, and we is still in Texas yet." This is a footnote in *Smith v Colonial Penn Insurance Company*, 943 F.Supp. 782 (S.D.Tex. 1996) wherein a former federal judge denied a defendants request to change venue in a breach of contract action from the Galveston Division of the Federal District Court chosen by Plaintiff, to the Houston Division[1]. The alleged basis for defendants' request was the inconvenience and burden placed on its attorneys, employees and witnesses to fly into Houston and then travel all the way (40 miles) to Galveston which did not have a commercial airport.

It is clear in the Court's opinion that the Court is not convinced by the defendant's inconvenience argument and it's one of the more entertaining opinions on what can be a bland, but sometimes important subject. The Court goes on to state "Defendant will be pleased to discover that the highway is paved and lighted all the way to Galveston, and thanks to the efforts of this Court's predecessor, Judge Roy Bean, the trip should be free of rustlers, hooligans, or vicious varmints of the unsavory kind. Moreover the speed limit was recently increased to seventy miles per hour on most of the road leading to Galveston, so Defendant should be able to hurtle to justice in lightning speed." *Id.* The court concludes by ordering the parties to "file nothing further on this issue in this Court, including motions to reconsider and the like. Instead the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course." It is unclear whether Defendants in this case seriously believed that the inconvenience of trying the case in Galveston rather than Houston would win the day – or if there were other motives for the request to change venue. Clearly, the Court in this particular case was not convinced.

As in Texas, in the State of Iowa the purpose of the various rules regarding venue "is to prevent the hardship and inconvenience to which a defendant may be subjected by having to defend himself in [a] county in which he [does not reside]". *Chrysler Fin. Co. v. Bergstrom,* 703 N.W.2d 415, 422 (Iowa 2005) *quoting State ex rel. Klabacka v. Charles*, 36 Wis.2d 122, 152 N.W.2d 857, 861 (1967). The defendant's "interest in not being sued in the wrong county [is] an important social value." *Id.* at 421. Furthermore, the courts "[w]hen possible [will] seek to construe the venue statutes so as to minimize forum shopping." *Froman v. Keokuk Health Systems, Inc.,* 755 N.W.2d 528, 531 (Iowa 2008).

Everyone reading this article is familiar with the general venue statutes, those being Iowa Code §§616.1, 616.17 and 616.18, and Iowa Rule of Civil Procedure 1.808. These statutes and rule of civil procedure provide, generally, that a defendant is to be sued in the county where he or she resides, in the county where one of the defendants resides if there are multiple defendants or where the injury or damage is sustained – all in keeping with the idea that a defendant is to be protected from inconvenience and unfair forum shopping. Actions relating to real property interests are to be filed in the county where the real estate is located, and actions for injury or damage to real property, where the real property is located or the defendant resides.

Of course, in addition to the general venue rules, there are numerous special venue provisions, which are too numerous to list for the purposes of this article. A comprehensive list of the special venue provisions is contained in 11 Barry Lindahl, Iowa Practice Series, Civil & Appellate Procedure §4.3 (2013), and spans nearly eight pages with explanations and footnotes.

Two cases stand out, however, in Iowa as containing very strong statements regarding the purposes behind the venue rules and the court's disfavor of forum shopping - *Froman v. Keokuk Health Systems, Inc.*, *supra.* and *Richards v. Anderson Erickson Dairy, et al.*, 699 NW2d 676 (Iowa 2005).

If any of you ever happen to practice in Lee County, first of all, welcome. Second, be aware of forum shopping and the special venue provision that applies to Lee County due to the fact that it contains two county seats, one in Fort Madison and one in Keokuk. There are, therefore, two divisions, divided between North Lee County with the courthouse in Fort Madison, and South Lee County with its courthouse in Keokuk.

Believe it or not, there are attorneys (particularly in the Plaintiff's bar) who, for convenience sake or based on a belief that they might gain some advantage with their local courthouse and local

citizenry, file every case that comes across their desk in either North Lee or South Lee depending on where their primary practice is located without regard to the little known rules relating to proper venue in such a split county. For instance, our firm has been required to file at least a dozen motions to transfer venue from one part of Lee County to the other in the last ten years – simply because the case was filed in the wrong location.

These cases include actions against municipal corporations which are governed, clearly I might add, by Iowa Code §616.16. Iowa Code §616.16 states "[a]ctions against municipal corporations in all counties where the district court convenes in more than one place *must* be brought in the county and at the place where court is held nearest to where the cause or subject of the action originated." *Emphasis provided.* A municipal corporation, under Iowa law, includes by definition cities and school districts within the county. Therefore, it would seem to be an easy task to determine, for instance, in Lee County that if suit is filed against the City of Fort Madison, that case must be filed in North Lee County. If against a school district, one should be able to determine which courthouse the school district's administration building or location of, for instance, an injury occurred is closest and file in that division. Recently, however, a case was filed against the Central Lee Community School District with the plaintiff's attorney, as per usual filing in South Lee County. As chance would have it, the Central Lee Community School District is located nearly 15 miles from both courthouses. However, a motion to transfer venue was filed by defense counsel complete with exhibits showing that the administration building and only campus was actually 15.1 miles *via* the shortest route to the North Lee County Courthouse and 15.3 miles *via* the shortest driving route to the South Lee County Courthouse.

Alas, despite the clear evidence in compliance with Iowa Code §616.16 the trial court denied the motion to transfer venue without addressing the code section and instead referring to and relying on *Froman v. Keokuk Health Systems, Inc.*, 755 N.W.2d 528 (Iowa 2008). This ruling is subject to a motion to reconsider which has not been decided.

Froman is the other controlling authority, if Iowa Code §616.18 does not apply, addressing the "split county" question and proper venue and contains clear guidance on the importance of venue rules. In *Froman*, the plaintiff sued Keokuk Health Systems d/b/a K.A.M.E. Pharmacy ("KHS") for negligently filling a prescription. The attorney from Fort Madison, filed the suit in the North Lee County Courthouse despite the fact that KHS pharmacy was located, and the prescription filled in Keokuk. KHS filed a pre-answer motion to transfer venue arguing that North and South Lee County are different counties for venue purposes. Defense counsel relied upon Iowa Code §607A.23 regarding selection of jurors which states that in split counties each division is treated as a separate county and argued that the split county rule should apply equally to venue rules and statutes which, other than Iowa Code §616.16, are silent on the matter. The trial court denied defendant's motion but the Supreme Court reversed, finding an ambiguity in reading Iowa Codes §§607A.23 and 616.18 together. To resolve the ambiguity the court turned to the legislative history, the intent and underlying purposes and policies seeking to, when possible, avoid or minimize forum shopping. The supreme court eventually held that while KHS did not argue that it would necessarily be inconvenient for the case to be tried in Fort Madison, "the judicial divisions of Lee County results in at least a modicum of additional convenience 'to attorneys, court personnel, litigants and potential jurors'" *citing State v. Morgan*, 559, 603, 610 (Iowa 1997). The court concludes that in counties where the county is divided into two judicial divisions, each division constitutes a separate county for venue purposes stating that "the construction of section 616.18 we adopt today prevents forum shopping in Lee County." *Id. at 532*.

Additional guidance is provided in *Froman* as to what constitutes North and South Lee County, should you ever happen to engage in this very specific battle. holding that the south division of Lee County only includes the City of Keokuk and the townships of Jackson, Des Moines and Monroe with the remainder of Lee County being defined as North Lee County. *Froman at 530, see also, Trimble v. State*, 2 Greene 404, 405-06 (Iowa 1850); and *an act fixing the times and places and holding the district court in the first judicial district*, 1 GA (extra session) ch. 52 , §§1-4 (approved Jan. 24, 1848).

In *Richards v. Anderson Erickson Dairy, et al.*, 699 NW2d 676 (Iowa 2005) the court had the opportunity to address a special venue provision codified at Iowa Code §616.8 and interpret it in light of the application of the general venue statute, Iowa Code §616.18. In *Richards*, Plaintiffs were involved in a collision and filed suit against the owner of the semi-truck (Anderson Erickson Dairy Company), the employee of Anderson Erickson as well as the operator and owner of another car involved in the accident. Plaintiffs filed their lawsuit in Johnson County even though none of the parties resided there. Plaintiffs attempted to argue, without success, that based upon Iowa Code §616.8 relating to common carrier they could file suit in any county the common carrier, Anderson Erickson, operated their trucks. However, the Iowa Supreme Court upheld the District Court's ruling granting the defendant truck driver's motion to change venue to Grundy County where the accident occurred and his county of residence. The Iowa Supreme Court held that pursuant to Iowa Code §616.17 "there is a long standing preference for trying cases in the county

of a defendant's residence." *Id.* at 679. After applying the general venue statute to the facts of that case the Supreme Court held that Iowa Code §616.18 which provides that actions arising out of injuries to a person or damage to property may be brought in the county in which the defendant or one of the defendants is a resident or in the county in which the injury or damage is sustained was applicable.

The court in *Richards* points out that the common carrier statute does not establish the *residence* of a common carrier, such as a railroad, but simply the venue where such a common carrier can be sued. The court in *Richards* distinguished, with reference to prior case law, *suability* and actual *residence* for venue purposes. *See, e.g. Nickel v. District Court*, 202 Iowa 408, 210 NW 563 (1926) and *Nickel Hinchcliff v. District Court,* 204 Iowa 470, 215 NW 605 (1927).

In essence, longstanding case law in the Iowa relating to this issue uniformly holds that *residence* when determining proper venue is far more important than *suability* and that when residence is established, such as it is here, venue may be, and in this case should be, transferred, even where the common carrier statute of Iowa Code §616.8 might apply, as compared to suability. *See, Richards supra* at 682-683. The court held in *Richards* that "it must be remembered that venue statutes are statutes of convenience, and to hold otherwise would promote inconvenience." *Richards Id.* at 682.

One would think it would be rare that a plaintiff would blatantly file suit in the wrong county to gain an advantage for convenience sake or for other reasons, and oftentimes defendants may not challenge the venue, particularly in a split county such as Lee. However, the cases above make it clear that the Supreme Court values the reasons and purposes behind the rules and the case law behind proper venue as well, and will not allow for forum shopping when it is attempted.

Finally, when faced with a suit filed in the wrong county, Iowa R. Civ. P. 1.808(1) provides that an action brought in the wrong county may be prosecuted there until termination, unless a defendant, before answer, moves for change to the proper county; but Iowa R. Civ. P. 1.808 specifically states that the court's order changing venue is at plaintiff's cost which *may* include "reasonable compensation for defendant's trouble and expense, including attorney's fees, in attending in the wrong county"; and if those costs are not paid within 20 days the action shall be dismissed.

Endnotes

[1] The author is hesitant to cite Judge Kent who was impeached from the bench after being embroiled in a harassment investigation and spent time in prison for his misdeeds but this opinion relating to what appeared to be a less than forthright *forum non conveniens* argument provides an appropriate lead in to the subject matter.

Case Law Update

by Alex E. Grasso, Hopkins & Huebner, P.C., Des Moines, Iowa

Alex E. Grasso

Wilma Kellogg v. City of Albia, No. 15—2143 (Iowa Ct. App. Feb. 8, 2017) (nuisance actions and immunity)

In 1972, the City of Albia constructed a storm sewer as part of a paving project. Several decades later, Wilma Kellogg purchased a home in Albia in 2008, although the home had originally been built in 1983. At the western edge of Kellogg's property, a drainage pipe that was installed beneath her land drained into Albia's storm sewer. In 2009, Kellogg first noticed her property was flooding. Her basement flooded eight or nine times between 2009 and 2015. Kellogg spoke to representatives from Albia in 2010, 2012, 2013 and 2014, but she claimed that each time the city advised her it would look into the flooding, but did nothing further.

Kellogg sued the city on February 25, 2015, asserting causes of action for nuisance, abatement of nuisance, and negligence. On September 15, 2015, Albia moved for summary judgment, arguing Kellogg's claims were barred by the statute of limitations and that it was immune from suit under Iowa Code § 670.4(1)(h). The trial court granted Albia's motion and Kellogg appealed.

On appeal, Kellogg argued the trial court erred in granting the summary judgment on the basis of § 670.4(1)(h), which is commonly known as "state-of-the-art" immunity. The text of that immunity is as follows:

> "[a]ny claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction. A claim under this chapter shall not be allowed for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards."

Because Kellogg's nuisance action arose out of a claim of negligent design or construction or failure to upgrade, improve, or alter this storm sewer, Albia argued it was immune from suit. In response, Kellogg claimed that § 670.4(1)(h) did not apply to nuisance claims, and even if it applied to those claims in general, it did not apply to her specific claim. The parties disputed whether Kellogg had actually asserted a nuisance claim. Albia claimed that Kellogg had alleged a negligence claim, but that even if she had alleged a nuisance claim, that § 670.4(1)(h) still barred Kellogg's suit. Kellogg countered that her nuisance action did not rely upon a negligent theory of construction or repair or improvement of the storm sewer. Indeed, she conceded on appeal that the sewer at issue was constructed according to state-of-the-art practices in 1972.

The Court of Appeals first addressed whether § 670.4(1)(h) would bar nuisance claims. Initially observing that chapter 670 governs "every civil wrong which results in… injury to property or injury to personal property rights and includes but is not restricted to actions based upon… nuisance," the court held that – while the code section did not limit itself to actions based on negligence – it did limit its applicability to claims arising out of negligent design, negligent construction, or failure to upgrade, improve, or alter a public improvement. Citing Supreme Court precedent, the Court of Appeals also noted that the code section at issue has not strictly applied to negligence actions and that immunity exists so long as the claim is arising out of a negligent design or failure to upgrade a public improvement.

Turning to the more specific question of whether this code section applied specifically to Kellogg's claim, Kellogg asserted that her action arose from the creation of a condition. Citing Supreme Court precedent that the maintenance of a nuisance is not a governmental function, Kellogg denied that her action arose from Albia's negligence and instead pointed to the creation of the nuisance, i.e., flooding. However, the city countered that she was citing precedent before the enactment of § 670.4(1)(h).

Recognizing that the phrase "arising out of" as used in § 670.4 has been interpreted broadly, the Court of Appeals concluded that the question was whether Kellogg had created a genuine issue of material fact as to whether her claim "[arose] out of" a claim of negligent design or construction. Citing case law before the

enactment of § 670.4(1)(h), as well as the statute itself, the court further held that neither the purpose nor the literal terms of the code section barred municipal tort claims based upon the failure to repair, maintain, or operate a storm sewer system.

Next, the court distinguished nuisance and negligence claims; negligence may or may not accompany a nuisance, but negligence is not an *essential* element of proving nuisance. If the condition constituting the nuisance exists, the party responsible for it is liable even though it acted reasonably to prevent or minimize the damages. In sum, a nuisance claim can lie even in the absence of negligence. Based on the evidentiary record available at the summary judgment hearing, the city conceded for purposes of the appeal that Kellogg had experienced frequent flooding, incurred damages, and that the city had had notice of the same.

Noting that a nuisance claim could escape the protections of § 670.4(1)(h) if it related to the repair, maintenance, or operation of a storm sewer, the other question at issue was whether the resulting dangerous condition was an unreasonable interference with Kellogg's use and enjoyment of her property. In addition, the court also observed that an "inherent danger" was usually required to find that a nuisance existed. In this case, the danger was the reoccurring flooding on Kellogg's property. Specifically, there was evidence that Kellogg had experienced flooding near electrical appliances, standing water in her basement, and mold growths. In other words, Kellogg's argument was not that the storm sewer system itself was a nuisance, but rather that the storm sewer system had created a nuisance simply by its operation (and that the nuisance had created an inherent danger).

The court then proceeded to weigh the factors of "priority of location, nature of the neighborhood, and the wrong complained of," as is customary for nuisance claims. It held that Kellogg had clearly not purchased her property with the intent of filing this lawsuit and that there was no evidence that she resided outside the city limits or was located in a flood plain. Considering all of this evidence in a light favorable to Kellogg, the Court of Appeals concluded a genuine dispute of material fact existed and that the city was not immune under § 670.4(1)(h).

The Court of Appeals next considered the city's statute of limitations argument. In essence, the city claimed that the two-year statute of limitations required in § 670.5 began to run in 2009 – when Kellogg was first on notice of the flooding. Because Kellogg filed her suit six years later in 2015, the city argued, the statute of limitations barred her action. Kellogg responded that the intermittent flooding was a "continuing wrong" and that, as such, her action was timely because damages had accrued within the two years before filing suit. Quoting precedent that statutes of limitation begin to run from the most recent instance of a "continuous or repeated wrongful act," as opposed to the first instance in the series, the Court of Appeals agreed with Kellogg. It distinguished Kellogg's case from a prior one where the Plaintiff's inverse condemnation cause of action had "arisen out of" construction of a permanent highway, which was not a "continuing wrong" because the construction came to a discrete stop and did not continue. Because the court recognized the likelihood of successive flooding at Kellogg's property, it held that the two-year statute of limitations for Kellogg would run from each instance of flooding. Thus, the Court of Appeals rejected the city's statute of limitations argument because the record contained evidence of a flood in 2014 (and a flood in July of 2015, after Kellogg had filed her petition).

Finally, because the trial court made no specific findings as to Kellogg's abatement claim, the court remanded the abatement claim for further proceedings, in addition to reversing the grant of summary judgment for Albia.

Eurich v. Bass Pro Outdoor World, L.L.C. and Cintas Corporation No. 2, No. 17—0302 (Iowa Ct. App. Nov. 8, 2017) (duty in a premises action involving "known" or "obvious" dangerous conditions)

Eurich slipped and fell on a rug at a Bass Pro Shop location in February of 2014. The rug was located near the entrance of the store and had several wrinkles that came up above the floor at 2 or 3 inches. Eurich tried to traverse the rug, but his foot was caught and he fell. He filed suit, alleging premises liability only against Bass Pro and Cintas. Both defendants denied liability, and then filed a joint motion for summary judgment. The crux of their argument was that they had no duty of care towards Eurich because he had admitted in his deposition to seeing the "rug deficiency" before he fell. Eurich attacked the defendants' position by arguing that they were relying on the Restatement 2d Torts instead of the Restatement 3d, which Eurich argued had been recently adopted in Iowa in terms of determining whether a duty of care applies in an action based on premises liability.

A hearing was held on the defendants' motion – a few days later, Eurich moved to re-open the record and offer an affidavit by Eurich. The defendants resisted Eurich's motion, but there was never a ruling on the issue because the trial court granted summary judgment for both defendants. Eurich moved to enlarge findings and requested that the trial court rule on his offer of the affidavit, but the court denied the motion and Eurich appealed.

Although it was unclear which version of the Restatement the trial court relied on in granting summary judgment, the Court of Appeals first traced the lineage of case law stemming from

Thompson v. Kaczinski in 2009. Multiple cases were cited wherein Iowa appellate courts cited with approval *Thompson's* adoption of the Restatement 3d. Then, the court reiterated that an actor normally has a duty at all times to exercise reasonable care if the conduct creates a risk of physical harm, and that duty is a question of law for the court, not a question of fact for the jury.

Next, the court traced Iowa's history with respect to a plaintiff's pre-existing knowledge of a dangerous condition. Before 1982, Iowa was a contributory negligence state and that knowledge would have ordinarily barred any recovery. After that the Iowa Supreme Court adopted a comparative negligence regime, and the legislature subsequently passed what is known now as chapter 668 of the Iowa Code. As a result of this legislation, a plaintiff is barred from recovery if he or she is more than fifty percent at fault. The court also highlighted that cases decided after the passing of chapter 668 were implicitly moving away from the notion of "no duty" for an "obvious" or "known" risk. From that precedent, the court deduced that a "known" or "obvious" danger is now a matter of whether a plaintiff was negligent, as opposed to whether or not a defendant had a duty of care in the first place.

As the "negligence of each party" and "proximate cause" are both questions for the jury, the court concluded that the trial court erred in granting summary judgment for the defendants. It reversed the decision and remanded for further proceedings. Although Eurich's appeal had also attacked the trial court's refusal to re-open the summary judgment record, the Court of Appeals did not address this in light of the reversal of the summary judgment ruling.

New Lawyer Profile

Chris R. Wertzberger

In every issue of *Defense Update,* we will highlight a new lawyer. This issue, we get to know Christopher R. Wertzberger of Cartwright, Druker & Ryden in Marshalltown.

Chris is an associate at Cartwright, Druker & Ryden, where he practices primarily in civil defense litigation. He has defended clients on a number of issues, including: general negligence, dram shop liability, breach of contract, property easements, consumer fraud, and construction defects. Chris grew up in Marshalltown and after high school joined the United States Army. He spent five years on active duty in the Army and earned the rank of Staff Sergeant. His tours in the Army included the 3d US Infantry Regiment, The Old Guard, in Ft. Myer, Virginia, and the 1-130th Attack Reconnaissance Battalion in Al-Basra, Iraq. Upon completion of his military service, Chris received his undergraduate degree from Iowa State University in 2012 and graduated from the University of Iowa College of Law with distinction in 2015. At the University of Iowa, he was involved in the Stephenson Trial Advocacy Competition and Appellate Advocacy program. In addition to the IDCA, Chris is a member of the Marshall County Bar Association, the Iowa Bar Association and the Defense Research Institute. He also volunteers with several community boards in Marshalltown. Chris and his wife, Amy, live in Marshalltown.

MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

You can trust 35 years
of experience protecting lawyers.

Serving Iowa Lawyers Since 1991.

Put your trust in the carrier
created by lawyers,
run by lawyers,
exclusively serving lawyers.

- Works exclusively with lawyers professional liability insurance
- Specializes in solo to mid-size firms
- Returned over $52 million in profits to policyholders since 1988
- Offers an array of services to mitigate risks

IOWA DEFENSE COUNSEL ASSOCIATION

2017 Annual Sponsor for the Iowa Defense Counsel Association

Protecting Your Practice is Our Policy.®

Get a fast quote today!
www.mlmins.com
or contact Clayton Jones
612-344-4361 or cjones@mlmins.com

Find us on Facebook, Twitter & LinkedIn

IDCA Annual Meeting Recap

IDCA: EDUCATION AND NETWORKING

IDCA held its 53rd Annual Meeting & Seminar, September 14–15, 2017, at the Stoney Creek Hotel & Conference Center in Johnston. More than 180 attendees heard from national and local speakers, networked and met with exhibitors. The highlight of the event was the Thursday evening reception at The Des Moines Art Center.

THANK YOU TO OUR EXHIBITORS

IDCA thanks the following exhibitors for their time and contribution at this year's event.

AEI
CED Technologies, Inc.
Crane Engineering
Denman & Company, LLP
Exponent
Engineering Systems Inc. (ESI)
ION Medical Designs, LLC
Minnesota Lawyers Mutual Insurance Co.
Rimkus Consulting Group
S-E-A Limited
Skogen Engineering Group, Inc.
Wandling Engineering

THANK YOU TO OUR SPONSORS

Without the generous support of our sponsors, many of the IDCA events and extras would not be possible. We thank our sponsors for their continued support of IDCA.

PLATINUM SPONSORS

DEFENSE PROGRAM
MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY
Professional Liability Specifically Designed for Defense Firms

WANDLING ENGINEERING
923 N. 2nd Street
Ames, Iowa 50010
P. 515-232-0158
F. 515-232-0218

Thursday Networking Reception at The Des Moines Art Center

GOLD SPONSOR

Exponent®
Engineering and Scientific Consulting

Name Badges and Thursday Evening Hospitality Suite

SILVER SPONSORS

GRINNELL MUTUAL

Annual Meeting Mobile Website

count on EMC INSURANCE

Thursday Continental Breakfast

BRONZE SPONSOR

S-E-A

Thursday Afternoon Networking Break

And the Award Goes to…

The IDCA Awards and Annual Business Meeting Lunch was an ideal time for attendees to celebrate IDCA's successes and honor members who have worked hard to help IDCA continually move forward. Congratulations to this year's Award recipients!

Outgoing Board Member Awards

The following Board members were recognized for their years of service on the IDCA Board of Directors.

- Andrew Van Der Maaten, Anderson, Wilmarth, Van Der Maaten, Belay, Fretheim & Zahasky, in Decorah, served seven years as District I Representative on the Board of Directors.

- René Lapierre, Klass Law Firm, L.L.P., in Sioux City, served six years as District III Representative on the Board of Directors.

- William Roemerman, Elderkin & Pirnie PLC, in Cedar Rapids, served seven years as an At-Large Representative on the Board of Directors.

- Chris Owenson, The IMT Group, in West Des Moines, served three years as an At-Large Representative on the Board of Directors.

President's Award

This Award is in honor and recognition of superior commitment and service to IDCA.

- Brent Ruther, Aspelmeier Fisch Power Engberg & Helling, P.L.C., Burlington, for his continuous efforts to index each issue of IDCA's *Defense Udpate*.
- Robert Engberg, Aspelmeier Fisch Power Engberg & Helling, P.L.C., Burlington, for his many years of service in indexing the IDCA Annual Meeting handouts. Bob has all handouts indexed from 1965 through 2016.

EDDIE Award

In 1988 Patrick Roby proposed to the Board, in Edward F. Seitzinger's absence, that the IDCA honor Ed as a founder and first president of IDCA and for his continuous, complete dedication to IDCA for its first 25 years by authorizing the Edward F. Seitzinger Award, dubbed "The Eddie Award." This award is presented annually to the IDCA Board member who contributed most to IDCA during the year. It is considered IDCA's most prestigious award.

Congratulations, Michele Hoyne, Farm Bureau Property & Casualty Insurance Company in West Des Moines! We appreciate your four years of dedication as the IDCA Treasurer.

Meritorious Service Award

This award is bestowed upon those who showed extreme dedication to the preservation and furtherance of the civil trial system in Iowa through professional and personal accomplishments. This year, IDCA honored past president Noel McKibbin for his countless years of contributions toward the organization.

IDCA Schedule of Events

September 13–14, 2018

54TH ANNUAL MEETING & SEMINAR
September 13–14, 2018
Embassy Suites by Hilton
Des Moines Downtown
Des Moines, IA.

September 12–13, 2019

55TH ANNUAL MEETING & SEMINAR
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, IA