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IOWA DEFENSE COUNSEL ASSOCIATION

DEFENSE UPDATE

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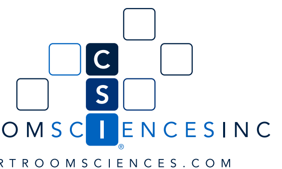
Join Dr. Kanasky at the IDCA Annual Meeting on September 16 for his session, *The Nuclear Verdict*. The nuclear verdict continues to be the hottest topic of discussion in civil litigation for both the plaintiff and defense bars. There are several factors to blame, including: 1) juror psychosocial factors, 2) growing litigation funding for plaintiff attorneys, 3) slow development of young defense attorneys, 4) political influences, 5) growth of Reptile tactics, 6) distrust of corporations, and 7) generational factors. This program will outline the influence of these factors on nuclear verdicts and provide practical solutions to avoid nuclear fallout for defendants.

Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution

Bill Kanasky Jr., Ph.D.



Dr. Bill Kanasky

INTRODUCTION

"What happened?" your client barks over the phone. As you gather the words to impress upon your client the challenges your witness faced, you also wonder and search for an explanation. "I prepared him like any other witness by explaining he should remain calm, deliver confident answers, listen carefully, and only answer the question asked"; but thinking back on the deposition, you cringe. Your objections went unheard. Your "preparation" sessions were useless.

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IDCA President's Letter

Steve Doohen
IDCA President

Hello IDCA members:

Many of us have taken a long trip in the car while the kids in the back seat ask are we almost there? How much longer? Today, it seems like we are all just like those kids in the back seat, wondering when we will get to our destination. The destination I refer to, of course, is a return to normal and rid of the scourge of COVID 19.

As an organization, the IDCA is charting a course towards returning to normal. In September, we will host our 57th Annual Meeting & Seminar. The meeting will be held in person at the Embassy Suites in downtown Des Moines. We have negotiated additional space in the hotel in order to ensure appropriate social distancing and other safety conscious protocols. I hope all of you are as excited as I am thinking of the prospect of live attendance at such an event. Our lives and practices are busy and often stressful. In years past, I always found the Annual Meeting & Seminar to be a great way to recharge. Simply being in the presence of other attorneys, rubbing elbows, talking about best practices, and exchanging "war stories" seems to have such a positive impact on our collective frame of mind.

Please plan on attending the Annual Meeting & Seminar on September 16—17, 2021. I know Susan Hess and Heather Tamminga are hard at work putting together an excellent program that you will not want to miss. A number of Iowa judges have agreed to participate in lectures and panel discussions, which is always much appreciated.

At this point, it is probably hard to gauge what the practice of law as defense counsel will look like next year or five years down the road. We know that trials in the past year simply vanished. While it is true that jury trials have now resumed, I hear a lot of talk about concerns over what the civil jury trial is going to look like going forward. In some ways, we are all starting from scratch in a system that looks new and different from days past.

Given this, keep in mind that IDCA has a verdict and settlement database up and running. Please log in at the website and report your trial and settlement results. Likewise, use the Community Forum to describe your experiences during trial. Now more than ever, our website can be a resource to help us all stay up to date on what is happening in courtrooms in Iowa.

As always, your board of directors is meeting regularly and hard at work trying to work towards our strategic goals as an organization. If you have questions or concerns, I am sure any of the Board members would be glad to hear from you.

It seems like the weather is turning in our favor, so I hope all of you have exciting plans for some hard-earned rest and relaxation during the summer months. Have a great time, and I look forward to seeing all of you this fall!

Respectfully,
Steve Doohen
2021 IDCA President

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Your "Deposition 101" speech had no impact. You then realize that plaintiff's counsel used a new, sophisticated approach that is immune to your standard witness preparation efforts—a form of psychological warfare. You realize the case is now over. "We were Reptiled, weren't we?" the client demands. . . .

As your client asks why the key witness in the case just "gave away the farm," with you defending the deposition right next to them, you flash back to what happened:

- Plaintiff's counsel presents the defendant witness with a series of general safety and/or danger rule questions;
- The witness instinctually agrees to the safety and/ or danger rule questions because it supports their highly-reinforced belief that safety is always paramount and that danger should always be avoided;
- The witness then continues to agree to additional safety and/ or danger rule questions that link safety and/or danger to specific conduct, as it aligns with their previous agreement to the general safety and/or danger rules;
- The witness begins unknowingly and inadvertently entrenching themselves deeply into an absolute, inflexible stance that omits circumstances and judgment;
- Plaintiff's counsel then presents case facts to the defendant witness that creates internal discomfort, as these facts do not align with the previous safety and/or danger rule agreements;
- Plaintiff's counsel then illuminates that the safety and/or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result;
- The defendant witness regrettably admits to negligence and/ or causing harm, as the perception of hypocrisy has been deeply instilled.
- The emotionally-battered defendant witness further admits that if they would have followed the safety and/or danger rules, harm would have certainly been prevented.

Rest assured your witness was not the first, nor will he be the last to fall victim to Reptile manipulation tactics because traditional preparation techniques are not sufficient for the emotional and psychological manipulation witnesses endure during Reptile style questioning. The four devastating psychological weapons that were used against your defendant witness are known as:

- Confirmation Bias
- Anchoring Bias
- Cognitive Dissonance
- The Hypocrisy Paradigm

The combination of these powerful psychological weapons doesn't influence witnesses; rather, it CONTROLS witnesses. These psychological weapons are precisely what the Reptile plaintiff attorney uses to destroy defendant witnesses at deposition.

The well-known"Reptile Revolution" spear headed by attorney Don Keenan, Esq. and jury consultant David Ball, Ph.D. is now a ubiquitous threat to defendants across the nation.[1] Keenan and Ball advertise their tactics as the most powerful approaches available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform, and they boast more than $6 billion in jury awards and settlements.[2] Ball and Keenan's tactics have been called "the greatest development in litigation theory in the past 100 years."[3] Although the theory developed within medical malpractice cases, Ball's and Keenan's seminars, held nationwide, now cover specific topics related to products liability and transportation. While the Reptile theory has been shown to be invalid, the specific Reptile tactics have proven deadly, particularly during defendant depositions.[4]

Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging deposition testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility.

Witnesses cannot be faulted for damaging testimony because Reptile tactics employ emotional and psychological tactics to manipulate witnesses into admitting fault. Witnesses' mistakes are caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high. Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics.

"Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging

deposition testimony, specifically by cajoling them into agreement with multiple safety rules."

Most papers and presentations from defense attorneys and jury consultants about the plaintiff Reptile theory merely describe the theory and provide rudimentary suggestions to defense counsel who may face a Reptile attorney.[5] While these efforts provide basic descriptions of the Reptile Theory, they fall woefully short on providing in-depth analysis and scientifically-based solutions. Suggestions such as "better prepare your witnesses" and "tell a better story during opening" do not provide defense attorneys with the neuropsychological weaponry needed to defeat the plaintiff Reptile approach. The Reptile attack during deposition is specifically designed to exploit the defendant witness' cognitive and emotional vulnerabilities. As such, a neurocognitively-based training system and counter-attack strategy is necessary if defendant witnesses are to defeat the Reptile attorney during deposition. This paper will serve to a) expose the step-by-step psychological attack orchestrated by Reptile attorneys, b) identify and analyze the cognitive breakdowns that lead to witness failure, and c) provide neurocognitive interventions to prevent witness failure.[6] Because Keenan and Ball have recently expanded their Reptile tactics past medical malpractice to target transportation and product liability litigation, we offer examples of Reptile questions commonly found within these three areas of litigation.

UNDERSTANDING REPTILE SAFETY AND DANGER RULE QUESTIONS

The Reptile attorney uses four primary "rule" questions to lure unsuspecting defendant witnesses into their psychological trap. The four questions are classified as:

- General Safety Rules (Broad Safety Promotion)
- General Danger Rules (Broad Danger/Risk Avoidance)
- Specific Safety Rules (Safe conduct, decisions and interpretations)
- Specific Danger Rules (Dangerous/Risky conduct, decisions, and interpretations)

"Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics."

Manipulating defendant witnesses into agreeing with these four types of questions is the linchpin of the Reptile cross-examination methodology, as the agreement creates intense psychological pressure during subsequent questioning of key case issues. Generating and intensifying this psychological pressure over the course of the questioning is essential to the Reptile attorney's success. Absent this psychological pressure, the Reptile attorney's odds of success drop exponentially. Therefore, the Reptile attack requires painstaking effort to both construct and order the questions in a manner which fully capitalizes on the natural biases and flaws of the witness' brain. The attack plan consists of four phases that build off of each other to ultimately force the defendant witness into admitting fault and accepting blame.

ANATOMY OF THE REPTILE CROSS—EXAMINATION METHOD

PHASE ONE
CONFIRMATION BIAS: FORCING AGREEMENT TO GENERAL SAFETY RULE QUESTIONS

Confirmation biases are errors in witness' information processing and decision-making. The brain is wired to interpret information in a way that "confirms" an existing cognitive schema (i.e., preconceptions or beliefs), rather than disconfirming information.[7] This means that during testimony, most witnesses quickly accept information which confirms their existing attitudes and beliefs rather than considering possible exceptions and alternative explanations. Essentially, witnesses struggle to say "no," to, or disagree with a line of questioning because of emotional and psychological challenges. Reptile attorneys rely on these cognitive challenges to entice defendant witnesses into a dangerous agreement pattern.

Cognitive schemas, the mental organization of knowledge about a particular concept, are powerful because they often relate to our identity as people.[8] The safety movement in many industries (healthcare, trucking, products, etc.) has strongly conditioned witnesses to *automatically* accept any safety principle as absolute and necessary, while simultaneously rejecting danger and risk. Specifically, years of repeated safety seminars, safety publications, and continuing education classes provided by employers have created powerful and inflexible cognitive schemas about safety. Therefore, when Reptile attorneys ask witnesses about safety issues during deposition, automatic agreement occurs as a function of the brain working to confirm its cognitive safety schema. Reptile attorneys have discovered that they can use a witness' confirmation bias tendency to their advantage, because it virtually guarantees agreement to safety and danger questions.

Here is how it works:

- The Reptile attorney illuminates the defendant witness' cognitive safety schema regarding safety within their question, relying on the psychological principle of confirmation bias to ensure agreement;
- The defendant witness has no choice but to agree to safety questions, as cognitive schemas are strongly related to

an individual's self-value and identity. In other words, disagreement with a cognitive schema is burdensome, if not impossible, as deviating from their internal value system proves uncomfortable for witnesses—no one likes to view themselves or their actions as anything but "safe."

- The Reptile attorney asks additional general safety and/or danger rule questions to the defendant witness, which forces further agreement and momentum.

Examples of General Safety and Danger Rule Questions (any case type):

- Safety
  - "Safety is your top priority, correct?"
  - "You have an obligation to ensure safety, right?"
  - "You have a duty to put safety first, correct?"
- Danger
  - "It would be wrong to needlessly endanger someone, right?"
  - "You would agree that exposing someone to an unnecessary risk is dangerous, correct?"
  - "You always have a duty to decrease risk, right?"

These repeated agreements lock the defendant witnesses into an inflexible stance, allowing the Reptile attorney to move to Phase Two of the attack—linking safety and/or danger issues to specific conduct, decisions, and interpretations.

PHASE TWO
ANCHORING BIAS: LINKING SAFETY AND/OR DANGER TO CONDUCT

Anchoring bias refers to the cognitive tendency to rely too heavily on early information that is offered (the "anchor") when making decisions. Anchoring bias occurs during depositions when witnesses use an initial piece of information to answer subsequent questions. Various studies have shown that anchoring bias is very powerful and difficult to avoid. In fact, even when research subjects are expressly aware of anchoring bias and its effect on decision-making, they are still unable to avoid it.[9] The Reptile attorney cleverly uses the initial agreement to general safety and/or danger rule questions to form an "anchor" that forces defendant witnesses to continue to agree to subsequent questions that are designed to link safety and/or danger to specific conduct, decisions, or interpretations. This sophisticated psychological approach manipulates the defendant witness by forcing them to repeatedly focus on their cognitive schema alignment, rather than effectively processing the true substance (and motivation) of the question.

Examples of Specific Safety and Danger Questions (Medical Malpractice Case):

Safety

- "If a patient's status changes, the safest thing to do is call a physician immediately, right?"
- "If a patient is having chest pain and shortness of breath, the safest thing to do is to send them to the ER immediately, correct?"
- "If a patient's oxygen saturation drops to 82%, and you are on-call, the safest thing to do to protect the well-being of the patient is to come to the hospital ASAP, right?"

Danger

- "Documentation in the medical chart must be thorough; otherwise a patient could be put in danger, right?"
- "You would agree with me that when a Troponin value is elevated, that the patient is in imminent danger, correct?"
- "Doctor, when you order a test or labs, you'd agree with me that you should review the results immediately, because any delay would put the patient at risk, right?"

Examples of Specific Safety and Danger Questions (Transportation Case):

Safety

- "To ensure safety, as a commercial truck driver, you must follow the federal rules governing hours of service, correct?"
- "Another safety rule requires daily inspection of the truck and trailer, such as brakes, correct?"
- "And you agree that if someone violates those safety rules and causes an accident, then they should be held responsible for their actions, correct?"

Danger

- "Commercial drivers must maintain daily log books, to ensure other drivers on the road are not put in danger, right?"
- "You would agree with me that when a commercial driver has exceeded the speed limit, other drivers on the road are put in danger, right?"
- "A commercial driver who places others in danger should be held responsible for the harms and losses caused, right?"

Examples of Specific Safety and Danger Questions (Product Liability Case):

Safety

- "Product manufacturers must make consumer products that are safe and free from defects, correct?"
- "To ensure consumer safety, authorized dealers must follow the product manufacturer's policies when selling, servicing, or repairing a product, correct?"
- "A product's operating manual ensures consumers know how to safely use a product, correct?"

Danger

- "Product testing should be thorough; otherwise consumers could be put in danger, right?"
- "When a product is mislabeled, you would agree with me that the consumer is in real danger, correct?"
- "Any defect discovered in the manufacturing process should result in an immediate recall of a product, because any delay could put the consumer in danger, right?"

These subsequent agreements to specific safety and/or danger rule questions accomplish two key Reptile attorney goals: a) it forces the defendant witness to become deeply entrenched in an inflexible stance on safety issues and b) it sets the stage to introduce case facts in a powerful manner to create psychological discomfort.

PHASE THREE
COGNITIVE DISSONANCE: CREATING PSYCHOLOGICAL DISTRESS

Cognitive dissonance is the mental discomfort people experience whenever beliefs or attitudes they hold about reality are inconsistent with their conduct, decisions, or interpretations.[10] Cognitive dissonance can occur in many areas of life, but it is particularly evident in situations where an individual's behavior conflicts with beliefs that are integral to his or her self-identity and profession. The Reptile attorney purposely generates cognitive dissonance by highlighting case facts which show the defendant witness' conduct, decisions or interpretations contradict his or her cognitive schema regarding safety and danger. Repeated contradictions result in the defendant witness experiencing psychological distress. Importantly, the amount of cognitive dissonance produced depends on the importance of the belief: the more personal value, the greater the magnitude of the cognitive dissonance. Additionally, the pressure to reduce cognitive dissonance is a function of the magnitude of said dissonance. Hence, the Reptile attorney purposely lays out multiple safety and/or danger questions in an effort to increase the magnitude of dissonance between the safety and/or danger admissions and the witness' conduct, decisions, or interpretations in the actual case.

During a deposition, there is a clear transition from general and specific safety and/or danger questions to case specific questions. Once the defendant witness has agreed to the safety and danger rule questions, the Reptile attorney starts to present case facts that do not align with the safety and danger rule answers. Here is how the question sequence works:

- General Safety Rule Question
- General Safety Rule Question
- General Danger Rule Question
- General Danger Rule Question
- Specific Safety Rule Question
- Specific Safety Rule Question
- Specific Danger Rule Question
- Specific Danger Rule Question
- Case Fact Question
- Case Fact Question
- Case Fact Question

As you can see, the Reptile plaintiff attorney strategically places the case fact questions directly behind several safety and danger rule questions. As the case fact questions are delivered to the defendant witness, his or her brain senses the contradiction between the case facts and their previous testimony, leading to cognitive dissonance. The ordering of the questions is crucial, as presenting case fact questions too early in the sequence will not produce cognitive dissonance. Therefore, the Reptile attorney will purposely delay the delivery of case questions to ensure that the safety and danger rule questions have been agreed to first.

PHASE FOUR
THE HYPOCRISY PARADIGM: FORCING AN ADMISSION OF FAULT

By repeatedly introducing case facts that contradict the defendant witness' previous testimony regarding safety and/or danger, the Reptile attorney intensifies the amount of psychological distress the witness experiences. The final and most powerful Reptile attack is the use of the hypocrisy paradigm.[11] By getting people to advocate positions they support but do not always live up to maximizes the level of cognitive dissonance an individual will experience. During a Reptile deposition, when the reptile attorney directly accuses the witness of putting someone else in danger and causing harm, the attorney's questioning

generates shame and threatens the witness' sense of integrity. Hypocrisy is an intense threat to one's identity and self-esteem, and creates intense psychological discomfort. Therefore, the Reptile attorney, as a form of manipulation, repeatedly points out that the defendant witness has failed to live up to his or her own professional standards. The hypocrisy fuels further cognitive dissonance, often generating feelings of shame and embarrassment.

Examples of Hypocrisy Paradigm Questions:

Medical Malpractice Case

- "Failing to call a physician at 4pm was a safety rule violation, correct?"
- "It exposed my client to unnecessary risk and harm, right?"
- "And if you would have called a physician, it would have prevented my client's stroke, right?"
- "Nurse Jones, failing to call a physician immediately at 4pm was a deviation of the standard of care, wasn't it?"

Transportation Case

- "Failing to perform a complete vehicle inspection prior to your travel was a safety rule violation, correct?"
- "It endangered my client and other drivers, correct?"
- "If you would have performed a vehicle inspection, it would have prevented my client's injury, right?"
- "By failing to perform a vehicle inspection prior to your travel, a violation of the safety rule, and endangering other drivers, including my client, you were negligent weren't you?"

Product Liability Case

- "Failing to perform an immediate recall after learning of a product's defect endangered consumers, right?"
- "Recalling the product immediately would have prevented my client's injury, correct?"
- "By failing to order a recall and allowing your product to harm consumers, you were negligent correct?"

After fostering shame and embarrassment through hypocritical behavior, the Reptile attorney has emotionally battered the defendant witness to a point in which he or she understandably concedes defeat and admits negligence. While some defendant witnesses attempt to fight and defend their conduct, the Reptile attorney often aggressively reminds them of their previous testimony about safety and danger rules, typically forcing the witness into submission.

Witnesses generally attempt to decrease intense cognitive dissonance by either admitting to fault or attempting to change previous testimony, neither of which prove successful when a video camera captures a clear admission, or credibility eroding back-pedaling.

1. Admitting Fault—Admitting fault reduces cognitive dissonance and relieves psychological pressure. When the defendant witness realizes that he or she is trapped and has no chance at escape, admitting fault is a fast way to decrease the intense cognitive discomfort that has been created by the Reptile attorney. Admitting fault is a low-road cognitive processing survival response that represents a "flight" (vs. fight) reaction. Specifically, admitting fault is a version of "playing dead" in an effort to decrease exposure to an aggressive negative stimulus (i.e., a Reptile Attorney). While this flight response may relieve psychological discomfort within the defendant witness, it obviously increases psychological discomfort within the defense attorney since both strategic and economic leverage in the case have been severely compromised.
2. Attempt to Change Previous Testimony—Some witnesses attempt to "back up" and try to change the conflicting belief so that it is consistent with their behaviors. Specifically, the defendant witness can try to explain to the Reptile plaintiff attorney that they were mistaken on their previous answers in an effort to escape the safety and/or danger rule trap. However, this is rarely effective as any attempt to reverse previous testimony is characterized as dishonesty by the Reptile plaintiff attorney, who will remind the defendant witness that he or she was under oath during the previous safety and danger rule questions. Even though the defendant witness may never admit fault in this circumstance, his or her credibility becomes severely damaged.

Regardless of how the defendant witness decides to decrease the psychological distress created from the hypocrisy paradigm questions, they both result in the Reptile plaintiff attorney gaining extraordinary strategic and economic leverage in the case. Table 1 illustrates the tactical use of each psychological weapon against the defendant witness and the subsequent result.

DERAILING THE REPTILE ATTACK AT DEPOSITION: REBUILDING COGNITIVE SCHEMAS

The foundation of the Reptile attack during testimony is to take advantage of the defendant witness' distorted cognitive schema related to safety and danger issues. Again, the witness' flawed cognitive schema results from years of conditioning and

reinforcement regarding workplace safety rules, which foster powerful and inflexible preconceptions absent circumstance and judgment. The Reptile attorney preys upon these cognitive flaws.

Table 1 illustrates how the Reptile attorney heavily relies on the initial agreement to safety and danger rule questions to implement subsequent psychological weapons that will effectively force agreement from the defendant witness. Importantly, without this initial agreement to safety and danger rules, the ensuing questions become impotent and ineffective because confirmation bias and anchoring bias cannot occur. In other words, if a defendant witness can be properly trained to identify safety and danger rule questions and avoid absolute agreement, the powerful effect of cognitive dissonance can be completely neutralized.

TABLE 1: THE REPTILE QUESTION SCRIPT (MEDICAL MALPRACTICE CASE)

QUESTION TYPE	QUESTION FORM	PSYCHOLOGICAL WEAPON	RESULT
General Safety Question	"Nurse Jones, you'd agree with me that ensuring patient safety is your top clinical priority, right?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
General Danger Question	"Because, you wouldn't want to expose your patient to an unnecessary danger, correct?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
Specific Safety Question	"You'd also agree with me that if a patient becomes unstable, the safest thing to do would be to call the physician immediately, right?"	Anchoring Bias to General Safety Agreement	Agreement; Psychological Comfort
Specific Danger Question	"Because hemodynamic instability can be dangerous, and even lead to death, right?"	Anchoring Bias to General Danger Agreement	Agreement; Psychological Comfort
Case Fact Question	"Nurse Jones, isn't it true that my client's blood pressure was 174/105 at 4pm?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"And you could have picked up the phone to call the physician, but you decided not to, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"At 5:30pm, my client suffered a hemorrhagic stroke, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Hypocrisy Question (Conduct)	"Failing to call a physician at 4pm was a safety rule violation, correct?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"It exposed my client to unnecessary risk and harm, right?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"Nurse Jones, failing to call a physician immediately at 4pm was a deviation of the standard of care, wasn't it?"	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Prevention)	And if you would have called a physician, it would have prevented my client's stroke, right?	Intensified Cognitive Dissonance / Hypocrisy	Regretful Agreement or Reversal Attempt

Properly training a witness to withstand Reptile attacks requires a sophisticated reconstruction of the original cognitive schema, followed by a rebuilding of a new, adjusted schema built upon an understanding of the role of circumstance and judgment. Once the new cognitive schema is firmly in place with no signs of regression, the defendant witness will be immune from the Reptile attorney's safety and danger rule attacks (see Table 2).

TABLE 2: EFFECTIVE RESPONSES TO GENERAL AND SPECIFIC SAFETY AND/OR DANGER RULE QUESTIONS

GENERAL SAFETY QUESTIONS	REBUILT COGNITIVE SCHEMA RESPONSES
"You have an obligation to ensure safety, right?" "Safety is your top priority?"	Option 1: General Agreement (not absolute) • Safety is certainly an important goal, yes. • We strive for safety, of course. • In general, yes. Option 2: Request Specificity • Safety in what regard? Can you please be more specific? • In what circumstance are you referring? • Safety is a broad term, can you be more precise?

SPECIFIC SAFETY AND/OR DANGER RULE QUESTIONS	REBUILT COGNITIVE SCHEMA RESPONSES
"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?" "(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"	• It depends on the patient's specific circumstances. • It depends on the full picture. • Not necessarily, as every situation is different. • That is not always true. • I would not agree with the way you stated that. • That is not how I was trained. • That is not how (INDUSTRY) works.

GENERAL DANGER RULE QUESTIONS	REBUILT COGNITIVE SCHEMA RESPONSES
"If you see or experience A, B, and C, the safest thing to do would be (Conduct or Decision X), correct?" "(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"	• I don't understand what you mean by "needlessly endanger." • That is a confusing question; can you define "needlessly endanger?" • I don't understand what you mean by "unnecessary risk;" can you please be more specific? • That is a very broad question, what specific circumstance are you referring to?

The cognitive schema reconstruction process is no easy task and requires advanced training in neurocognitive science, communication science, personality theory, learning theory and emotional control. As such, the following steps are only intended to provide general knowledge to defense counsel about how to identify and reconstruct a witness' cognitive schema.

10 STEPS TO REBUILDING THE COGNITIVE SCHEMA

- Education: scientifically define cognitive schemas and how they work
- Identification: identify and discuss the witness' personal Safety and Risk schemas
- Demonstration: demonstrate cognitive flaws regarding safety and danger (live, video, written)
- Education: scientifically define confirmation bias and anchoring bias
- Education: scientifically define cognitive dissonance and hypocrisy paradigm
- Simulation: create cognitive dissonance and force failure (i.e., the witness must fail repeatedly, proving that their current cognitive schema is flawed and ineffective, in order to ingrain successful communication patterns and behavior)
- Operant Conditioning: positive reinforcement of correct answers (see Table 2)
- Operant Conditioning: punishment (criticism) of incorrect agreement
- Repeated Simulation: attempt to force cognitive dissonance and agreement from varying angles
- Solidify New Cognitive Schema: repeat simulation until cognitive regression is minimal to none

CONCLUSION

The ultimate goal of the Reptile attorney is simple: create economic leverage. They have no interest in truth, justice, or even prestige in the courtroom. Rather, the Reptile attorney is only interested in fast cash. They strive to force clients to settle a case for far more than the realistic case value by manipulating the defendant witness into delivering damaging testimony. The economic impact of being "Reptiled" is staggering, resulting in millions of dollars of unnecessary payouts to undeserving plaintiffs and their attorneys. The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals. As such, defense counsel and clients need to supplement their traditional witness preparation efforts with sophisticated psychological training to specifically derail the perilous Reptile attacks.

> "The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals."

Advanced neurocognitive witness training can completely stymie a savvy Reptile attorney from controlling a defendant witness' answers and steering them towards admissions to negligence and causation. The problem is that merely warning a defendant witness about these sophisticated tactics is grossly inadequate. Well-prepared defendant witnesses have repeatedly failed at deposition because the preparation program did not include training to diagnose and repair the neurocognitive vulnerabilities where the Reptile attorney attacks. Proper training can not only protect the defendant witness from Reptile attorney safety rule attacks at deposition, but it can substantially decrease the economic value of the case. To no surprise, many corporate clients, particularly insurance companies, put great emphasis on decreasing annual legal costs and expenses. Claims specialists and corporate counsel routinely question whether they can afford the cost of advanced deposition training for their defendant witnesses. However, as Reptile settlements and damages continue to mount into the billions, the real question becomes: Can they afford the cost of NOT training witnesses?

ABOUT THE AUTHORS

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Ryan Malphurs, Ph.D contributed to this article.

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1 For the widespread impact of the Reptile Theory see Ken Broda-Bahm, "Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution," *The Jury Expert* v.25.5, 2013; Ken Broda-Bahm "Defendants: Be the Mongoose," www.persuasivelitigator.com, 12/26/13; Kathy Cochran, "Reptiles in the Courtroom," www.dritoday.org, 1/12/10; Bill Kanasky "Debunking and Redefining the Plaintiff Reptile Theory," *For the Defense*, April 2014; Ryan Malphurs and Bill Kanasky Jr. "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training," Georgia Defense Lawyer's Association, Spring 2014; David C. Marshall, "Lizards and Snakes in the Courtroom: What every Defense Attorney needs to know about the Emerging Plaintiff's Reptile Strategy" *For The Defense*, 4/2013; David C. Marshall, "Litigating Reptiles," The Defense Line, 41.1.2013; Minton Mayer, "Make Boots Out of that Lizard: Defense Strategies To Beat the Reptile," *The Voice* v12.38, 2013; Pat Trudell, "Beyond the Reptilian Brain," www. zenlawyerseattle.com, 2010; Stephanie West Allen, Jeffrey Schwartz, and Diane Wyzga, "Atticus Finch would not Approve: Why a Courtroom full of Reptiles is a Bad Idea," *The Jury Expert* v.22.3, 2010.

2 See www.reptilekeenanball.com for promotional material.

3 Introductory Remarks, Georgia Motor and Trucking Association 2014 Annual Meeting, Atlanta GA, 9/23-25.

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An Update on Iowa's Certificate of Merit Statute

By Austin R. Lenz, Lane & Waterman LLP, Davenport, IA

Austin R. Lenz

I. INTRODUCTION

Defense practitioners—particularly those defending medical malpractice actions—need to remain aware of the various developments to Iowa's new certificate of merit statute. The certificate of merit requirement is still relatively new to Iowa, having only taken effect July 1, 2017. In the time since, the statute has yet to receive substantial attention from Iowa's appellate courts. However, two recent Iowa Court of Appeals decisions indicate Iowa's higher courts are now ready and willing to begin hashing out the particular requirements for certificates of merit. This Article will provide a brief overview of Iowa's new certificate of merit requirement by breaking down the specific provisions of the statute and discussing two recent decisions from the Iowa Court of Appeals interpreting the statute's requirements.

II. IOWA CODE SECTION 147.140—THE BASIS FOR THE CERTIFICATE OF MERIT REQUIREMENT

The certificate of merit requirement is codified as Iowa Code § 147.140 and is simply entitled "Expert Witness–certificate of merit affidavit." All-in-all the statute is fairly short in length, especially considering the dramatic results it can dictate for medical malpractice cases. In its entirety that statute provides:

1. a. In any action for personal injury or wrongful death against a health care provider based upon the alleged negligence in the practice of that profession or occupation or in patient care, which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the plaintiff shall, prior to the commencement of discovery in the case and within sixty days of the defendant's answer, serve upon the defendant a certificate of merit affidavit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care. The expert witness must meet the qualifying standards of section 147.139.

   b. A certificate of merit affidavit must be signed by the expert witness and certify the purpose for calling the expert witness by providing under the oath of the expert witness all of the following:

      (1) The expert witness's statement of familiarity with the applicable standard of care.

      (2) The expert witness's statement that the standard of care was breached by the health care provider named in the petition.

   c. A plaintiff shall serve a separate certificate of merit affidavit on each defendant named in the petition.

2. An expert witness's certificate of merit affidavit does not preclude additional discovery and supplementation of the expert witness's opinions in accordance with the rules of civil procedure.

3. The parties shall comply with the requirements of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses.

4. The parties by agreement or the court for good cause shown and in response to a motion filed prior to the expiration of the time limits specified in subsection 1 may provide for extensions of the time limits. Good cause shall include but not be limited to the inability to timely obtain the plaintiff's medical records from health care providers when requested prior to filing the petition.

5. If the plaintiff is acting pro se, the plaintiff shall have the expert witness sign the certificate of merit affidavit or answers to interrogatories referred to in this section and the plaintiff shall be bound by those provisions as if represented by an attorney.

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.

7. For purposes of this section, "health care provider" means the same as defined in section 147.136A.

Iowa Code § 147.140 (2020).

Several of Section 147.140's provisions should be specifically emphasized. First, it is important to point out the statute

applies only to "personal injury" or "wrongful death" claims alleging negligence against "health care providers." Iowa Code § 147.140(1) (2020). In such cases the malpractice plaintiff is required to submit a certificate of merit affidavit signed by a qualified expert establishing the prima facie viability of their claims within 60 days of the defendant's answer and prior to commencing discovery. *Id.* Specifically, the expert's certificate of merit affidavit must establish both the applicable standard of care for the case, and that the defendant breached that standard. *Id.* In offering their opinion the expert must specifically establish the basis for their familiarity with the applicable standard of care prior to offering their opinion that the individual defendant breached the applicable standard of care. Iowa Code § 147.140(1)(b) (1)-(2) (2020). The foregoing requirements are particularly important, given the certificate of merit will need to be produced in a cases' relative infancy (i.e. within 60 days of the defendant's answer and prior to commencing discovery). Accordingly, a plaintiff carries stronger initial burden by needed to identify an expert either at the time of filing their petition or in the months soon after.

Undoubtedly the most useful portion Section 147.140 to defense practitioners comes via the remedy that Section 147.140 provides for a plaintiff's noncompliance. A plaintiff's failure to substantially comply "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." Iowa Code § 147.140(6) (2020) (emphasis added). Accordingly, a plaintiff's non-compliance is not only fatal to their pending case, but through dismissal with prejudice fatal to any future assertion of the same claims against the same defendants. Given the certificate of merit statute is still relatively new, it is still quite easy for an inexperienced or unwary plaintiff's attorney to miss the certificate of merit filing deadline, and by missing the filing deadline losing their entire case. This harsh penalty alone should serve as sufficient motivation for any medical malpractice practitioner to remain acutely aware of the statute's specific requirements along with the various opinions interpreting them.

Given the harsh remedy Section 147.140 affords defendants, it also maintains several internal checks to protect plaintiffs. For instance, dismissal with prejudice is only required where a plaintiff fails to "substantially comply" with Section 147.140. Iowa Code § 147.140(6) (2020). The "substantial compliance' language has been, and will continue to be, readily relied on by any plaintiff's attorneys who fail to comply with Section 147.140's internal requirements. Accordingly, the "substantial compliance" language will likely receive increased appellate interpretation in the coming years. Plaintiffs are also protected by Section 147.140's permissive modification of the 60-day filing deadline either pursuant to an agreement by the parties, or upon motion to the court demonstrating good cause for an extension. Iowa Code § 147.140(4) (2020). That subsection specifically clarifies "inability to timely obtain the plaintiff's medical records from health care providers when requested prior to filing the petition" is an example of good cause for an extension. *Id.* Accordingly, it can be inferred good cause will generally be satisfied where the defendants have engaged in some form of improper behavior. *See id.* This good cause temporal extension is another provision of Section 147.140 plaintiff's attorneys are likely to rely on when attempting to garner more time to locate a qualified expert, albeit when relying on the good cause extension a plaintiff's attorney must both be sure to timely raise their request and make a sufficient showing of good cause for granting the extension.

As previously alluded to, Iowa's appellate courts are now beginning to clarify some of the specific requirement's imposed by Section 147.140. In light of the defense friendly remedy Section 147.140 provides through dismissal with prejudice, it is imperative for medical malpractice attorneys to understand and remain up to date with these cases. The following cases recently decided by the Iowa Court of Appeals are briefly summarized below. These two decisions, filed March 17, 2021, are the only Iowa decisions opining on Section 147.140 to date.

III. MCHUGH V. SMITH—THE IOWA COURT OF APPEALS' MOST EXTENSIVE DISCUSSION OF SECTION 147.140

Of the two new cases, the *McHugh* decision provides the most extensive discussion on the Iowa certificate of merit requirement. *See McHugh v. Smith*, 20-0724, 2021 WL 1016596 (Iowa App. Mar. 17, 2021). Accordingly, it is important to clearly understand the *McHugh* decision and how it might be applied to future certificate of merit disputes.

The plaintiff in *McHugh* sued her doctor and his practice group following an allegedly negligent plastic surgery procedure. *Id.* at *1. The doctor filed an answer and several months later the parties made initial disclosures. *Id.* As part of her initial disclosures McHugh named five doctors likely to poses discoverable information relevant to her claim. *Id.* The defendants then then sent McHugh interrogatories and other initial discovery requests. *Id.* Following McHugh's eventual responses, the defense moved for dismissal citing McHugh's failure to timely provide a certificate of merit. *Id.* As part of her resistance to the defendant's motion to dismiss, and in an apparent attempt to substantially comply with the certificate of merit requirement, McHugh provided an untimely certificate of merit from one of the practitioners she had previously identified in her initial disclosures. *Id.* This certificate of merit was provided some 118 days after the statutorily mandated 60 day filing deadline had passed. *Id.* The district court ultimately concluded that McHugh failed to substantially comply with the certificate of merit requirement and dismissed her claims with

prejudice pursuant to Iowa Code Section 147.140(6). *Id.* An appeal followed soon thereafter. *Id.*

The Iowa Court of Appeals opened its analysis by discussing the various specific requirements included within Section 147.140. *Id.* at *2. Of note, the Court readily recognized that where a plaintiff fails to substantially comply "a court must dismiss with prejudice . . . each cause of action as to which expert witness testimony is necessary to establish a prima facie case." *Id.* The Court next noted Section 147.140 bears marked similarity to Iowa Code Section 668.11, which provides a 180-day deadline for certifying expert opinions in other professional liability cases. *Id.* at *3; *See also* Iowa Code § 668.11(1) (2020). The Court noted Section 668.11 is a "procedural" statute which requires a plaintiff to "have his or her proof prepared in the early stage of the litigation so that the defendant does not have to spend time, effort and expense in defending a frivolous action." *Id.* at *3 (citing *Hantsburger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993) (internal quotations omitted). A failure to comply with Iowa Code 668.11 precludes an expert's testimony. *Id.* Of particular relevance, Iowa Code 668.11 also protects a plaintiff so long as they "substantially comply" with that statute's requirements. *Id.* Substantial compliance under Section 668.11 has been defined as "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Id.* (citing *Hantsburger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). The Court's discussion of Section 668.11 provides an analog into its view on Section 147.140, particularly through its borrowing of the "substantial compliance" definition. *See id.*

The *McHugh* Court next had to turn to some of the specific arguments raised in the McHugh's appeal. McHugh essentially argued that despite filing her certificate of merit 118 days late, she still substantially complied with Section 147.140, because her eventual filing still established the prima facie merit of her claims via expert affidavit. *Id.* at *3. McHugh also argued that she substantially complied with Section 147.140 by identifying potential experts in initial disclosures and through interrogatory responses which further demonstrated her suit was not frivolous. *Id.* at *4.

Because the Court defined substantial compliance as "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute" to decide McHugh's substantial compliance arguments, the Court had to first determine the legislative purpose behind the certificate of merit requirement. *Id.* at *3-*4. The Court emphasized Section 147.140 serves to guarantee a medical malpractice claim possesses colorable merit early in the litigation. *Id.* at *4. Specifically, "Section 147.140 gives the defending health professional a chance to arrest a baseless action early in the process if a qualified expert does not certify that the defendant breached the standard of care." *Id.* at *4. The Court also specifically emphasized that Section 147.140 places specific additional requirements on top of those imposed by Section 668.11 by requiring a plaintiff to "provide verified information about the medical malpractice allegations to the defendants" and to "do so earlier in the litigation." *Id.* at *4.

The Iowa Court of Appeals ultimately rejected McHugh's arguments in light of Section 147.140's purpose. *Id.* The Court first noted that Section 147.140 specifically requires an expert affidavit both identifying the applicable standard of care, and further that the defendants specifically breached that standard of care. *Id.* While McHugh's initial disclosures and interrogatory responses provided some identification of doctors who may eventually offer opinion on a standard of care and subsequent breach, her discovery disclosures failed to specifically meet the aforementioned requirements. *Id.* Where a statute lists specific requirements, those requirements need to be directly followed. *See id.* McHugh's failure to meet these requirements made it impossible for the defendants to determine whether McHugh's claims were colorable early in the litigation, which was inconsistent with Section 147.140's purpose. *Id.* at *5.

The Court of Appeals further stressed the importance of meeting Section 147.140's temporal requirements, indicating that untimely filings do not substantially comply with "the legislation's demanding deadline." *Id.* Stated differently, compliance with the 60-day deadline is imperative given the certificate of merit statute's entire purpose is to place defendants on notice of the viability of the claims leveled against them early in the litigation. *See id.* Accordingly, McHugh's certificate of merit, filed 118 days late, did not substantially comply with Section 147.140's requirements. *Id.*

The *McHugh* Court also quickly rejected several additional arguments McHugh advanced. First, the Court refused to read a requirement into Section 147.140 forcing defendants demonstrate "actual prejudice" prior to dismissal. *Id.* Nothing in Section 147.140 indicates defendants must make this type of demonstration, rather the Court observed, "[t]he statute permits dismissal upon defendant's motion alleging plaintiff's inaction." The Court closed its decision by finding a plaintiff will not be excused from noncompliance based on "simple and excusable oversight." *Id.* at *6. The legislature specifically determined Section 147.140 would take effect after July 1, 2017, and it is up to attorneys to familiarize themselves with its requirements. *See id.*

The *McHugh* decision provides several important take-always for Iowa medical malpractice attorneys. Most importantly, the Iowa Court of Appeals takes a strict approach to the temporal requirements imposed by Section 147.140. Where a Plaintiff fails to timely file a certificate of merit, or to timely request an extension to do so, the statute will likely compel dismissal

of their claims with prejudice. Additionally, the certificate of merit is its own stand-alone requirement. Simply providing some information on potential experts through basic discovery responses will be insufficient to substantially comply with Section 147.140's requirements.

In addition to the Iowa Court of Appeal's specific findings, the *McHugh* decision also provided some guidance on how Iowa courts will interpret future certificate of merit disputes. For instance, the Iowa Court of Appeals views Section 147.140 as analogous in purpose to Section 668.11. Accordingly, prior decisions interpreting substantial compliance under 668.11 are likely to hold persuasive value before Iowa courts until the parameters of Section 147.140 are more clearly articulated. Additionally, it is imperative to keep in mind the Iowa Court of Appeals views Section 147.140 as a defense focused statute purposed with guaranteeing defendants are quickly and reliably appraised on the viability of the malpractice claims leveled against them.

IV. SCHNEIDER V. JENNIE EDMUNDSON MEMORIAL HOSPITAL—ANOTHER SPECIFIC APPLICATION OF IOWA CODE 147.140

While less detailed than the *McHugh* decision, the decision from *Schneider v. Jennie Edmundson Memorial Hospital* is also helpful in highlighting the strict effect Iowa courts dictate for noncompliance with Section 147.140. In 2018, Janet Schneider, as an individual and executor for her husband's estate, filed for wrongful death against seven different healthcare providers. *Schneider v. Jennie Edmundson Meml. Hosp.*, 19-1642, 2021 WL 1016599, at *1 (Iowa App. Mar. 17, 2021). Each of the defendants filed answers, which triggered the running of the plaintiff's 60-day time limit to file a certificate of merit establishing the prima facie viability of her claims against each defendant. *Id.* Filing deadlines for three of the defendants passed without Schneider filing a certificate of merit. *Id.* Upon realizing her mistake, Schneider sought the court's permission to extend the filing deadline as to all seven defendants. *Id.* The district court rejected this request, noting her failure to either file certificates of merit or timely request extensions did not constitute substantial compliance with Section 147.140. *Id.* The Court then dismissed the plaintiff's entire petition with prejudice. *Id.*

On appeal the Iowa Court of Appeals initially rejected Schneider's initial attempt to reframe the wrongful death claim as one of personal injury. *Id.* at *2. In essence, Schneider attempted to recast her wrongful death claim as one of personal injury for pre-death damages. *Id.* The personal injury damages would have predated the certificate of merit statute's July 1, 2017 effective date, leaving Section 147.140 inapplicable to Schneider's case. *Id.* The Court easily rejected Schneider's argument noting, "Schneider pled wrongful death; she did not plead a separate claim for personal injury against any of the defendants." *Id.* Attempts to reframe claims, as Schneider did, to avoid Section 147.140's effective date will be less and less likely as time progresses, but practitioners will still want to be aware the foregoing argument was directly rejected. *See id.*

The *Schneider* Court next turned directly to Schneider's failure to comply with the certificate of merit filing deadlines imposed by Section 147.140. *Id.* at *2. Looking first to the three defendants whose deadlines for filing had already passed by the time Schneider moved for an extension, the Court noted, "those defendants were entitled to dismissal with prejudice without consideration of whether there was good cause for an extension." *Id.* The foregoing illustrates the harsh result plaintiffs face through failure to timely comply–principally, their petitions will be dismissed with prejudice. *See id.* Additionally, courts are unlikely to listen to a plaintiff's argument for a temporal extension following a missed 60-day deadline, as missing that deadline constitutes a lack of substantial compliance. *See id.*

The Iowa Court of Appeals final determination involved the fate of the remaining four defendants against whom the plaintiff had timely requested a filing extension. *Id.* The Court recognized time extensions are to be granted upon a demonstration of "good cause." *Id.* Schneider's argument for good cause essentially "stat[ed] that the case is complex involving multiple healthcare providers and many pages of medical records." *Id.* Schneider basically attempted to argue more time was needed because timely obtaining the certificates was difficult given the complexity of her case. *See id.* The Court quickly rejected this argument noting complexity in a personal injury or wrongful death claim against a healthcare provider is not uncommon. *Id.* Additionally, the record noted Schneider was aware of Section 147.140's requirements but "simply neglected to [comply]." *Id.* Ultimately, the Iowa Court of Appeals found the district court did not abuse its discretion in denying the time extension, and that the district court properly dismissed all seven of Schneider's claims with prejudice.

Like the *McHugh* decision, the *Schneider* decision clarifies substantial compliance cannot occur where a plaintiff fails to meet Section 147.140's 60-day filing deadline. Simply put, the Iowa Court of Appeals has now twice indicated missing the certificate of merit filing deadline is fatal to a plaintiff's case. Additionally, while the *McHugh* Court did not extensively discuss what constitutes good cause in a plaintiff's request for a filing extension, the *Schneider* Court at least indicated a Plaintiff's negligence in timely obtaining the certificate is an insufficient reason for extension. The foregoing is even the case for more complex malpractice cases involving multiple defendants. Accordingly, a malpractice plaintiff is under a fairly strict requirement to satisfy the certificate of merit requirement within

60 days and should not be granted a time extension based on the difficulty inherent in timely obtaining an expert opinion.

V. LOOKING FORWARD—ADDITIONAL CLARIFICATIONS NEEDED

It is unlikely the certificate of merit requirement will be going away any time soon. The case-determinative benefit provided to defendants though dismissal with prejudice should guarantee defense practitioners will continue to invoke Section 147.140. In turn, it is highly likely Iowa's appellate courts will need to further define and clarify Section 147.140's contours. Chief amongst these clarifications should come for Section 147.140's indication that only a plaintiff's failure to "substantially comply" will result in dismissal with prejudice. This substantial compliance language provides a violating plaintiff an easy means to challenge whether their conduct truly requires dismissal with prejudice. Accordingly, further clarification on what constitutes substantial compliance will likely come. While *McHugh* provided the initial clarification that substantial compliance looks to whether the plaintiff "compli[ed] in respect to essential matters necessary to assure the reasonable objectives of the statute", it is likely more cases will be needed to flush out specific parameters and to identify the specific situations where a plaintiff's noncompliance will be excused. Similarly, further clarity will likely be needed on what constitutes "good cause" sufficient to grant a plaintiff's unilateral request for a temporal extension to their certificate of merit filing deadline. Good cause was not clearly defined in either of the Iowa Court of Appeals decisions, although the specific language from the statute seems to indicate the good cause analysis will look to misconduct by the health care defendant. *See* Iowa Code § 147.140.

Section 147.140 provides a powerful weapon to any medical malpractice defense practitioner's arsenal. Section 147.140 is a statute specifically crafted to protect medical professionals from frivolous suits by placing a heightened burden on plaintiffs to demonstrate the merit and validity of their claims early in litigation. Accordingly, the statute's burdens are almost entirely imposed on the plaintiff, with the defendant needing only to sit back, wait for non-compliance, and file for dismissal should a plaintiff fail to meet their obligations. While judicial attention to Section 147.140 is still in its infancy, it is critical that the defense bar continue to closely monitor developments as the parameters of Section 147.140 are more clearly articulated over time.

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Case Law Update

By Spencer O. Vasey, Elverson Vasey, Des Moines, IA

Spencer O. Vasey

Join Spencer Vasey at the IDCA Annual Meeting on September 16 for critical Case Law Updates. Vasey will present with Crystal Pound and Austin McMahon.

JONES V. GLENWOOD GOLF CORP., NO. 20-0303, MARCH 12, 2021

WHY IT MATTERS

The Jones Court decided, as a matter of first impression, that a plaintiff's settlement and release of claims against a driver also constitutes a release of the vehicle owner's vicarious liability under Iowa Code 321.493. This previously undecided issue means plaintiffs will be restricted from attempts to recover double by collecting from both a driver and owner separately for the driver's negligence.

FACTUAL & PROCEDURAL BACKGROUND

Terry Jones was injured when the driver of the golf cart he was a passenger in swerved to the right, ejecting Terry over the side of a bridge to the creek bed below. It was undisputed that the golf cart was owned by Glenwood Golf Corporation, and that the driver of the golf cart, Terry's son Jeff, was operating the cart with the consent of Glenwood.

Following the incident, Terry entered into a settlement agreement with Jeff. Pursuant to the agreement, Terry agreed to release all claims against Jeff and Jeff's insurer. The agreement contained an indemnification provision which required Terry to indemnify and hold harmless the released parties from any suits or claims. The release further provided that Terry "specifically preserve[d] any and all claims [he] may have against the Glenwood Golf Course, Glenwood Golf Corporation and any other responsible party."

Following the settlement, Terry filed suit against Glenwood, alleging two theories of liability: (1) premises liability, and (2) vicarious liability pursuant to Iowa Code 321.493. Glenwood filed a motion for summary judgment on the vicarious liability claim, which was denied. The case proceeded to trial, where the jury allocated 100% of fault to Jeff as a released party and 0% fault to Glenwood on the premise liability claim. The district court, after applying a dollar-for-dollar setoff of the sum previously received from Jeff, entered a judgment awarding Terry no damages.

Terry moved for a new trial and additur, claiming the verdict was inadequate and Glenwood was vicariously liable for Jeff's negligence. The motion was granted and the Court ordered a new trial on damages only. Glenwood appealed, arguing a new trial was unnecessary because it was not vicariously liable for Jeff's negligence. On appeal, the Court considered "whether the plaintiffs' release of the golf cart driver, Jeff, extinguished their vicarious liability claims against Glenwood as the golf cart owner under Iowa Code 321.493 for the damages caused by Jeff's negligent driving."

HOLDING

The Court held that a plaintiff's release of claims against a vehicle driver extinguishes the vehicle owner's vicarious liability for the driver's negligence under Iowa Code 321.493.

ANALYSIS

The Court began its opinion by discussing the text of Iowa Code 321.493. The Court analyzed the statute, noting that the statute imposes liability on owners by imputing a drivers' *negligence*, rather than the drivers' *liability*, on the owner. The Court emphasized the importance of the "liability versus negligence dichotomy." Under this theory, an owner whose driver is immune from liability, can still be held responsible for the driver's negligence under Iowa Code 321.493 because, only the driver's negligence, not his immunity, imputes to the owner. In contrast, when the negligence of the driver has been voluntarily released, there is no longer any negligence to impute to the owner. Thus, a release of actionable negligence against the driver inherently serves as a release of the owner as well.

The Court went on to explain its finding in the context of the Iowa Comparative Fault Act. The Court stated that an owner and driver are considered a single party under the Act. A plaintiff's settlement with a driver, therefore, constitutes a settlement of the "entire 'single share' of liability" attributable jointly to the driver and owner. Thus, "the plaintiffs' settlement with Jeff discharged the percentage of fault the jury attributed to him (one hundred percent)." Because Jeff's fault had been discharged, Terry could not recover from Glenwood and Glenwood was entitled to judgment as a matter of law.

HOLMES V. POMEROY, NO. 19-1162, MAY 7, 2021

WHY IT MATTERS

The Court in Holmes clarifies Iowa Rule of Evidence 5.406, governing habit evidence, in the context of cell phone use while driving. The Court sheds light on the quality and extent of evidence necessary for a plaintiff to argue a defendant had a habit of texting while driving and ultimately finds the plaintiff's proffered evidence is insufficient. The Court also discusses a plaintiff's ability to admit subsequent instances of conduct to prove a habit existed at the time of the accident. Ultimately, however, the Court declined to decide whether evidence of subsequent conduct falls within the scope of Rule 5.406.

FACTUAL SUMMARY

Matthew Holmes was injured when the bicycle he was riding collided with a vehicle driven by Miranda Pomeroy. Holmes believed Pomeroy had been texting at the time of the accident but, because Pomeroy had gotten a new phone after the accident, Holmes was unable to access data capable of proving his suspicion true. Instead, Holmes sought to introduce evidence that, since the collision, Pomeroy had used her cell phone while driving. Holmes argued that Pomeroy's subsequent use of her phone while driving was relevant to establishing Pomeroy had a habit of using her phone while driving.

The district court excluded the evidence, holding that only acts occurring *prior* to the accident could be used to show a habit, not subsequent acts. Holmes appealed the decision, which was affirmed by the court of appeals. He then applied for further review, which the Court granted to determine whether the proffered evidence of Pomeroy's cell phone use while driving after the accident was admissible of habit evidence under Iowa Rule of Evidence 5.406.

HOLDING

The Court held that the evidence of subsequent phone usage was inadmissible because there was not enough evidence of phone usage to constitute a habit. The Court declined to answer the question which it had initially granted further review on–whether habit evidence may be shown by instances subsequent to the occasion in question.

ANALYSIS

The Court began its analysis by discussing whether Iowa Rule of Evidence 5.406 allows evidence of a habit to be proven by instances of subsequent conduct. The Court summarized decisions from other jurisdictions and noted that authority exists for both admission, and exclusion, of subsequent acts. After reviewing the cases on both sides, the Court determined that it would not decide at this time whether habit evidence can be shown through specific subsequent instances.

Instead, the Court chose to reach its decision under a more traditional framework, holding "the proffered specific instances of Pomeroy's cell phone use while driving are not numerous enough to constitute habit evidence." The Court reasoned that Holmes' evidence, comprised of twenty photos allegedly taken while driving, did not establish a habit, but instead revealed only "casual occurrences." The Court further noted that the photographs could have been taken while Pomeroy was a passenger, or when her vehicle was stopped. "Holmes had access to the cell phone that Pomeroy used during the entire approximately three-year-post-accident period and this was all he could find out of over a thousand photos." "Based on the limited evidence offered, Pomeroy's cell phone use while driving does not rise to the level of a habit."

Caps

By Thais Ann Folta, Grinnell Mutual, Grinnell, IA

Thais Ann Folta

The IDCA Board recently conducted a survey of its members for their opinions on damages caps. The issue arose from discussion of Senate File 557 proposing a change to the noneconomic damages caps in medical malpractice cases. A prevailing position in the conversation on caps—and the position embraced by the majority of IDCA members who oppose caps—is the notion that our jury system is sacrosanct and should remain free from restrictions such as caps. Regardless which side of the argument you agree with, it is hard to dispute that juries receive great deference and are handled with care. During trial jurors are protected and kept separate from parties and outside influences, and even after trial jurors carry with them the right to keep private their decision-making. Not surprisingly, introducing any limits or boundaries on that distinguished status is therefore a big deal.

Full disclosure here—I fall on the side of favoring caps on damages. But fellow Board members made good points during our meetings, and they prompted me to question how other states have handled the same issue. I intended to survey the states and determine which ones have implemented caps on damages and report those numbers here. But my initial review turned up several such surveys. The most helpful of which I found was conducted by the Center for Justice and Democracy at the New York Law School. It identifies the states with caps, the type of cases subject to those caps, and the type of damages capped. Here is a partial summary by numbers, but I encourage a closer inspection of the data by visiting the Center's website at centerjd.org and reviewing the *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*. The Center is on the side of no caps (the moniker on its homepage reads, "CJ&D: Fighting for civil justice; stopping so-called "tort reform") but it has the most thorough information on states and caps that I have found.[1]

States with some type of non-economic damages caps: 23

States with both economic and non-economic damages caps: 6

States with Constitutional provisions prohibiting caps: 9

Damages caps are a type of tort reform. "Tort reform" became popularized in the 1970s and has become a political issue as much as a legal one. Proponents of caps are typically proponents of tort reform, but the reverse is not necessarily true. My guess is that many IDCA members who are opposed to caps may be in favor of various other tort reform measures such as statutes of limitation or elimination of joint and several liability.

Tort reform is intended to reduce litigation. But for all its value, the jury system doesn't get much use. According to the Iowa State Bar Association, Iowa had only 179 civil jury verdicts in 2017. In 2016, Iowa had only 14 malpractice jury trials[2]. To give some perspective, during those same years, the number of civil cases filed were 128,598 and 117, 282 respectively.[3] One argument pro-tort reformers put forth is that the existence of caps lead to fewer lawsuits. But the numbers don't always bear that out. For example, in the year 2019 Florida—a state whose constitution prohibits caps—had 4,650 civil cases filed for every 100,000 people. Indiana—a state with caps—had 5,966 civil cases filed for every 100,000 people.[4] Interestingly, Florida and Indiana had bench trial rates in 2019 of 3.1% and 28.7% respectively. Florida's civil jury trial rate was 0.2% and Indiana's was 0.1%, so maybe it's better to say caps reduce *jury* trials rather than all trials.[5] If caps are intended to curb runaway verdicts, then why so few juries? Moreover, if verdicts are restrained by caps, then why the "fear" of juries? Every one of us will answer those questions based, in part, on our personal tolerance for risk. The plaintiff's bar will say they advocate for human rights, and they will put up contingency fee agreements as evidence of that intent.[6] But once the game begins, they, too, make nearly all decisions based on risk. Both plaintiffs' and defense counsel have worked to tailor the system to favor their positions. The result is that neither juries nor judges get the full story of any case. Both sides keep things from the factfinder in order to prevent prejudice and avoid bias. Where a plaintiff chooses to file a case may be dictated by facts, but even within that constraint parties still forum shop. Objections to discovery requests are so common and production so restricted that I find answers and responses to be of minimal value in many cases. Another great example of lawyers tinkering with the system is the collateral source doctrine. Should a factfinder learn whether a medical bill has already been paid? Seems fair if verdicts are to be based on verifiable damages; seems unfair if they are used as a basis to determine non-economic damages. Lately plaintiffs' counsel have stopped introducing any evidence as to bills so as to avoid the reimbursement issue. But that, too, is risky, and who among us feels totally comfortable letting a jury come up with their own idea of what medical bills may have been and what was paid? Many times over the years I have had

clients ask if they can have the other side pay my attorney fees if we win. Attorney fee-shifting does not typically fall under the tort reform umbrella, but it seems a fitting consideration if we are going to embrace contingent fee agreements. And America is not the only country struggling with this issue. Scotland, for example, is walking back their fee-shifting history to qualified one-way cost shifting in personal injury cases beginning June 30, 2021.[7]

Perhaps the biggest tort reform occurred when people started routinely buying risk protection—that is, insurance. Since the start of insurance in 1666 after the Great London Fire, insurance has affected people's management of risk. The first insurance company—"The Insurance Office"—formed firefighting teams that would try to save homes that the company insured. They identified those houses with so-called firemarks. Given the choice of buildings to save, the firefighters would look for houses displaying a firemark (signifying an insured house), then work to save it before going to a house without a firemark (an uninsured house). Not surprisingly, it was customary for insurance companies to buy ale at the local pub for any firefighters who attempted to save an insured property and to provide bonuses for those who were successful at it.[8]

Maybe the issue of caps on damages is just the next step in risk reduction. If true, then the passionate support or opposition is difficult to explain. But if the sanctity of the jury is the true heart of our country's unique system, preserving it is vital, and the conversation becomes earnest. The strongest argument against imposing caps may be that while we may limit the information presented to a jury, we must not limit a jury's power to render judgment as it sees fit.

1 *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, Center for Justice & Democracy, August, 2020.

2 ISBA's Position Statement on Civil Justice System Reform.

3 Court Statistic Project, National Center for State Courts

4 Id.

5 The Court Statistics Project has an excellent interactive Caseload Data Display feature. You can find it at this link: https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays.

6 In his law review article *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, author Elihu Inselbuch wrote, " Because the United States lacks [a nationally financed legal aid program], the contingent-fee contract is widely recognized as the means by which all Americans may retain counsel to seek legal assistance, no matter what their means may be." He argues against Tort Reform by advocating for contingency fee agreements and prejudgment interest. He concludes by saying, "If, then, one accepts the need for the contingent-fee contract to give tort victims access to the courts, the question becomes whether the percentages routinely charged are fair in the circumstances. Here, it must be recognized that the risk is not principally the risk of nonrecovery, although that risk does exist. It is the risk that the percentage of the amount recovered paid to the attorney will or will not represent fair remuneration for the amount of effort required to obtain the recovery in a context where it is the opposing party who defines the amount of effort required. As the statistics demonstrate, overall the portion of the cost of the personal injury system attributed to the plaintiffs' lawyers is no larger than and may be substantially less than the portion attributed to defense lawyers. What could be fairer?" 2001 Law and Contemporary Problems, Vol. 64, Issue 2, pp 178, 195.

7 Civil Litigation Act 2018

8 *The Word's First Insurance Company*, Barry Klein, Expert Commentary, IRMI, July 2001.

New Lawyer Profile

David C. Waterman

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know David C. Waterman at Lane & Waterman LLP (L&W) in Davenport, Iowa. In 2020, David joined L&W (the fifth generation in his family to practice at the firm), and his practice areas include civil litigation, white collar criminal defense, government regulatory and compliance, and appeals.

Before joining L&W, David spent more than four years at the U.S. Attorney's Office for the Middle District of Florida where he served as a federal prosecutor in the Appellate and Criminal Divisions. As a federal prosecutor, David argued appeals before the Eleventh Circuit and directed federal and local law enforcement agencies in grand jury and wiretap investigations.

Prior to joining the U.S. Attorney's Office, David clerked for The Honorable Michael J. Melloy, U.S. Court of Appeals for the Eighth Circuit (2015 to 2016); The Honorable Mark W. Bennett (Ret.), U.S. District Court, Northern District of Iowa (2014 to 2015); and The Honorable John A. Jarvey, Chief Judge, U.S. District Court, Southern District of Iowa (2013 to 2014).

David earned his J.D. from UCLA School of Law in 2013. Before UCLA, he earned his M.Phil. in Political Thought and Intellectual History from the University of Cambridge in 2010. He earned his B.A. in Political Science, *summa cum laude* and Phi Beta Kappa, from The George Washington University Honors Program in 2009, where he studied abroad for the 2007 to 2008 academic year at the University of Oxford.

David was born and raised in Davenport, Iowa. He is a member of the Scott County Bar Association, the Iowa State Bar Association, the Federal Bar Association, the American Bar Association, and the National Association of Criminal Defense Lawyers.

David is an avid endurance sports enthusiast and has completed four Ironman triathlons. He was a varsity ice hockey player at the University of Cambridge and the University of Oxford.

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IDCA Annual Meetings

September 16–17, 2021

57TH ANNUAL MEETING & SEMINAR
September 16–17, 2021
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, Iowa

September 15–16, 2022

58TH ANNUAL MEETING & SEMINAR
September 15–16, 2022
Embassy Suites by Hilton, Des Moines Downtown
Des Moines, Iowa

IDCA IS MEETING IN-PERSON THIS SEPTEMBER

The IDCA is excited for our own return-to-learn as we prepare to meet in-person September 16 – 17. Rest assured, IDCA's priority is the health and safety of attendees. IDCA will adhere to CDC and local guidelines and hotel protocols. Please watch your mailboxes and inboxes this summer for event registration and safety details.