IN THE SUPREME COURT OF IOWA

No. 19-1066

ROSALINDA VALLES, individually, and On behalf of F.L., her minor child,

Plaintiff-Appellant,

vs.

ANDREW MUETING, D.O., JOSEPH LIEWER, M.D., NORTHWEST IOWA EMERGENCY PHYSICIANS, P.C., AMY WINGERT, M.D., KELLY RYDER, M.D., et al.,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HON. JEFFREY L. POULSON

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN ITS INTERPRETATION OF IOWA CODE §147.136.

Cases

Constitutional Provisions

Other Authorities

II. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, DR. AMY WINGERT AND DR. KELLY RYDER.

Cases

Other Authorities

Rules

Cases

Other Authorities

PRESENT PRIMA FACIE EVIDENCE OF NURSING NEGLIGENCE OR FACTUAL CAUSATION.

Cases

V. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANTS TO PRESENT PREVIOUSLY UNDISCLOSED, UNJUSTIFIED AND SIGNIFICANTLY HARMFUL EXPERT TESTIMONY AND OPINIONS OF AN EXPERT IN NEURORADIOLOGY, DR. JOEL R. MEYER, DURING THE JURY TRIAL ON THE PLAINTIFF'S REMAINING CLAIMS AGAINST DR. ANDREW MUETING, DR. JOSEPH LIEWER AND NORTHWEST IOWA EMERGENCY PHYSICIANS, P.C.

Cases

Other Authorities

Rules

ROUTING STATEMENT

This case presents substantial issues of first impression and substantial constitutional questions of the validity of a state statute, as well as questions of "enunciating or changing legal principles." Iowa R. App. P. 6.1101(2)(a), (c), (f).

The Iowa Supreme Court has not addressed the interpretation of the statutory collateral source rule's "scope of recovery" language, purporting to bar the recovery of economic damages for medical expenses sustained by victims of medical malpractice when such damages are "replaced . . . by governmental . . . benefit programs," except when the "[b]enefits [were] received under the medical assistance program under chapter 249A." *See* Iowa Code §147.136(1) and (2)(a). The trial court construed these provisions to bar recovery of economic damages for past medical expenses by victims of medical malpractice who have become eligible for Medicaid benefits outside the State of Iowa, as well as any recovery by the other State's Medicaid agency, to the extent that any such claimed medical expense sought to be collected has already been covered by the other State's Medicaid program. Furthermore, the Court has not addressed the question of whether this statutory construction is preempted by the federal Medicaid statutes, violates

the U.S. Constitution's Full Faith and Credit Clause or suffers from other constitutional infirmities.

The Iowa Supreme Court should retain this case to address the substantial questions presented herein relative to the proper interpretation and validity of Iowa Code §147.136.

STATEMENT OF THE CASE

1. Introduction

This case arises out of the medical care, evaluation and treatment provided to an 11-year old boy (F.L.) after he was brought to the emergency department at Mercy Medical Center—Sioux City Hospital. (Am. App. Vol. 1 p. 1309). Although F.L. exhibited classic signs and symptoms of bacterial meningitis, his infection went undiagnosed and untreated at the hospital while his neurological condition deteriorated significantly, and he developed a severe bacterial meningitis infection. As a result, F.L. suffered a permanent and catastrophic brain injury.

Rosalinda Valles, as F.L.'s mother and conservator, asserted claims against 10 physicians (Andrew Mueting, D.O., Joseph Liewer, M.D., Jamie

Dodge, M.D.,[1] Jesse Nieuwenhuis, M.D., Said Hasib Sana, M.D., Thomas Morgan, M.D., Aruntha Swampillai, M.D., Amy Wingert, M.D., Kelly Ryder, M.D., Leah Johnson, M.D., and Rex Rundquist, M.D.) for medical negligence and loss of parental consortium. She also asserted direct and vicarious liability claims against three professional corporations (Northwest Iowa Emergency Physicians, P.C., Siouxland Medical Education Foundation, and Prairie Pediatrics & Adolescent Clinic, P.C. d/b/a Prairie Pediatrics, P.C.), as well as against Mercy Health Services–Iowa Corp. d/b/a Mercy Medical Center—Sioux City Hospital. She alleged that the above-named doctors and other healthcare providers were negligent in failing to timely diagnose and properly treat F.L.'s bacterial meningitis infection (Am. App. Vol. 1 p. 1309), and that she and F.L. sustained injuries, damages and losses as a result. (Am. App. Vol. 1 p. 1316).

The Defendants denied they were negligent or that their acts or omissions caused any of the claimed injuries, damages and losses, and also raised a number of affirmative defenses.

[1] The claims against Dr. Jaime Dodge were voluntarily dismissed with prejudice prior to trial. (Am. App. Vol. 1 p. 3590).

Subsequently, Rosalinda Valles, on behalf of herself and F.L., reached pretrial settlement agreements regarding the claims against Dr. Nieuwenhuis, Dr. Swampillai, Dr. Morgan, Dr. Johnson, Dr. Sana, Siouxland Medical Education Foundation, and Mercy Medical Center—Sioux City Hospital (hereinafter referred to collectively as the "settling defendants"). (Am. App. Vol. 1 p. 3521; Vol. 2 p. 186:21-187:12). [2]

The trial court had previously granted Defendants' joint summary judgment motion and determined as a matter of law that Iowa Code § 147.136 barred recovery of past medical expenses in this case to the extent medical assistance had previously been provided for F.L. under the Texas Medicaid program, after his family moved out-of-state.[3] As outlined below, the trial court also rejected Rosalinda Valles' arguments that this statutory construction was preempted by the federal Medicaid statutes and suffered from constitutional infirmities.

[2] Plaintiff later finalized the pretrial settlement agreements and formally dismissed the claims against all the settling defendants in April of 2019. (Am. App. Vol. 1 pp. 4047, 4049).

[3] The trial court's Ruling on Defendants' Joint Motion for Summary Judgment Re: Texas Medicaid was filed June 7, 2018. (Am. App. Vol. 1 p. 1293).

Also, the trial court granted summary judgment motions filed on behalf of Defendants, Dr. Amy Wingert,[4] Dr. Kelly Ryder,[5] and Dr. Rex Rundquist (and his employer, Prairie Pediatrics & Adolescent Clinic, P.C. d/b/a Prairie Pediatrics, P.C.).[6]

Thus, by the time of trial, the only remaining claims were those against Dr. Andrew Mueting, Dr. Joseph Liewer and Northwest Iowa Emergency Physicians, P.C. Those claims were tried to a Woodbury County jury.[7] The

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[4] The trial court's Ruling on Defendant Amy Wingert, M.D.'s August 17, 2018 Motion for Summary Judgment was filed October 12, 2018. (Am. App. Vol. 1 p. 2877).

[5] The trial court's Ruling on Defendant Kelly Ryder, M.D.'s August 17, 2018 Motion for Summary Judgment was filed October 12, 2018. (Am. App. Vol. 1 p. 2885).

[6] The trial court's Ruling on Defendants Rex Rundquist, M.D. and Prairie Pediatrics & Adolescent Clinic, P.C. d/b/a Prairie Pediatrics, P.C.'s August 9, 2018 Motion for Summary Judgment was filed October 12, 2018. The Plaintiff-Appellant does not seek to appeal this summary judgment order.

[7] Notably, the trial court decided that the settling defendants would also be shown in the case caption. Moreover, in its opening remarks, the court informed the prospective jury panel that:

> Dr. Jesse Nieuwenhuis, Dr. Aruntha Swampillai, Dr. Thomas Morgan, Dr. Leah Johnson, Dr. Said Sana, Siouxland Medical Education Foundation, and Mercy Medical Center are shown in the caption as defendants. The case against these defendants has been settled and they are released parties.

(Am. App. Vol. 2 p. 316:6-11).

jury trial spanned several weeks in October and November of 2018. On November 21, 2018, the jury returned a verdict in favor of Dr. Mueting, Dr. Liewer and Northwest Iowa Emergency Physicians, P.C. (Am. App. Vol. 1 p. 3969; Vol. 2 p. 3217:1-9).

The trial court entered a Final Judgment that finally disposed of all claims asserted by Rosalinda Valles, individually and on behalf of F.L., against all parties, on May 29, 2019. (Am. App. Vol. 1 p. 4057). This timely appeal followed. (Am. App. Vol. 1 p. 4060). *See* Iowa R. App. P. Rule 6.101(1)(d).[8]

2. Motions for Summary Judgment

a. Determination of law regarding the interpretation of Iowa Code §147.136, following the trial court's order for the joinder of the Texas Health and Human Services Commission as an Indispensable Party

The Plaintiff sought to present evidence that after F.L. suffered his catastrophic brain injury, she incurred expenses for medical care and treatment and rehabilitative services. Since Rosalinda Valles and her family,

[8] Earlier this year, Plaintiff-Appellant had filed a premature Notice of Appeal in Case No. 19-0055. Treating that earlier appeal as an application for discretionary interlocutory appeal, the Supreme Court denied the application on March 24, 2019, and the *procedendo* subsequently issued on April 10, 2019.

including F.L., had moved to the State of Texas, where F.L. was eventually determined to be eligible for Medicaid benefits, a significant portion of the costs of care, treatment, and services F.L. claimed as a result of the complained of medical malpractice in this case was covered by the Texas Medicaid program.

On January 5, 2018, the Defendants jointly filed a motion for summary judgment. (Am. App. Vol. 1 p. 616). The Defendants asked the trial court to determine that Iowa Code §147.136 was applicable to this case, and to rule that Plaintiff's recovery of damages for medical expenses "shall not include any amount paid or to be paid by the Texas Medicaid program and that Defendants are not liable to Plaintiff, Texas, or any Texas entity (including the Texas Health and Human Services Commission) for such payments." (Am. App. Vol. 1 p. 618).[9] Rosalinda Valles, in her resistance and

[9] Defendants also filed a simultaneous motion requesting the trial court to order the joinder of the Texas Health and Human Services Commission ("HHSC") in this case, which the Plaintiff resisted. (Am. App. Vol. 1 pp. 774, 806).

On March 7, 2018, the trial court issued an order for joinder of the Texas HHSC as an indispensable party, and an original civil notice was thereupon issued on March 9, 2018, and served on the Texas HHSC on March 13, 2018. (Am. App. Vol. 1 pp. 1270, 1282, 1287).

Consequently, the Texas Attorney General's Office, by letter dated April 27, 2018, notified the parties on behalf of the Texas HHSC that it was

memorandum of authorities filed January 26, 2018 (Am. App. Vol. 1 p. 837), argued that the Defendants' statutory interpretation was incorrect, that it was preempted by the federal Medicaid statutes, and that the Iowa legislature could not, without violating the U.S. Constitution's Full Faith and Credit Clause and other constitutional provisions, eliminate the right to recover from the Defendants for medical expenses related to F.L.'s injuries, including amounts

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their position the Iowa District Court did not have jurisdiction over HHSC, an agency of the State of Texas; and, as such, HHSC did not recognize the court's authority over it in any respects and would not be making an appearance. (Am. App. Vol. 1 p. 1292). The trial court was promptly apprised and provided with a copy of the aforementioned letter during the hearing on Defendants' Motion for Summary Judgment Re: Texas Medicaid Payments. (Am. App. Vol. 2 pp. 54:9-17, 61:5-14, 62:1-6).

On May 13, 2019, the United States Supreme Court, in its last of three opinions in *State Franchise Tax Bd. of Cal. v. Hyatt*, 587 U. S. ___, 139 S.Ct. 1485 (2019), held that States have sister-state sovereign immunity from private suits brought in courts of other States, and overruled an earlier decision to the contrary in *Nevada v. Hall*, 440 U. S. 410 (1979). *But cf. Franchise Tax Bd. of Cal.* v. *Hyatt*, 578 U. S. __, 136 S.Ct. 1277, 1281 (2016) (the second of three opinions in that case, rejecting a constitutional challenge to *Nevada v. Hall* by operation of law due to an equally-divided court, yet holding that the Full Faith and Credit Clause of Article IV of the U.S. Constitution prohibits States from adopting a "policy of hostility to the public Acts" of another State).

While the trial court did not have the benefit of the last *Hyatt* opinion when it ordered the joinder of the Texas HHSC and ruled on the summary judgment motion regarding Texas Medicaid payments, there can be hardly any doubt that it did not possess jurisdiction over the Texas HHSC or the authority to decide issues relative to the rights of the State of Texas or its Medicaid agency.

paid on his behalf under the Texas Medicaid program, or extinguish the medical assistance lien of the Texas Medicaid agency, while preserving the medical assistance lien belonging to the State of Iowa's Medicaid agency. (Am. App. Vol. 1 p. 837; Vol. 2 pp. 62:7-65:5, 66:1-78:16, 88:8-92:23).

After hearing, the trial court ruled, *inter alia*:

- "[S]ection 147.136(1) does preclude a medical malpractice defendant's liability for those medical expenses *paid* by governmental benefit programs and payers except when those expenses are paid by Iowa's governmental benefit program. Thus, the Defendants are not liable for those past medical expenses paid by the Texas Medicaid program to the Plaintiffs";
- "[S]ection 147.136 precludes the Defendants liability for those medical expenses *already paid* by the Texas Medicaid program. The Plaintiff is therefore not permitted to recover those expenses as damages"; and
- "[T]he Texas Medicaid program is itself also not permitted to recover those expenses either directly from the Defendants or indirectly from the Plaintiffs."[10]

Am. App. Vol. 1 pp. 1302, 1303) (emphasis in original).[11]

b. Defendants Amy Wingert, M.D. and Kelly Ryder, M.D.

[10] "[C]oncerning *future* medical expenses paid by Texas Medicaid," the trial court stated, however, that "section 147.136 will not preclude the recoverability of . . . *future* expenses by either the Plaintiff or Texas Medicaid." (Am. App. Vol. 1 p. 1304) (emphasis in original).

On August 17, 2018, Dr. Kelly Ryder filed a motion for summary judgment. (Am. App. Vol. 1 p. 1469). Also on August 17, 2018, Dr. Amy Wingert filed a motion for summary judgment that was substantially similar. (Am. App. Vol. 1 p. 1485). Dr. Ryder and Dr. Wingert, both of whom were then working at the hospital as residents, claimed that there was no evidence, even when viewed in the light most favorable to the Plaintiff, from which a reasonable juror could conclude that they were in a physician-patient relationship with F.L. that gave rise to duties of care, and that these duties were breached. (Am. App. Vol. 1 pp. 1485, 1471, 1487).

The Plaintiff filed a combined resistance and memorandum of authorities, as well as exhibits showing that Nurse Sandra Lang, who was caring for F.L. on the hospital's pediatrics floor, had paged Dr. Wingert about F.L.'s deteriorating neurologic status and serious medical needs on April 7, 2015, but that Dr. Wingert failed to return the page while being on call; and that there were also telephone communications between Nurse Lang and Dr. Ryder, who failed to appropriately respond to Nurse Lang's concerns while being on call and having the primary responsibility for covering patients on the hospital's pediatrics floor, including F.L. Additionally, the Plaintiff provided expert reports indicating that these Defendants were in a physician-

patient relationship with F.L., and the duties of care they owed to him were breached. Thus, the Plaintiff argued that the evidence of record and the reasonable inferences to be drawn therefrom, when viewed in the light most favorable to the Plaintiff, could lead a reasonable juror to conclude that these Defendants had formed an express or implied physician-patient relationship with F.L., giving rise to cognizable duties of care. (Am. App. Vol. 1 pp. 1513, 1518, 2569).

Both Defendants replied, and Dr. Wingert also submitted supplemental exhibits. (Am. App. Vol. 1 pp. 2545, 2555, 2569). The summary judgment motions came before the trial court for hearing on September 26, 2018. (Am. App. Vol. 2 pp. 99:12-125:15.) Subsequently, the trial court granted the summary judgment motions on October 12, 2018, finding that no genuine dispute of material fact existed concerning the formation of a physician-patient relationship with respect to either one of the Defendants, Dr. Wingert or Dr. Ryder, and that they were entitled to judgment in their favor as a matter of law. (Am. App. Vol. 1 pp. 2877, 2885).

3. Trial presentation of previously undisclosed expert testimony and opinions of Defendant's neuroradiology expert, Dr. Joel Meyer

On November 13, 2018, defense counsel called Joel R. Meyer, M.D.—out of order during the Plaintiff's case-in-chief—as a witness for the defense.

(Am. App. Vol. 2 pp. 1947:1-2; 1955:17-24). He was called to testify as an expert in neuroradiology. (Am. App. Vol. 2 p. 1962:11-12).

At the onset, Plaintiff's counsel brought an expert disclosure pertaining to Dr. Meyer dated December 15, 2017, to the trial court's attention, pointing out that it was just two pages. (Am. App. Vol. 1 p. 549). Plaintiff asked the trial court to preclude the introduction by defense counsel of any previously undisclosed expert testimony or opinions by Dr. Meyer, including any expert evidence that F.L. couldn't have had meningitis on April 5, 2015, and that something else must have caused the damage to F.L.'s brain at a later point in time, while he was under the care of the settling defendants instead. (Am. App. Vol. 2 pp. 1935:2-6, 1949:6-9, 1956:9-1958:9).[12]

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[12] Plaintiff's counsel explained his reasoning for this request as follows:

> I do also want to bring to your attention that when you look at Dr. Meyer's disclosure, you will see there is no opinion as to the date when the meningitis started. The only thing he says on page 1, it says, Findings are suggestive of early meningitis. But never ever tries to date that, whether that's on April 8th, April 5th, 6th, 7th. And so I just want to alert the Court that if he tries to then say that it's his opinion it started on the 8th or 7th or whatever, it's not part of his opinion.
>
> Furthermore, the disclosure -- We anticipate that Dr. Meyer may -- we don't know this for sure, but may suggest there's some other cause for [F.L.]'s brain injury

After a brief recess, the trial court made a preliminary ruling on the permissible scope of Dr. Meyer's expert testimony. The court's ruling allowed the Defendants to elicit testimony from Dr. Meyer as long as it was responsive to "specific issues raised in Dr. Madan's testimony," whether or not such opinions and their basis were set forth in Dr. Meyer's expert disclosure:

> The scope of his testimony under Rule 1.508 is premised upon the concept that the scope of the expert's testimony must be within the fair scope of his report. And the testimony must all relate back to that disclosure. I believe that all the parties know what Dr. Madan testified to.
>
> And it's therefore my ruling that under Rule 1.508(4) that the testimony must be limited to the fair scope of his disclosure, but also allows the defendants to respond to specific issues raised in Dr. Madan's testimony.
>
> And within that range, I believe that the disclosure falls within the ambit of the scope set forth in 1.508(4).

(Am. App. Vol. 2 p. 1959:3-20).

> other than this infection. It's not disclosed. It's not anywhere in his opinion. And furthermore, his deposition was never taken.
>
> So with -- We are requesting that he be limited to the four corners of his disclosure which do[es]n't contain either an opinion as to when this process started or an opinion that something else other than the bacterial infection that got into his brain and caused his injury.

(Am. App. Vol. 2 pp. 1937:8-1938:6, 1958:1-9).

Subsequently, over Plaintiff's consistent and repeated objections that Dr. Meyer was expressing opinions that went beyond his two-page disclosure, Dr. Meyer was allowed to present testimony that the damage to F.L.'s brain was not caused by meningitis; that a CT scan taken on April 8, 2015, was negative, signifying that F.L. couldn't have had meningitis on April 5, 2015; that follow-up MR imaging studies indicated that the damage to F.L.'s brain injury resulted from of brain infarction or hypoxic-ischemic injury caused by a respiratory compromise that must have occurred sometime early in the morning on April 8, 2015; and to expansively disagree with opinions that had supposedly been expressed by the Plaintiff's neuroradiology expert, Dr. Neel Madan. (Am. App. Vol. 2 pp. 1973:10-2027:12; *cf.* pp. 1387:18-1483:1).

None of the aforementioned opinions of Dr. Meyer had previously been disclosed to the Plaintiff in his expert disclosure, and no supplemental disclosure of Dr. Meyer's opinions was furnished to the Plaintiff. Further, the Defendants made no showing that the nondisclosure of Dr. Meyer's opinions was either substantially justified or harmless.

4. The Plaintiff's directed verdict motion on the Defendants' defense of comparative fault of the settling defendant, Mercy Medical Center—Sioux City Hospital and its nursing staff.

After the Defendants rested, the Plaintiff moved for a directed verdict on the Defendant's comparative fault defense, arguing that the Defendants did

not present expert evidence of nursing negligence properly attributable to the hospital, or that any such negligence was a cause of the Plaintiff's or F.L.'s claimed injuries, damages or losses. (Am. App. Vol. 2 pp. 3047:13-3048:17, 3052:9-3053:10). The trial court reserved ruling on the motion temporarily. (Am. App. Vol. 2 pp. 3052:1-6, 3053:11). Plaintiff renewed her directed verdict motion that afternoon. (Am. App. Vol. 2 pp. 3064:7-3066:14). Again, the trial court declined to make a definitive ruling on the directed verdict motion, but instead submitted the defense of comparative fault to the jury, requiring the Plaintiff to address it in closing argument. (Am. App. Vol. 2 pp. 3067:2-3068:13, 3104:2-3105:24).

After trial, the Plaintiff again moved the trial court for a ruling on her directed verdict motion, which the Defendants opposed. (Am. App. Vol. 1 pp. 3990, 3998).

Consequently, the trial court issued an order concluding it was proper to reserve ruling on the directed verdict motion until after the jury had returned its verdict, the motion had been rendered moot based on the jury's verdict for the Defendants, and the Plaintiff was not prejudiced as a result of its decision to reserve ruling and not make a definitive ruling. (Am. App. Vol. 1 p. 4006).

5. The Jury Instructions

Before the case was submitted to the jury, the parties tendered proposed instructions and made a record on jury instructions. Plaintiff sought jury instructions regarding the specialist standards of care required of the emergency physician defendant, Dr. Joseph Liewer, and of the family practice physician, Dr. Andrew Mueting, under the facts of this case. (Am. App. Vol. 1 pp. 3261, 3528). She specifically objected to the Defendant's proposed instruction on a nonspecialist standard of care applicable to Dr. Mueting and Dr. Liewer alike. (Am. App. Vol. 1 pp. 3784, 2940:5-9).[13]

Jury Instruction No. 11, as submitted to the jury, stated, "A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances. A violation of this duty is negligence." (Am. App. Vol. 1 p. 3950). Instruction No. 16 allocated to Rosalinda Valles the burden of proving Dr. Liewer was negligent in "[f]ailing to order antibiotics and a lumbar puncture for [F.L.] when he suspected or should have suspected that he had bacterial meningitis." (Am. App. Vol. 1 p. 3955). Similarly, Instruction No. 17 allocated to her the burden of proving Dr. Mueting was negligent in "[f]ailing to order antibiotics and a

[13] Notably, Plaintiff also submitted her objections, in writing, to the Final Instructions to the Jury afterwards, pursuant to the trial court's directions. (Am. App. Vol. 1 p. 3985; Vol. 2 pp. 3985, 3205:4-3206:4).

lumbar puncture for [F.L.] when he suspected or should have suspected that he had bacterial meningitis." (Am. App. Vol. 1 p. 3956).

The jury returned a verdict finding Dr. Liewer and Dr. Mueting not negligent, and therefore did not provide answers to the other questions on the Verdict Form. (Am. App. Vol. 1 p. 3969).

STATEMENT OF THE FACTS

On April 5, 2015, F.L. was brought to the emergency room. Although he exhibited classic signs and symptoms of bacterial meningitis, his infection went undiagnosed and untreated at the hospital while his neurological condition deteriorated significantly, and he developed a severe bacterial meningitis infection.

Initially, F.L. was brought to the emergency department of Mercy Medical Center—Sioux City Hospital on April 3 (Good Friday), 2015. He was evaluated and treated for flu-like symptoms, including a fever, chills and a cough, and was sent home. Two days later, while attending a birthday party on April 5 (Easter Sunday), 2015, F.L. became ill with a high fever, a severe headache, body aches, nausea, vomiting, fainting and lethargy. Because his symptoms seemed worse than before, F.L.'s mother, Rosalinda Valles, decided to take him back to the hospital's emergency department. Dr. Joseph

Liewer, a board-certified emergency physician, and Dr. Andrew Mueting, a third-year resident in family practice, were the first doctors to examine F.L. at Mercy Medical Center. Although bacterial meningitis was apparently suspected, these physicians did not order a lumbar puncture to ascertain whether F.L. had a bacterial meningitis infection and did not provide him antibiotic therapy. (Am. App. Vol. 2 pp. 1776:18-1782:5, 1550:21-1615:12).

Because of the improper care and treatment provided to F.L., he suffered a devastating brain injury, with resulting permanent mental, physical and developmental disabilities. He will never be able to work or support himself, will require nearly constant care and supervision, and will be dependent for his entire life in all major activities of daily living. At the time he suffered his brain injury, F.L. was 11 years old.

Additional pertinent facts are set out in the Argument below.

ARGUMENT

I. The trial court erred in its interpretation of Iowa Code §147.136.

In this appeal, the Court is presented with the issue of whether the district court correctly interpreted Iowa Code §147.136, the statutory collateral source rule for medical malpractice cases.

Standard of Review

The Court reviews questions of statutory construction, including the interpretation of §147.136, for correction of errors at law. *Dykstra v. Iowa Dist. Ct.*, 783 N.W.2d 473, 477 (Iowa 2010). When interpreting statutes, the Court looks to the intent of the legislature based on the words used and what interpretation will best effect the purpose of the statute. *IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001). The "starting point in statutory interpretation is to determine if the language has a plain and clear meaning within the context of the circumstances presented by the dispute." *McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010). "When the text of a statute is plain and its meaning clear, the court should not search for a meaning beyond the express terms of the statute . . . ." *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999) (quoting *Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22, 25 (Iowa 1999)). If the language is ambiguous, then the Court may apply the rules of statutory construction. *McGill*, 790 N.W.2d at 118. Ambiguity in statutory language "exists only if reasonable minds could differ on the meaning." *Id.*

The doctrine of constitutional avoidance counsels courts to construe statutes to avoid constitutional issues when possible. *State v. Iowa Dist. Ct.*, 843 N.W.2d 76, 85 (Iowa 2014); *Mall Real Estate, L.L.C. v. City of Hamburg*,

818 N.W.2d 190, 200 (Iowa 2012); *see Ashwander v. Tenn. Valley Auth*., 297 U.S. 288, 345–48, 56 S. Ct. 466, 482–84, 80 L. Ed. 688, 710–12 (1936) (Brandeis, J., concurring).

Preservation of Issues

Plaintiff preserved error by resisting Defendants' Joint Motion for Summary Judgment Re: Texas Medicaid Payments as well as Defendants' Motion for Joinder of Indispensable Party. (Am. App. Vol. 1 pp. 830, 806). The trial court first granted the motion requesting joinder. (Am. App. Vol. 1 p. 1270). Next, the court granted in part and denied in part the joint summary judgment motion. (Am. App. Vol. 1 p. 1293).

Argument

The Iowa legislature passed §147.136 to eliminate the collateral-source rule in medical malpractice cases ostensibly in the hopes of decreasing malpractice premiums and making health care more affordable. *Heine v. Allen Memorial Hosp. Corp*., 549 N.W.2d 821, 823 (Iowa 1996); *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417, 424 (Iowa 1985); *Rudolph v. Iowa*

Methodist Med. Ctr., 293 N.W.2d 550, 558 (Iowa 1980). As such, the Iowa legislature could not have intended the reading of the statute at issue here.[14]

Under the statutory interpretation of Iowa Code §147.136 at issue, no family receiving Medicaid benefits outside the State of Iowa would ever be able to recover damages for medical expenses paid by Medicaid as a result of liability occurring in Iowa. If that same family stayed in Iowa, however, the money Medicaid paid because of a third party's liability would be recoverable. In that very realistic scenario, if a low-income family who received substandard medical care in Iowa wanted to move to a different state that has better medical care, the family would have to decide whether to move and get better care, or whether to stay and have the ability to potentially recover more in a lawsuit. This unfair choice would then both increase the burden on Iowa taxpayers and restrict the free movement of individuals throughout the United States.

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[14] The "medical malpractice crisis" Iowa Code §147.136 was intended to combat and the corresponding rise in professional liability insurance, has been discredited. (Am. App. Vol. 1 p. 1179). In fact, it was recently estimated that up to 1 in 5 Iowans have been received negligent medical care. *See* Tony Leys, *Many Iowans Have Suffered Medical Errors, and Most Weren't Told, Poll Finds*, DES MOINES REGISTER (1-8-18) (https://www.desmoinesregister.com/story/news/health/2018/01/08/many-iowans-have-suffered-medical-errors-and-most-werent-told-poll-finds/1008075001/).

Restricting F.L.'s freedom to move to another state would violate the United States Constitution. As the Supreme Court has stated, "Interstate travel is classified as a 'fundamental right' for substantive due process and equal protection purposes. "The exact source of the fundamental right of interstate travel is said to be uncertain, but it is probably based on the commerce clause or the privilege and immunities provisions of the United States Constitution." *City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989) (internal citations omitted). Further, the freedom to move between states is "assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974)).

As the United States Supreme Court has also recognized, "It is, of course, well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice is protected by the Federal Constitution." *Jones v. Helms*, 452 U.S. 412, 417-18 (1981). "Whatever its source, a State may neither tax nor *penalize* a citizen for exercising his right to leave one State and enter another." *Id.* at 419 (emphasis

added). And because "medical care" is a "basic necessity of life," any classification that restricts interstate movement to seek such healthcare "must be justified by a compelling state interest." *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974); *see also United States v. Guest*, 383 U.S. 745, 757 (1966).

The interpretation of Iowa Code §147.136 at issue in this case is unconstitutional because it *penalizes* F.L. for exercising his right to leave Iowa and enter Texas for purposes of obtaining the necessary healthcare he requires because of Defendants' negligence. There is nothing whatsoever to suggest that imposing such a penalty is justified by a compelling State interest. To the contrary, the interpretation at issue will restrict freedom of movement for people seeking medical care and would thereby increase Iowan's taxes by requiring the State to pay for the medical care of these individuals.

Under the doctrine of federal preemption, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824). "Federal law preempts state law not only where the two are plainly contradictory, but also where 'the incompatibility between [them] is discernible only through

inference.'" *Estate of Foster by Foster v. Shalala*, 926 F. Supp. 850, 862 (N.D. Iowa 1996) (quoting *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir. 1992)). Where Congress has not expressly ousted state law or intended to displace state regulation in an entire field, "state law is preempted to the extent that it actually conflicts with federal law." *Lankford v. Sherman*, 451 F.3d 496, 510 (8th Cir.2006) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983)).

An actual conflict exists where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Concerning Medicaid, "[i]f a state statute fails to conform with federal law, it may be invalidated to the extent necessary to harmonize the state scheme with the federal scheme." *Norwest Bank of N. Dakota, N.A. v. Doth*, 159 F.3d 328, 335 (8th Cir. 1998) (Heaney, J., concurring). Accordingly, "if there is *any tension* between the state and federal schemes, the state scheme must yield to the extent necessary to effectuate the federal scheme." *Id.* (emphasis added).

In enacting 42 U.S.C. §1396a(a)(25), Congress required states "to recover medical costs incurred under Medicaid programs from responsible

third parties, rather than relying on federal aid exclusively." *Barton v. Summers*, 293 F.3d 944, 951-52 (6th Cir. 2002). The language and design of the Medicaid Act illustrates "Congress's clearly expressed intention that these funds be repaid." *See Doth*, 159 F.3d at 333 (explaining 42 U.S.C. §1396k is designed "to maximize the effectiveness of [the Medicaid Act] by ensuring Medicaid is a payor [sic] of last resort"). Thus, Congress unequivocally intended Medicaid to be the payer of last resort. *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 291, 126 S.Ct. 1752, 1758, 164 L.Ed.2d 459 (2006); *Strand v. Ramussen*, 648 N.W.2d 95, 106 (Iowa 2002) (Medicaid is "the payer of last resort").

If Iowa Code §147.136 applies to Texas Medicaid payments, it would thwart the ability of the state of Texas, and any other state, "to recover medical costs incurred under Medicaid programs from responsible third parties." *See Barton*, 293 F.3d at 951-52; 42 U.S.C. §1396a(25). Consequently, §147.136 would force Texas to rely exclusively on federal aid, prevent Texas from carrying out its statutory mandate, and endanger federal funding to the state program. Such an interpretation would also, contrary to congressional intent, prevent repayment of funds to the federal government. *See Doth*, 159 F.3d at

333. Thus, as construed by the trial court, Iowa Code §147.136 stands as an obstacle to carry out federal objectives. *See Lankford*, 451 F.3d at 510.

Additionally, any argument that Texas' right to recovery is somehow extinguished here would bring about an unconstitutional result. Iowa cannot legislate outside its jurisdiction to remove a valid, contractual right of another state.

The United States Constitution's Full Faith and Credit Clause states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, §1. Pursuant to that Clause, Congress has stated, "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. §1738. The purpose of the full faith and credit command, as explained in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935), "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations

created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."[15] Under this constitutional mandate, Iowa must recognize Texas' right to recover the money that Texas Medicaid has spent on F.L.'s medical care needs, by means of a medical assistance lien on Plaintiff's recovery in this case that is in no way inferior to Iowa's.

II. The Trial Court Erred in Granting Summary Judgment in Favor of Defendants, Dr. Amy Wingert and Dr. Kelly Ryder.

Standard of Review

[15] *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861 (1995) ("Because powers are reserved to the States 'respectively,' it is clear that no State may legislate for another State: Even though the Arkansas Legislature enjoys the reserved power to pass a minimum-wage law for Arkansas, it has no power to pass a minimum-wage law for Vermont."); *Baker v. GM Corp*., 522 U.S. 222, 232 (1998) ("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'") (quoting *Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)); *BMW, N.A., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("But while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its own policy choice on neighboring States."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

Review of a summary judgment ruling is for corrections of errors of law. *Kennedy v. Zimmermann*, 601 N.W.2d 61, 63 (Iowa 1999).[16] The Court's function on appeal is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). Summary judgment is only appropriate when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007).

An issue of material fact exists if reasonable minds can differ on how the issue should be resolved. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). A court does not weigh the evidence but merely determines whether a reasonable jury could find for the nonmoving party based on the evidence presented. *Clinkscales v. Nelson Secs., Inc.*, 697 N.W.2d 836, 841

[16] "Our scope of review on appeal from an entry of summary judgment is well-settled. We, like the district court, are obliged to view the factual record in the light most favorable to the resisting party, affording that party all reasonable inferences that the record will bear. Summary judgment is proper only if the record made shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. If the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper. . . . Our review, therefore, is for the correction of errors at law." *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 649-50 (Iowa 2000) (citations omitted).

(Iowa 2005). Accordingly, "[m]ere skepticism of a plaintiff's claim is not a sufficient reason to prevent a jury from hearing the merits of a case." *Id.* The Court reviews the evidence in the light most favorable to the nonmoving party. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

When considering a motion for summary judgment, court must consider the entire record, including pleadings, the motion, the resistance, affidavits, admissions, deposition testimony, and exhibits. Iowa R. Civ. P. 1.981(3); *Thomas v. Gavin*, 838 N.W.2d 518, 521 (Iowa 2013); *Porter v. Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993). The court must "view the record in the light most favorable to the nonmoving party" and "grant that party all reasonable inferences that can be drawn from the record." *Estate of Gray ex rel. Gray v. Baldi*, 880 N.W.2d 451, 455 (Iowa 2016) (quoting *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011)). The court "will indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 228 (Iowa 2004). A fact question is generated if reasonable minds can differ on how the issue should be resolved. *See McIlravy* 653 N.W.2d at 328; *Walker v. Gribble,* 689 N.W.2d 104, 108 (Iowa 2004).

The moving party has the ultimate burden to demonstrate there are no genuine issues of material fact. *McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841, 843–44 (Iowa 2002). An issue of material fact exists when "the dispute involves facts which might affect the outcome of the suit, given the applicable governing law." *Nelson v. Lindaman*, 867 N.W.2d 1, 6 (Iowa 2015). "An issue is 'genuine' if the evidence in the record 'is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008)).

Preservation of Error

Plaintiff preserved error by resisting Defendants' Motions for Summary Judgment. (Am. App. Vol. 1 pp. 1513, 2569). As previously indicated, the summary judgment motions came before the trial court for hearing on September 26, 2018. (Am. App. Vol. 2 pp. 99:12-125:15). Subsequently, the trial court granted these motions on October 2, 2018. (Am. App. Vol. 1 pp. 2877, 2885); *see Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005) ("[I]f a motion for summary judgment presented the issue to the district court and the district court ruled on it, the rule requiring the district court to first consider issues raised on appeal is satisfied.").

Argument

A. The existence of a physician-patient relationship is a question of fact to be determined by the jury.

"A physician owes a duty to his patient to exercise the ordinary knowledge and skill of his or her profession in a reasonable and careful manner when undertaking the care and treatment of a patient." *J.A.H. ex rel. R.M.H. v. Wadle & Assocs.*, P.C., 589 N.W.2d 256, 260 (Iowa 1999). This duty is usually "based on privity, arising from the contractual relationship between the two." *Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393, 401 (Iowa 2017). "Although this contractual physician-patient relationship is sufficient to establish a duty, it is not required." *Id.* In fact, as far as the medical profession is concerned, Iowa courts have relaxed the privity requirement even more so than in other professions such as the legal and accounting professions. *See J.A.H.*, 589 N.W.2d at 260 (citing *Freese v. Lemmon*, 210 N.W.2d 576 (Iowa. 1973)). This is because a medical malpractice case is based on professional negligence, and there is no requirement for the plaintiff to plead or prove a special contractual relationship existed at the time of injury.

Furthermore, the existence of a physician-patient relationship is a usually a question of fact reserved for the jury, except where the facts are

undisputed. A legal duty "is defined by the relationship between individuals; it is a legal obligation imposed upon one individual for the benefit of another person or particularized class of persons." *Sankey v. Richenberger*, 456 N.W.2d 206, 209 (Iowa 1990). "Whether, under a given set of facts, such a duty exists is a question of law." *Leonard v. State*, 491 N.W.2d 508, 509 (Iowa 1992).

In cases like this, however, the "determination as to whether a duty exists (a question of law) is dependent upon a question of fact that must be decided by the jury." *Kelley v. Middle Tennessee Emergency Physicians, P.C.*, 133 S.W.3d 587, 598 (Tenn. 2004). The Supreme Court of Michigan (in a non-medical malpractice context) explained this distinction:

> It is commonplace to say that a particular defendant owes a duty to a particular plaintiff, but such a statement, although not incorrect, merges two distinct analytical steps. *It is for the court to determine, as a matter of law, what characteristics must be present for a relationship to give rise to a duty the breach of which may result in tort liability. It is for the jury to determine whether the facts in evidence establish the elements of that relationship.* Thus, the jury decides the question of duty only in the sense that it determines whether the proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law.

Smith v. Allendale Mut. Ins. Co., 303 N.W.2d 702, 714-15 (Mich. 1981) (emphasis added). Thus, "it is generally held in medical malpractice cases that

the question of whether a physician-patient relationship exists is a question of fact to be decided by the jury." *Kelley*, 133 S.W.3d at 598.[17]

Additionally, a physician-patient relationship may be either express or implied. *See Dougherty v. Gifford*, 826 S.W.2d 668, 674-75 (Texas App. 1992) (implying relationship between patient and pathologist because diagnostic services were furnished on a patient's behalf); *Walters v. Rinker*, 520 N.E. 2d 468, 471-472 (Ind. Ct. App. 1988) (implying relationship between patient and pathologist just because patient's treating physician requested pathologist's services on behalf of patient).

[17] The majority of jurisdictions have concluded that whether a physician-patient relationship exists is generally a question of fact for the jury. *See, e.g.*, *Dodd–Anderson v. Stevens*, 905 F. Supp. 937, 944 (D. Kan.1995), *aff'd* 107 F.3d 20 (10th Cir. 1997) (explaining that the existence of a physician-patient relationship is a question of fact); *Walker v. Jack Eckerd Corp.*, 434 S.E.2d 63, 69 (Ga. Ct. App. 1993) (finding existence of physician-patient relationship is question of fact for jury); *Gallion v. Woytassek*, 504 N.W.2d 76, 80 (Neb. 1993) (noting that it is the purview of jury to determine whether physician-patient relationship exists); *Irvin v. Smith*, 31 P.3d 934, 940-41 (Kan. 2001); *Cogswell v. Chapman*, 249 A.D. 2d 865, 866 (N.Y. App. Div. 1998) (explaining it is generally a question of fact for the jury whether an implied physician-patient relationship exists); *Brown v. Central Suffolk Hosp.*, 163 A.D.2d 269, 557 N.Y.S.2d 139, 139-40 (N.Y. App. Div. 1990); *Tumblin v. Ball–Incon Glass Packaging*, 478 S.E.2d 81, 85 (S.C. Ct. App. 1996) (stating existence of physician-patient relationship is question of fact for the jury); *Lyons v. Grether*, 239 S.E.2d 103, 105 (Va. 1977) (holding that physician-patient relationship is a question of fact).

As such, whether an on-call physician's actions create a physician-patient relationship and the resulting duty of care is a question of fact better suited for the jury. *See Schroeder v. Hinrichs*, No. 07821LACE103154, 2005 WL 5190743 (Iowa Dist. Sep. 29, 2005). In *Schroeder*, the defendant argued that his status as an on-call physician and consultation with another physician via telephone did not establish a physician-patient relationship because the call concerned a person who was not his patient. *Id.* The court explained that "the fact that a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship." *Id.* The defendant had access to the patient's medical records and provided an opinion on whether the patient should be admitted to the hospital. Because the court determined the existence of a physician-patient relationship was a genuine issue of material fact, it denied the defendant's motion for summary judgment. *Id.*

The facts and questions raised in *Schroeder* are similar to those here—i.e., whether on-call doctors (Dr. Wingert and Dr. Ryder) who did not deal directly with the patient (F.L.) formed a physician-patient relationship. The questions of whether physician-patient relationships existed here between

F.L. and Drs. Wingert and Ryder are therefore questions of fact the jury should decide.

In the present case, after F.L. was admitted to the hospital, his neurological condition deteriorated significantly. Concerned about his well-being, his nurse, Sandra Lang, reached out to the on-call residents in family practice, Dr. Kelly Ryder and Dr. Amy Wingert. Nurse Lang first paged Dr. Wingert, but Dr. Wingert never returned Nurse Lang's page. After not hearing back from Dr. Wingert, Nurse Lang reached out to Dr. Ryder, another on-call resident who was responsible for covering patients on the pediatrics floor of the hospital. Dr. Ryder returned the page and spoke with Nurse Lang. And, while Nurse Lang explained, in detail, all of her concerns about F.L.'s worsening medical condition, Dr. Ryder took no action whatsoever. Defendants' contentions that no reasonable mind could conclude from the evidence that a physician-patient relationship existed between them and F.L. giving rise to a duty of care, and that this duty of care was breached, is simply meritless, especially in light of the undisputed facts, the reasonable inferences that may be drawn therefrom, and the disputed issues of material fact, as explained below.

B. <u>The trial court, in ruling on the summary judgment motions in this case, failed to view the evidence in totality</u>

in the light most favorable to Rosalinda Valles and F.L. and abused its discretion.

In this case, there was substantial direct and circumstantial evidence which, when viewed in the light most favorable to the Plaintiff, should have precluded entry of summary judgment on the medical malpractice claims against Dr. Wingert and Dr. Ryder. The Plaintiff placed evidence in the summary judgment record to show that a suitably qualified physician had formed an opinion that would satisfy Plaintiff's requirement to offer expert testimony which would allow her case to proceed. The trial court erroneously failed to view the entirety of the evidence in the light most favorable to the Plaintiff, and abused its discretion in improperly weighing the evidence and disregarding evidence that supported the Plaintiff's claims.

"The test for determining [the] admissibility [of circumstantial evidence] is that the offered proof must lead to a reasonable inference and not a mere suspicion of the existence of the fact sought to be proven." *Smith v. Pine*, 12 N.W.2d 236, 242 (Iowa 1943). Courts should afford "wide latitude" in admitting circumstantial evidence, "especially where direct evidence is lacking." *Id.* The law is well settled that where a party must rely on circumstantial evidence to prove a theory, the court should be very liberal and allow "great latitude" in admitting such evidence. *Hayes v. Stunkard*, 10

N.W.2d 19, 23 (Iowa 1943). Circumstantial evidence is especially relevant in negligent credentialing claims because direct evidence is precluded by Iowa's peer-review statute.

Direct evidence is the evidence of the witnesses to facts which they have knowledge of by means of their senses, and circumstantial evidence is the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. Put another way:

> The basic distinction between direct and circumstantial evidence is that in direct evidence the witnesses testify of their own knowledge as to the ultimate facts to be proved, while circumstantial evidence relates to instances where proof is given of facts and circumstances from which the finder of fact may infer other connected facts which reasonably follow, according to the common experience of mankind.

Jennings v. Farmers Mut. Ins. Ass'n, 149 N.W.2d 298, 301 (Iowa 1967).

Evidence is not rendered less persuasive by being circumstantial. *Wroblewski v. Linn-Jones FS Servs., Inc.*, 195 N.W.2d 709, 712 (Iowa 1972). The Iowa Supreme Court has "repeatedly held that circumstantial evidence is admissible and can form the basis or in some cases a part of the basis for submission of the case to the jury." *Turner v. Hansen*, 75 N.W.2d 341, 345 (Iowa 1956). "Knowledge, of course, may be proved by circumstantial evidence." *Loghry v. Capel*, 132 N.W.2d 417, 420 (Iowa 1965). And while

direct and circumstantial evidence are "equally probative," *Thacker v. Eldred*, 388 N.W.2d 665, 670 (Iowa Ct. App. 1986), circumstantial evidence is even "more reliable than direct evidence" in some cases. *State v. Stamper*, 195 N.W.2d 110, 111 (Iowa 1972); *see also Turner*, 75 N.W.2d at 345 ("The facts may be established as well, and sometimes better, by circumstantial evidence than by the direct testimony of witnesses.").

To prove a claim by circumstantial evidence, the evidence must be "reasonably probable and not merely possible." *Jennings*, 149 N.W.2d at 301. "But this means only the evidence must be such as to raise a jury question within the limits of the foregoing rule; it need not be conclusive." *Wroblewski*, 195 N.W.2d at 712. Nor must it "exclude every other possible theory." *Jennings*, 149 N.W.2d at 301. And, as is critical here, "it is generally for the trier of fact to say whether circumstantial evidence meets this test." *Wiley v. United Fire & Cas. Co.*, 220 N.W.2d 635, 635 (Iowa 1974).

If the trial court had viewed the direct and circumstantial evidence in the light most favorable to the Plaintiff, and had properly considered that evidence in its ruling on Dr. Wingert's and Dr. Ryder's dispositive motions, then a jury would have weighed the evidence and determined whether or not these physicians were negligent in failing to take action to properly care for

and treat F.L.'s bacterial meningitis infection. "Because resolution of issues of negligence and proximate cause turns on the reasonableness of the acts and conduct of the parties under all the facts and circumstances, actions for malpractice "'are ordinarily not susceptible of summary adjudication.'" *Campbell v. Delbridge*, 670 N.W.2d 108, 110 (Iowa 2003) (quoting *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990)). Accordingly, "[t]he question of whether negligence is established under the evidence is almost without exception said to be inappropriate for summary judgment treatment." *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989). And as is pertinent here, "the critical issue in this case is not whether there was *negligence* in the actions of the defendant but whether there was *evidence* upon which liability could be found." *Id.*

Here, it should have been the jury's province to decide whether these Defendants were in a physician-patient relationship with F.L. While the issue of whether these Defendants owed F.L. a duty of care is a question of law, the existence of a physician-patient relationship that gives rise to that duty, and whether the physician in that relationship breached accepted standards of care, are factual determinations the jury should decide.

1. Genuine issues of material fact existed as to whether a physician-patient relationship existed between Dr. Wingert and F.L.

There were material issues of fact concerning Dr. Wingert's level of participation in F.L.'s treatment that give rise to a physician-patient relationship and therefore a duty to treat him according to accepted standards of care. Dr. Wingert was the on-call resident assigned to Mercy's Pediatric Unit on April 7, 2015, from noon until 6 p.m. (Am. App. Vol. 1 p. 1537.) During this time, Dr. Wingert took care of family medicine patients that would have come into the emergency department at Mercy, such as F.L. (Am. App. Vol. 1 p. 1534). Nevertheless, Dr. Wingert never even reviewed F.L.'s medical records during her shift.

On April 7, 2015, Nurse Sandra Lang paged Dr. Wingert at 2:15 p.m. (Am. App. Vol. 1 p. 1540). Dr. Wingert did not call Nurse Lang back even though she had primary responsibility for F.L.'s care. (Am. App. Vol. 1 pp. 1540, 1545). Nurse Lang testified that she had unsuccessfully reached out to Dr. Wingert and that she wanted to provide Dr. Wingert with a progress report because she was concerned about F.L.'s health. (Am. App. Vol. 1 pp. 1544, 1545).

Contrary to Dr. Wingert's position in the summary judgment proceeding, there is no evidence whatsoever that the page Nurse Lang sent to Dr. Wingert did not go through or that Dr. Wingert did not receive this page. Indeed, the evidence, when viewed in the light most favorable to the Plaintiff indicates that Dr. Wingert got the page and simply did not return it. And as the available, paged on-call resident, a reasonable juror could conclude that Dr. Wingert had a physician-patient relationship with F.L. that was breached when she did not return the page. Accordingly, summary judgment in favor of Dr. Wingert was inappropriate.

2. Genuine issues of material fact existed as to whether a physician-patient relationship existed between Dr. Ryder and F.L.

Nurse Lang paged Dr. Ryder at 4:24 p.m. (Am. App. Vol. 1 p. 1541). Dr. Ryder returned Nurse Lang's page at 4:30 p.m., and Nurse Lang provided her with a report on F.L.'s condition. (Am. App. Vol. 1 pp. 1541, 1545). Dr. Ryder testified in her deposition that she does not have an independent recollection of speaking with Nurse Lang or receiving her page. (Am. App. Vol. 1 p. 1716).

Nurse Lang testified that she called Dr. Ryder because she had unsuccessfully reached out to Dr. Wingert, and that she wanted to provide an

on-call resident with a progress report because she was concerned about F.L.'s status. (Am. App. Vol. 1 pp. 1544, 1545). Specifically, Nurse Lang was concerned that F.L. had vomited again, that he had an unsteady gait, that he was complaining of eye twitching, that his eyes deviated upward, that he voided amber urine, that his fever spiked, and that he had a frontal headache. (Am. App. Vol. 1 p. 1545). Nurse Lang testified that she told Dr. Ryder about this because it was a change in F.L.'s condition. (Am. App. Vol. 1 p. 1545).

Dr. Ryder had access to F.L.'s electronic medical record and could have accessed information regarding his history, including the multiple references to meningitis in his chart and discussions about obtaining a lumbar puncture if his condition did not improve or got worse. (Am. App. Vol. 1 p. 1715).

Dr. Ryder did nothing in response to Nurse Lang's concerns—she did not contact a supervising doctor, never reviewed F.L.'s medical records, entered no progress notes in the chart, issued no orders, failed to order a lumbar puncture or antibiotics, and did nothing to change the treatment plan for F.L. despite his deteriorating medical condition as reported by Nurse Lang. (Am. App. Vol. 1 pp. 1717. 1476).

When Nurse Lang reached out to Dr. Ryder and relayed her concerns, a physician-patient relationship was formed and Dr. Ryder had a duty to treat

F.L. appropriately. (Am. App. Vol. 1 pp. 2575, 2600). In sum, Dr. Ryder's failure to appropriately respond to Nurse Lang's concerns was a breach of accepted standards of care.

C. Even in the absence of a physician-patient relationship, Defendants owed a duty of care to F.L.

In deciding whether to impose a duty, three factors govern the analysis: (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. *Leonard*, 491 N.W.2d at 509-12. Courts use these factors under a balancing approach and not as three distinct and necessary elements. *Id.* at 512. At the heart of the matter, whether a duty exists is a policy decision based upon all relevant considerations that guide a conclusion that a particular person is entitled to be protected from a particular type of harm. *See Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 285 (Iowa 1981).

"Duty is, after all, merely 'an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" *Diggs v. Arizona Cardiologists Ltd.*, 8 P.3d 386, 389 (Ariz. App. 2000) (quoting *Ontiveros v. Borak*, 667 P.2d 200, 208 (Ariz. 1983)). The duty of a physician or surgeon to bring skill and care to the amelioration of the condition of his patient does not arise from contact, but

has its foundation in public considerations that are inseparable from the nature and exercise of his calling. *See* AM. JR. 2D PHYSICIANS, SURGEONS AND OTHER HEALERS 202 (1964).

III. The Trial Court Reversibly Erred in Failing to Properly Instruct the Jury on the Respective Specialist Standards of Care Owed to F.L. by Dr. Andrew Mueting and Dr. Joseph Liewer.

Standard of Review (Instructional Error)

"Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." *Alcala v. Marriott International, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (citing *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)). "The verb 'require' is mandatory and leaves no room for trial court discretion." *Id.* Thus, appellate review of nondiscretionary refusals to give requested jury instructions that are supported by the evidence and applicable law, as in the present case, is for "correction of errors at law," and is not based on the abuse-of-discretion standard.

Moreover, in reviewing whether substantial evidence supports submission of certain instructions to the jury, appellate courts must view the evidence in the light most favorable to the party advocating submission of the instructions. *Asher v. Ob-Gyn Specialists, P.C.*, 846 N.W.2d 492, 495, 496-

97 (Iowa 2014) (citing *Hoekstra v. Farm Bureau Mut. Ins. Co*., 382 N.W.2d 100, 107–08 (Iowa 1986)), *overruled on other grounds by Alcala*, 880 N.W.2d at 707-08.

Finally, "an instructional error must be prejudicial to warrant reversal." *Mumm v. Jennie Edmundson Memorial Hospital*, 924 N.W.2d 512, 518 (Iowa 2019) (citations omitted).

Preservation of Error

Plaintiff preserved the claimed instructional errors. As previously indicated, she repeatedly requested jury instructions on the specialist standards of care applicable to physicians practicing within the medical specialties of family practice (Dr. Mueting) and emergency medicine (Dr. Liewer), before the trial court submitted its final jury instructions in this case. (Am. App. Vol. 1 pp. 3261, 3528). She specifically objected to the Defendant's proposed instruction on a nonspecialist standard of care applicable to Dr. Mueting and Dr. Liewer alike. (Am. App. Vol. 1 p. 3772; Vol. 2 p. 2940:5-9). Pursuant to the trial court's directions, Plaintiff also submitted her objections, in writing, to the Final Instructions afterwards. (Am. App. Vol. 1 pp. 3985-3986; Vol, 2 pp. 3205:4-3206:4).

Argument

A nonspecialist physician must act consistently with the standards required of other physicians under similar circumstances. A nonspecialist physician's conduct is measured against other physicians practicing under such circumstances in the same or similar locality as the defendant's practice. *See Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 89 (Iowa 2004) (rejecting contention the locality rule is not part of Iowa's medical malpractice jurisprudence in a case involving a nonspecialist physician).

On the other hand, a specialist physician's performance is not measured against the care and skill of nonspecialist physicians under similar circumstances, but instead, is measured against a standard commensurate with that of a physician practicing in that specialty under similar circumstances. *See Schroeder v. Albaghdadi*, 744 N.W.2d 651, 655-56 (Iowa 2008) (citing *McGulpin v. Bessmer*, 241 Iowa 1119, 1132, 43 N.W.2d 121, 128 (1950) ("A physician . . . who is held out as a specialist is required to exercise that degree of skill and care ordinarily used by similar specialists in like circumstances, having regard to the existing state of knowledge in medicine . . ., not merely the average skill and care of a general practitioner.")); *accord, Jordan v. Bogner*, 844 P.2d 664, 666-67 (Colo. 1993) (recognizing distinctions between

specialist and nonspecialist standards of care); *Aaheim v. Humberger*, 215 Mont. 127, 695 P.2d 824, 827 (Mont. 1985) (finding that the locality rule bears no rational relationship to specialist standard of care); *Orcutt v. Miller*, 95 Nev. 408, 595 P.2d 1191, 1194 (Nev. 1979) (holding that a board-certified specialist should be held to national standards of the specialty rather than the locality rule); *Restatement (Second) of Torts §299A cmt. d* (1965); *see also Gittens v. Christian*, 600 F. Supp. 146, 148-49 (D. V.I. 1985) (holding that a family practice specialist should be held to a higher degree of care than a general practitioner), *aff'd*, 782 F.2d 1028 (3d Cir. 1986). While a physician's ability to conform to the specialist standard of care may be affected by the circumstances existing at the time and place of his performance, these circumstances do not alter the requirement that the specialist conform to the professional standards of the specialty, and do not allow the specialist to be measured by the locality rule. Instead, a specialist is measured against a national standard and by what a reasonable physician certified in that specialty would or would not do under similar circumstances.

In the present case, the evidence at trial was undisputed that Dr. Liewer was a specialist in emergency medicine. Thus, the Plaintiff-Appellant properly requested the trial court to give an instruction patterned on Iowa Civil

Jury Instruction 1600.3 (Negligence – Duty of Physician – Specialist). The cases cited as authority in Instruction No. 1600.3 clearly articulate that different language must be used to define the duty of a specialist like Dr. Liewer, who should be held to the higher emergency medicine specialist standard of care, as contrasted with the average care and skill of a general practitioner. *See McGulpin*, 43 N.W.2d at 128; *Perini v. Hayne*, 210 N.W.2d 609, 615 (Iowa 1973). But, the trial court erroneously failed to give the Plaintiff's requested instruction on the emergency medicine specialist standard of care owed by Dr. Liewer.

Furthermore, the evidence at trial was undisputed that Dr. Mueting was in the third year of a residency program in family medicine, which is a recognized medical specialty. While it is true that Dr. Mueting was just a resident in the specialty of family practice, the majority rule throughout the United States holds residents to the same standard of care as physicians who have completed their residency in the same field of medicine. *Centman v. Cobb*, 581 N.E.2d 1286, 1290 (Ind. Ct. App. 1991); *Green v. State Through Southwest Louisiana Charity Hospital*, 309 So. 2d 706, 709 (La. Ct. App. 1975); *contra*, *Rush v. Akron General Hospital*, 171 N.E.2d 378, 381 (Ohio Ct. App. 1957); *accord*, *Arpin v. United States*, 521 F.3d 769, 774-75 (7th Cir.

2008); *Ayers v. United States*, 750 F.2d 449, 455-56 (5th Cir. 1985); *McBride v. United States*, 462 F.2d 72, 73-74 (9th Cir. 1972); *Eureka-Maryland Assurance Co. v. Gray*, 121 F.2d 104, 107 (D.C. Cir. 1941). *See generally* Joseph H. King, *The Standard of Care for Residents and Other Medical School Graduates in Training*, 55 Am. U. L. Rev. 683, 751 (2006); Justin L. Ward, *Medical Residents: Should They be Held to a Different Standard of Care*, 22 J. Legal Med. 283 (2001).

The Plaintiff-Appellant properly requested the trial court to give Iowa Civil Jury Instruction 1600.3 (Negligence – Duty of Specialist) with respect to Dr. Mueting's performance within his family practice specialty. Again, the cases cited as authority in Instruction No. 1600.3 clearly articulate that different language must be used to define the duty of a specialist such as Dr. Mueting, who should be held to the higher family practice specialist standard of care. It was also erroneous for the trial court to use the exact same language for Dr. Mueting and Dr. Liewer, when Dr. Liewer was practicing in the hospital's emergency department within his emergency medicine specialty, while Dr. Mueting was practicing within the specialty of family practice. The language of Plaintiff-Appellant's requested specialist standard of care instructions would have instructed the jury to compare Dr. Mueting's

actions against what a family practice specialist would have done in similar circumstances at Mercy Hospital.

Based on the facts of this case, the trial court should not have given the jury a nonspecialist standard of care instruction. Because the Plaintiff-Appellant's requested instructions correctly stated the law, had application to the case, and were not stated elsewhere in the instructions, the trial court erred in failing to instruct the jury on the respective specialist standards of care owed by Dr. Liewer and Dr. Mueting to F.L., and this Court must decide whether that failure was reversible error.

The Supreme Court, in *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553 (Iowa 2017), said that appellate courts will "assume prejudice unless the record affirmatively establishes that there was no prejudice." *Id.* at 570 (citing *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 903 (Iowa 2015)). The burden is on the party claiming harmlessness to overcome the presumption of prejudice.

Nonetheless, "[w]hen a jury instruction fails to convey a central principle of liability, this warrants a new trial." *Rivera,* 865 N.W.2d at 903. Here, the trial court's erroneous standard of care instruction was a case central instruction on the elements of liability and went to the very heart of this case.

Although applying the harmless-error doctrine is viewed as a "delicate task that should emphasize humility over hubris," *see id.*, the Court here should find that the instructional error was material and not harmless, thereby warranting a new trial on the Plaintiff's claims against Dr. Mueting, Dr. Liewer and Northwest Iowa Emergency Physicians, P.C.

IV. The Trial Court Erred When it "Reserved Ruling" on Plaintiff's Motion for a Directed Verdict on the Defendants' Defense of Mercy Medical Center—Sioux City Hospital's Comparative Fault.

The Court in this case must decide whether the trial court erred by submitting the defense of comparative-fault of the hospital to the jury for resolution, without the jury's having heard any expert testimony or competent proof of the applicable hospital or nursing duties of care attributable to Mercy Medical Center or the breach of such duties, let alone expert evidence that any acts or omissions on the part of the nursing staff was a cause of some or all of the claimed injuries, damages or losses.

Standard of Review

The Court's review of a trial court's decision on a motion for directed verdict is generally for correction of errors at law. *Pavone v. Kirke*, 801 N.W.2d 477, 486–87 (Iowa 2011). Furthermore, issues relating to a trial court's decision on whether to submit a comparative-fault defense may be

reviewed for correction of errors at law. *DeMoss v. Hamilton*, 644 N.W.2d 302, 305 (Iowa 2002).

Iowa case law unequivocally holds that expert testimony is required to prove the elements of professional negligence and causation in a medical malpractice case. *See, e.g., Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991) ("Professional liability cases, especially medical malpractice actions, require expert testimony of a technical nature concerning standards of care and causation."); *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001) (holding expert testimony is nearly always required to establish each element of a prima facie of medical malpractice claim, including causation). This principle should extend to a comparative-fault defense involving alleged medical malpractice attributable to a settling defendant in a medical malpractice case, since there is no logical basis for imposing requirements of expert evidence when plaintiffs have the burden of proof, but not when non-settling defendants have the burden of proof on a comparative-fault defense, where both the claim and defense involve the same defendant.

Preservation of Error

The Plaintiff preserved the error by moving the trial court for a directed verdict on the Defendant's comparative fault defense, renewing this motion,

and repeatedly requesting a ruling. (Am. App. Vol. 2 pp. 3047:13-3048:17, 3052:9-3053:10, 3064:7-3066:14). The court said it was reserving ruling on the motion, and declined to make any definitive ruling whatsoever. (Am. App. Vol. 2 pp. 3052:1-6, 3053:11, 3067:2-3068:13). After trial, the Plaintiff once again requested a ruling on her directed verdict motion, which the Defendants opposed on grounds of mootness. (Am. App. Vol. 1 pp. 3990, 3998).

Argument

The evidence presented at trial in this case was insufficient to support the Defendants' defense of comparative-fault on the part of the settling defendant, Mercy Medical Center—Sioux City Hospital, or its nursing staff, or the final instructions given to the jury on that defense. The evidence presented was also insufficient to show that any act or omission of the hospital or its nursing staff was a factual cause of the claimed injuries, damages or losses suffered by F.L.

The Defendants evidently made a strategic decision not to introduce any such expert evidence, but instead, to try to capitalize on the fact of the Plaintiff's settlement with the hospital, hoping the jury would therefore shift some of the blame to Mercy Medical Center—Sioux City Hospital along with other settling defendants. Throughout the trial, defense counsel urged that

F.L.'s brain injury occurred on the settling defendants' watch and common sense was that the subsequent care and treatment performed by the settling defendants caused F.L.'s tragic injuries.

However, because the record here contains no expert evidence or other competent proof of the applicable hospital or nursing standard of care for purposes of the Defendants' comparative-fault defense, let alone that Mercy Medical Center—Sioux City Hospital or its nursing staff breached their duties to F.L. or caused any of F.L.'s injuries or losses, this defense should have been stricken.

Finally, the trial court's finding that its decision did not prejudice the Plaintiff is clearly erroneous. As indicated above, because the comparative-fault defense was submitted to the jury for resolution, the Plaintiff was required to address it in closing argument, including remarks on the jury's task of allocating percentages of fault among the Defendants and the settling defendants. (Am. App. Vol. 2 pp. 3104:2-3105:24). Had the trial court made a definitive ruling on the Defendants' comparative-fault defense and ordered it to be stricken, then the jury instructions on that defense, as well as argument on issues relative to the alleged fault of the hospital or its nursing staff would

not have been needlessly submitted to the jury and injected into an already complicated closing and fact-finding process.

V. The Trial Court Erred in Allowing the Defendants to Present Previously Undisclosed, Unjustified and Harmful Expert Testimony and Opinions of an Expert in Neuroradiology, Dr. Joel Meyer.

Standard of Review

Iowa R. Civ. P. 1.508(4), entitled "[e]xpert testimony at trial," provides, "The expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's disclosures [or] report . . . ." Parties also have a "duty to supplement" their initial disclosures "no later than 30 days before trial" under Iowa R. Civ. P. 1.508(3). The obvious purpose of the rule is to avoid surprise to litigants and to allow the parties to formulate their positions on as much evidence as is available.

The standard of review applicable to a trial court's decision on exclusion of expert evidence based on an inadequate disclosure is abuse of discretion. *Lawson v. Kurtzhals,* 792 N.W.2d 251, 259 (Iowa 2010); *Sullivan v. Chicago & N.W. Transportation Co.*, 326 N.W.2d 320 (Iowa 1982).

Among the factors that should be considered to assess the appropriateness of possible sanctions for inadvertent nondisclosure are: "(1) the party's reasons for not providing the challenged evidence during

discovery; (2) the importance of the evidence; (3) the time needed for the other side to prepare to meet the evidence; and (4) the propriety of granting a continuance." *Id*. (quoting 27 C.J.S. *Discovery* §102 at 169 (2009)).

Preservation of Error

The Plaintiff preserved error by asking the trial court to limit Dr. Meyer's testimony based on the four corners of his disclosure, after proving the two-page disclosure to the court for review. (Am. App. Vol. 2 pp. 1935:2-6, 1937:8-1938:6, 1949:6-9, 1956:9-1958:9). As indicated above, the trial court made a preliminary ruling on the permissible scope of Dr. Meyer's expert testimony. (Am. App. Vol. 2 p. 1959:3-20). Plaintiff also made a number of contemporaneous objections to Dr. Meyer's undisclosed, unjustified and prejudicial testimony that exceeded the disclosure, which the trial court mostly overruled. (Am. App. Vol. 2 pp. 1973:10-2027:12, *cf.* pp. 1387:18-1483:1).

Argument

Applying the 4-factor test in assessing the appropriateness of sanctions,

- There was no substantial justification or excuse for the Defendants' failure adequately to disclose Dr. Meyer's opinions that were not contained in his initial 2-gae

disclosure, or for their failure to supplement that disclosure with additional information as to his new opinions. This complex medical malpractice action had been pending for a number of years and there was ample time to disclose Dr. Meyer's opinions and to supplement his disclosure prior to trial. In this case, the disclosure occurred at the time of trial, during the Plaintiff's case-in-chief, when Dr. Meyer was called by defense counsel out of order.

- Plaintiff was significantly harmed by the nondisclosure, after Dr. Meyer was permitted to testify regarding his undisclosed opinions on direct examination. Dr. Meyer was allowed to present testimony that the damage to F.L.'s brain was not caused by meningitis; that a CT scan taken on April 8, 2015, was negative, signifying that F.L. couldn't have had meningitis on April 5, 2015; that follow-up MR imaging studies indicated that the damage to F.L.'s brain injury resulted from brain infarction or hypoxic-ischemic injury caused by a respiratory

compromise that must have occurred sometime early in the morning on April 8, 2015; and to expansively disagree with opinions that had supposedly been expressed by the Plaintiff's neuroradiology expert, Dr. Neel Madan. (Am. App. Vol. 2 pp. 1973:10-2027:12; *cf.* pp. 1387:18-1483:1).

- Plaintiff had no ability to depose Dr. Meyer about his undisclosed opinions or their basis, since they were presented at trial, during the Plaintiff's case in chief, when Dr. Meyer was called by defense counsel out of order.
- There was no prospect for a trial continuance.

The nondisclosure of Dr. Meyer's opinions in this case was not inadvertent. The Defendants' failure to disclose his expert evidence prejudiced the Plaintiff by denying her an adequate opportunity to defend against the evidence or to secure rebuttal evidence for use at trial.

There is no indication that the trial court considered the 4-factor test, let alone weighed the factors. In failing to limit Dr. Meyer's testimony under the circumstances of this case, the trial court committed a clear abuse of discretion.

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant Rosalinda Valles requests that this Court reverse the trial court's final judgment in favor of Defendants, Andrew Mueting, D.O., Joseph Liewer, M.D. and Northwest Iowa Emergency Physicians, P.C., and remand the case for a new trial against these Defendants, with directions (1) to submit jury instructions on the specialist standards of care applicable to physicians practicing with the medical specialties of family practice (Dr. Mueting) and emergency medicine (Dr. Liewer); (2) to strike the Defendants' defense of comparative fault of Mercy Medical Center—Sioux City Hospital; and (3) to preclude the Defendants and Dr. Joel Meyer from presenting expert evidence that was not contained in his expert disclosure.

Furthermore, Plaintiff-Appellant requests that this Court reverse the trial court's orders granting summary judgment in favor of Defendants, Dr. Kelly Ryder and Dr. Amy Wingert, with directions to reinstate the claims against these Defendants.

Lastly, but perhaps most importantly, Plaintiff-Appellant requests that this Court review the trial court's orders joining of the Texas Health and Human Services Commission as an indispensable party and determining as a

matter of law that Iowa Code section 147.136 precludes the Defendants' liability for damages for past medical expenses that have been paid by Texas Medicaid.

After such review, Plaintiff-Appellant asks that this Court hold that the Plaintiff is not precluded from recovering as damages any medical expenses that have been provided for F.L. under the Texas Medicaid program, with respect to which the State of Texas or its Medicaid agency may have a medical assistance lien pursuant to law.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Rosalinda Valles hereby requests oral argument on the issues raised herein.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1), (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 13,149 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

/s/Benjamin I. Sachs 2/27/20
SIGNATURE DATE

CERTIFICATE OF COST

The undersigned hereby certifies that the cost of producing the necessary copies of Appellant's Final Brief was $0.00.

DATED this 27th day of February, 2020.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

The undersigned hereby certifies on this 27th day of February, 2020, that the foregoing Appellant's Final Brief was filed with the Clerk of Court using the electronic filing system, which will send notification of such filing to the following:

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