

**IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 20-1228
(Woodbury County No. LACV190500)**

JACQUELINE STRUCK,
Plaintiff-Appellee,

vs.

MERCY HEALTH SERVICES-IOWA, CORP. A/K/A MERCY MEDICAL
CENTER – SIOUX CITY, RODNEY J. DEAN, MD, ALBERT OKINE, PA,
JEREMY J. VANDE ZANDE, MD, ROBBIE L. ROBINSON, NP,
AND EILEEN MIDDLETON, PA,

Defendants-Appellants.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE ZACHARY HINDMAN**

**DEFENDANTS-APPELLANTS' APPLICATION FOR FURTHER
REVIEW OF COURT OF APPEALS DECISION OF NOVEMBER 3, 2021**

Frederick T. Harris, #AT0003198
LAMSON DUGAN & MURRAY LLP
10306 Regency Parkway Drive
Omaha, NE 68114
Tel: (402) 397-7300 | Fax: (402) 397-7824
rharris@ldmlaw.com
*ATTORNEY FOR MERCY HEALTH
SERVICES-IOWA, CORP. SIOUX CITY
A/K/A MERCY MEDICAL CENTER-SIOUX
CITY, Defendant-Appellant.*

QUESTION PRESENTED FOR REVIEW

- I. Whether in a medical malpractice case the court of appeals erred in finding an exception to Iowa Code Section 147.140 (Certificate of Merit) by finding claims of ordinary negligence which were not pled in Plaintiff's petition to avoid dismissal of her case.**

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STATEMENT SUPPORTING FURTHER REVIEW

This case presents a question of broad public importance and an important question of law that should be settled by the Supreme Court.

The ruling of the Iowa court of appeals is at odds with the goal of the legislature: ensuring early dismissal of meritless claims. The decision essentially renders the statute meaningless by creating an ordinary negligence claim which was not pled, and thus allowing plaintiffs to avoid the application of Iowa Code Section 147.140.

In order to dispose of meritless claims and protect medical professionals from expenses of defending those claims, the newly enacted Iowa Code Section 147.140 requires plaintiffs in an action against a hospital or a medical professional to file early a certificate of merit, attesting their claim is colorable. In this case, Plaintiff brought a medical malpractice claim, which was dismissed by the district court with prejudice when she failed to submit the certificate of merit.

The court of appeals affirmed the trial court's decision by holding that professional negligence claims against all Defendants, as well as the negligent retention and hiring claim against Mercy Medical Center, were correctly dismissed. However, the court of appeals also held that Plaintiff intended to make claims of ordinary negligence that might not require a certificate of merit, and read it into her petition. The court also presumed that Plaintiff's incident must

likely involve claims of ordinary negligence, although both the facts and the pleadings alleged only professional negligence in caring for the patient and administering medication.

The creation of ordinary negligence exception to Iowa Code Section 147.140, when such negligence was not pled, renders the statute meaningless. Plaintiffs routinely seek to avoid their cases being dismissed with prejudice when they fail to comply with the statute. This case presents a procedural maneuver that allows plaintiffs to defy the legislative intent to sort through meritless claims early. Medical professionals are exposed to high-priced lawsuits. The statute, if applied correctly, protects them from expensive and stressful litigation. If circumvented, the statute becomes useless notwithstanding that it was intended to prevent bogus litigation and ultimately limit our costs of healthcare.

STATEMENT OF FACTS

Plaintiff alleges that on January 25, 2018, after being admitted to the hospital for prolonged dizziness and lightheadedness, Struck stood up and fell, which resulted in her injuries. She filed a claim against physicians, physician assistants, and a nurse practitioner, as well as Mercy Medical Center.

Struck sued these Defendants based on two theories of negligence. First, based on professional negligence. Plaintiff alleged all these Defendants failed to use the proper care, skill, and knowledge ordinarily possessed by medical professionals. *See* Dist. Court Order, at 2. She alleged that Defendants negligently failed to properly supervise her considering her medications and the risks they posed for dizziness, and failed to take steps to ensure she was safe from falls and injury. Her second claim was based on negligent hiring and retention against Defendant Mercy Medical Center. Struck claimed Mercy Medical Center was negligent in hiring and retention of each of the specifically named Defendants as well as other unnamed “non-party staff.” *See* Dist. Court Order, at 3.

Subsequently, Plaintiff failed to timely file a certificate of merit required by the Iowa Code Section 147.140 to pursue her case. Iowa Code Section 147.140(1) requires the plaintiff to file a certificate of merit affidavit signed by an expert witness attesting to the applicable standard of care and an alleged breach of the standard of care in an action against medical professionals. Further, Iowa Code

Section 147.140(6) provides that “failure to substantially comply with subsection 1 *shall* result, upon motion, in dismissal with prejudice of each cause of action to which expert witness testimony is necessary to establish a *prima facie* case.” (emphasis added). *See Iowa Supreme Court Atty. Disciplinary Bd. v. Doe*, 888 N.W.2d 248, 252 (Iowa 2016) (explaining that “[p]art of the restyling of the federal rules involved removing all instances of ‘shall’ and replacing them with ‘must’ or ‘will’ or other language that clearly expresses the mandatory nature of the rule”). A certificate of merit is necessary to establish a *prima facie* case. *See Iowa Code Section 147.140(6)*.

Upon Defendants’ motion and after a court hearing, the district court dismissed Struck’s case with prejudice against all Defendants.¹ The district court considered separately the professional negligence claims against all Defendants and negligent hiring and retention against Mercy Medical Center. The court concluded that the Iowa Code Section 147.140 applied equally to both categories of claims.

The first time on appeal, Struck argued that she made ordinary negligence claims that did not require the certificate of merit. The court of appeals affirmed

¹ The court dismissed claims against Rodney J. Dean, MD, Albert Okine, PA, and Eileen Middleton, PA. Earlier in the proceeding, Plaintiff voluntarily dismissed her claim with prejudice against Jeremy J. Vande Zande after his motion to dismiss for failure to serve a certificate of merit.

the decision in part and reversed in part. The court determined that a hospital may face both claims of professional and ordinary negligence, for which a certificate of merit is not required. *See* Court of App. Opinion, at 8. Accordingly, the court affirmed the dismissal of claims for professional negligence and negligent hiring and retention. *See* Court of App. Opinion, at 12. The court held, however, that Struck sufficiently plead ordinary negligence, and therefore her case should continue in court. *Id.*

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY PRESUMED THAT PLAINTIFF MADE CLAIMS OF ORDINARY NEGLIGENCE AND ALLOWED HER TO AVOID THE MANDATORY DISMISSAL OF HER PETITION

A. Standard of Review

On the application for further review, the Supreme Court can review any or all issues raised on appeal or review only those issues brought to the Court's attention in the application. *In the Interest of H.S.*, 805 N.W.2d 737, 744 (Iowa 2011). An appellate court reviews a district court's ruling on a motion to dismiss for the correction of errors at law. *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020); *see also Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) ("For purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, but not its legal conclusions"). "[W]e

will affirm a dismissal only if the petition shows no right of recovery under any state of facts." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001).

B. Plaintiff's petition did not provide a notice of pleading ordinary negligence and the court of appeals erroneously implied such claim.

Iowa Rule of Civil Procedure 1.403(1) requires the petition to include "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the type of relief sought." The content of a petition must be "liberally construed in order to effectuate justice and the pleader will be accorded the advantage of every reasonable intendment, even to implications necessarily inferred." *Wenndt v. LaTare*, 200 N.W.2d 862, 870 (Iowa 1968) (citing *Coleman v. Hall*, 161 N.W.2d 329, 332 (Iowa 1968)). The petition must establish prima facie elements of the claim and give a fair notice to the defendant. *Lamantia v. Sojka*, 298 N.W.2d 245, 247 (Iowa 1980) (requiring that a petition apprise a defendant of the incident out of which the claim arose as well as the general nature of the action); *see also Doerring v. Kramer*, 556 N.W.2d 816, 818 (Iowa Ct. App. 1996) ("even the liberal notice pleading rules require a simple statement of the prima facie elements of a claim.").

Plaintiff did not provide a notice of pleading ordinary negligence in her petition. The district court correctly held that Plaintiff only pled professional

negligence against all Defendants and negligent retention and hiring against Defendant Mercy Medical Center. As the district court and the court of appeals explained, a hospital may face claims of both professional and ordinary negligence, for which the certificate of merit is not required. In this case, however, Plaintiff failed to plead anything beyond professional negligence, and the court of appeals incorrectly allowed Struck to proceed on claims that she did not make.

The court of appeals presumed that because Plaintiff was injured as a result of a fall, Struck must have intended to sue the hospital on the basis of ordinary negligence. *See* Court of App. Opinion, at 9-10. There is no support in law for this kind of presumption. The court of appeals did not point to specific statements in the petition that would provide a notice of pleading ordinary negligence. The court held that “[t]o effectuate justice and give the pleader the advantage of all reasonable intendments, we conclude the order dismissing all claims against Mercy was in error and Struck’s claim or claims of negligence of premises liability and negligence of non-professional staff against Mercy remain viable.” Court of App. Opinion, at 11-12. Nowhere in her petition Struck alleges the premises liability or negligence of non-professional staff.

In the petition, Struck groups her claims under two subheadings: (1) Statement of Claim and General Allegations, and (2) Count I: Negligence.

Para. 17 of subheading 1 reads:

17. The Defendants breached their duty to Jacqueline Struck to possess and use, care, skill and knowledge ordinarily possessed and used under like circumstances by other members of their profession engaged in a similar practice, because they negligently:

- A. Failed to properly supervise Jacqueline Struck considering the medications she was on and the risks they posed for dizziness;
- B. Failed to take steps to ensure Plaintiff was safe from falls and injury; and
- C. Were negligent in other ways not presently known to the Plaintiff.

Para. 17 alleges a breach of duty “to possess and use, care, skill and knowledge ordinarily possessed and used under like circumstances by other members of their profession,” which is professional negligence. The subheadings A, B, and C illustrate how Defendants allegedly breached their professional duty. Even subheading C cannot be interpreted to mean anything beyond a breach of professional duty. A failure to use professional skill and knowledge, as alleged in para. 17, could not give a notice of pleading premises liability or ordinary negligence of non-professional staff.

Similarly, subheading “Count I: Negligence” refers only to professional negligence and negligence in hiring and retention:

Count I: Negligence

For her Count I claim against Defendants Mercy Medical Center and Dr. Rodney J. Dean, Albert Okine, PA, Jeremy Vande Zande, MD, Robbie Robinson, NP and Eileen Middleton, PA, Jacqueline Struck alleges:

18. Plaintiff Jacqueline Struck reaffirms, re-alleges, and incorporates by reference each and every allegation contained in Paragraphs 1-17.

19. Defendant Mercy Medical Center was negligent in hiring and retaining Rodney Dean, MD, Albert Okine, PA, Jeremy Vande Zande, MD, Robbie Robinson, NP and Eileen Middleton, PA and non-party staff who were individually and jointly responsible for her care and treatment.

20. The professional negligence of Defendants Mercy Medical Center, Rodney Dean, MD, Albert Okine, PA, Jeremy Vande Zande, MD, Robbie Robinson, NP and Eileen Middleton, PA was a violation of an acceptable standard of care.

21. As a direct and proximal result of the negligence of the Defendants, Plaintiff Jacqueline Struck had to remain in the hospital for some time to undergo further medical care for her injuries. Furthermore, the Plaintiff subsequently suffered and suffers from injuries and damages associated with the aforementioned acts of negligence. Plaintiff Jacqueline Struck has incurred medical costs and will continue to incur medical expenses in the future. Plaintiff experienced unnecessary conscious suffering, including physical pain and suffering, mental and emotional distress and further damages.

Para. 19 alleges negligent retention and hiring, while para. 20 reiterates professional negligence on part of the named Defendants. Para. 21 describes causation (“As a direct and proximal result”), and therefore relates to the negligent retention and hiring and professional negligence as alleged in Paras. 19 and 20.

These are the only allegations in the petition. This petition does not contain any statements that could be interpreted as alleging ordinarily negligence including “negligence of premises liability and negligence of non-professional

staff against Mercy” as implied by the court of appeals. It does not establish prima facie elements of a claim for ordinary negligence and even less so gives a notice to Defendant of such claims. *See Lamantia v. Sojka*, 298 N.W.2d 245, 247 (Iowa 1980).

Furthermore, the circumstances of Struck’s accident are not typical of a slip and fall incident, and therefore the court of appeals’ assertion that the claim must involve ordinary negligence was misplaced. The petition explains that Struck was admitted to the hospital with symptoms of dizziness and unsteadiness when standing:

10. On or about January 18, 2018, Jacqueline Struck was admitted to Mercy Medical Center with extrapyramidal symptoms as well as other symptoms, including, but not limited to dizziness, headaches, and unsteadiness when upright or standing.

She sustained injuries resulting from the same symptoms she was admitted for:

14. On January 25, 2018, Jacqueline Struck was suffering from dizziness and lightheadedness upon standing and fell and struck her chin on the floor resulting in a laceration.

In addition, the petition suggests that Struck fell and injured herself as a result of receiving incorrect medication.

15. During the hospital stay at Mercy Medical Center, Jacqueline Struck was given medications that were contraindicated with the medications she was already taking.

These circumstances are not typical of a slip and fall incident as assumed by the court of appeals. Therefore, the court could not presume that Defendant received

a fair notice of pleading ordinary negligence while the only claims related to professional negligence and negligence in retention and hiring.

C. Allowing Plaintiff to make late ordinary negligence claims defies the intent of the legislature in enacting Iowa Code Section 147.140.

The legislature enacted Iowa Code Section 147.140 in order to “dispose of unmeritorious medical malpractice claims quickly, and thereby to reduce the defense expenses incurred by the medical professionals who are targets of those claims.” See Dist. Court Order, n. 5. “Section 147.140 is more narrowly tailored to simply require the certificate of one expert . . . to show that the plaintiff’s claim at least has colorable merit.” *McHugh v. Smith*, No. 20-0724, 2021 Iowa App. LEXIS 254, at *9 (Iowa Ct. App. Mar. 17, 2021) (citing the district court’s decision). The court of appeals also noted that “section 147.140 seeks to relieve defendants of the burden to ferret out the details of plaintiffs’ malpractice claims.” *Id.* at 12.

The court of appeals’ decision creates a dangerous precedent allowing plaintiffs to circumvent the requirements of the certificate of merit, and therefore defying the intent of the legislature to dispose of unmeritorious claims and reduce expenses incurred by medical professionals. If the facts of the case support it, plaintiffs can always plead ordinary negligence, which might not require filing a certificate of merit. A petition, however, must provide defendants

with a fair notice of such claim. Plaintiffs should not be allowed to prevent the consequences of failing to submit a certificate of merit by making late claims of ordinary negligence.

This case is a primary example of an attempt to prevent the application of the statute. Struck failed to certify that her claim for professional negligence and negligent retention and hiring had a colorable merit. Only upon the court's order dismissing her case, she argued that her petition encompassed additional claims that did not require the certification. The court of appeals went far beyond interpreting Struck's petition, and allowed to add claims that neither party contemplated at the time of the petition. The legislature did not intend for plaintiffs to circumvent Section 147.140 by adding bogus claims after dismissing unmeritorious professional negligence claims.

CONCLUSION

The district court did not err in granting Defendant's motion to dismiss the petition for lack of certificate of merit. Therefore, Defendant-Appellant respectfully requests this Court reverse the court of appeals' opinion and affirm the district court's decision.

Respectfully submitted,

/s/ Frederick T. Harris

Frederick T. Harris, #AT0003198

LAMSON DUGAN & MURRAY LLP

10306 Regency Parkway Drive

Omaha, NE 68114

Tel: (402) 397-7300 | Fax: (402) 397-7824

rharris@ldmlaw.com

ATTORNEY FOR MERCY HEALTH

SERVICES-IOWA, CORP. SIOUX CITY

A/K/A MERCY MEDICAL CENTER-SIOUX

CITY, Defendant-Appellant.

CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed Defendants-Appellants' Proof Brief with the Clerk of the Supreme Court of Iowa by EDMS on the 17th of November, 2021, which constitutes service on all other parties to this appeal pursuant to Iowa Ct. R. §16.315(1)(b) (2018).

/s/ Frederick T. Harris

Frederick T. Harris, #AT0003198

LAMSON DUGAN & MURRAY LLP

10306 Regency Parkway Drive

Omaha, NE 68114

Tel: (402) 397-7300 | Fax: (402) 397-7824

rharris@ldmlaw.com

ATTORNEY FOR MERCY HEALTH

SERVICES-IOWA, CORP. SIOUX CITY

A/K/A MERCY MEDICAL CENTER-SIOUX

CITY, Defendant-Appellant.

Copy to:

Thomp J. Pattermann

Law Office of Gallner & Pattermann, P.C.

300 w. Broadway, Ste. 145

Council Bluffs, IA 51503

T: (712) 323-0999

F: (712) 323-0814

E-mail: tjpattermann@sgallnerlaw.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1). This brief contains 2265 words, excluding the parts exempted by Rule 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in font size 14, Times New Roman.

Dated: November 17, 2021

/s/ Frederick T. Harris

Frederick T. Harris, #AT0003198

LAMSON DUGAN & MURRAY LLP

10306 Regency Parkway Drive

Omaha, NE 68114

Tel: (402) 397-7300 | Fax: (402) 397-7824

rharris@ldmlaw.com

ATTORNEY FOR MERCY HEALTH

SERVICES-IOWA, CORP. SIOUX CITY

A/K/A MERCY MEDICAL CENTER-SIOUX

CITY, Defendant-Appellant.