IN THE SUPREME COURT OF IOWA

No. 22-0101
Floyd County Iowa District Court Case No. LACV031539

ESTATE OF ROBERTA ANN BUTTERFIELD by Bradley Dean Butterfield and Deanne Marie Rogers, Co-Administrators,

Plaintiff-Appellant,

v.

CHAUTAUQUA GUEST HOME, INC., d/b/a CHAUTAUQUA GUEST HOME #3 and CHAUTAUQUA GUEST HOMES,

Defendants-Appellees.

Appeal from an order of the Iowa District Court for Floyd County,
The Honorable Colleen Weiland, Presiding District Court Judge

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FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the District Court Erred In Finding that Expert Testimony Is Required To Prove A *Prima Facie* Case of Negligence Against Defendants.

II. Whether the District Court Erred When It Found That The Parties Could Not Enter Into An Agreement That Concluded A Certificate Of Merit Affidavit Was Not Needed.

III. Whether the District Court Erred When It Failed to Consider That Chautauqua Waived The Requirement That A Certificate Of Merit Must Be Filed.

IV. Whether the District Court Erred When It Found That Plaintiff Did Not Substantially Comply with § 147.140.

V. Whether the District Court Erred When It Failed To Consider That Chautauqua Should Be Estopped From Dismissal.

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court under Iowa R. App. P. 6.1101(2)(c). The Iowa Court of Appeals has ruled on four cases involving Iowa Code § 147.140. However, this case presents substantial issues of first impression that those decisions have not addressed.

STATEMENT OF THE CASE

This appeal arises out of the district court's September 2, 2021 Order granting Defendants' Motion to Dismiss for Plaintiff's Failure to Comply with Iowa Code § 147.140 (Appx., p. 141, 144) and the district court's December 14, 2021 Order denying Plaintiff's Motion to Reconsider, Amend, & Enlarge under Iowa R. Civ. P. 1.902(2). [Appx., p. 443, 510]. On April 20, 2020, The Estate of Roberta Ann Butterfield (hereinafter "Butterfield" or "Plaintiff")

brought personal injury/wrongful death and loss of consortium claims against Defendants-Appellees Chautauqua Guest Home Inc. d/b/a Chautauqua Guest Home #3 and Chautauqua Guest Homes ("Chautauqua" or "Facility") for the injuries and death of Roberta Ann Butterfield while she was a resident at Chautauqua, a skilled nursing facility. [Appx., p. 9, 22-23]. On May 21, 2020, Chautauqua filed their Answer. [Appx., p. 25-30].

Extensive discovery was engaged in between both parties, including a June 15, 2020 agreed upon Discovery Plan as well as the exchange of expert disclosures and expert reports. [Appx., p. 247-48]. Fifteen days after Chautauqua filed their Notice of Serving Expert Reports, on July 16, 2021, they filed their Motion to Dismiss under Iowa Code § 147.140. [Appx., p. 141, 144]. Butterfield filed her Resistance on July 28, 2021, and Chautauqua filed their Reply Brief on August 2, 2021. [Appx., p. 232] [Appx., p. 425]. The district court heard unreported oral argument on August 31, 2021 and granted Chautauqua's Motion to Dismiss in its written Order on September 2, 2021 citing to Iowa Code § 147.140. [Appx., p. 443]. On September 15, 2021, Butterfield filed a timely Motion to Reconsider, Amend, & Enlarge under Iowa R. Civ. P. 1.904(2), which Chautauqua resisted on September 21, 2021. [Appx., p. 447] [Appx., p. 497]. Butterfield filed her Response to Chautauqua's Resistance on September 27, 2021. [Appx., p. 505]. Ultimately, the district

court denied Butterfield's Motion to Reconsider in its December 14, 2021 written Ruling. [Appx., p. 510]. Butterfield filed her Notice of Appeal on January 12, 2022. [Appx., p. 512, 515].

STATEMENT OF FACTS

Roberta Ann Butterfield was a resident of Chautauqua skilled nursing facility from October 26, 2017 to May 18, 2019. [Appx., p. 10]. On or about May 19, 2018, Chautauqua staff attempted to transfer Butterfield out of the bathroom and into her wheelchair and heard a "pop" mid-transfer, causing Butterfield to immediately complain of left leg pain. [Appx., p. 13]. Subsequent to the "popping" of Butterfield's left leg, Chautauqua staff did nothing and did not have Butterfield transferred to a hospital until six days later on May 25, 2018. [Appx., p. 13-14]. At the hospital, Butterfield was diagnosed with a subtrochanteric intertrochanteric left hip fracture and required surgical intervention on May 27, 2018. [Appx., p. 14].

On June 1, 2018, Butterfield was readmitted to Chautauqua. [Appx., p. 14]. Upon readmission, Butterfield did not have any pressure injuries or skin problems. [Appx., p. 14]. She spent a significant time in bed, and Chautauqua did nothing to prevent skin breakdown. [Appx., p. 14]. By January 10, 2019, Butterfield developed a fluid filled blister on her left buttocks area that was 0.8 cm by 1.0 cm. [Appx., p. 15]. From January 10, 2019 to February 28, 2019,

Chautauqua continued to do nothing regarding Butterfield's skin breakdown, which ultimately resulted in the injury becoming infected with a strong foul odor and growing in size to 2.8 cm by 3.0 cm by 1.8 cm. [Appx., p. 15-16]. Chautauqua continued to do nothing, and, by April 3, 2019, the pressure injury developed to a stage 4 with bone visualization and measured at 7.5 cm by 2.0 cm by 4.0 cm, requiring surgical intervention. [Appx., p. 16-17]. Butterfield ultimately died on May 18, 2019 as a result of Chautaqua's acts and omissions. [Appx., p. 17].

Plaintiff, The Estate of Roberta Ann Butterfield, filed her Petition on April 20, 2020. [Appx., p. 8]. Chautauqua answered on May 21, 2020. [Appx., p. 25]. On June 15, 2020, Butterfield and Chautauqua entered into an agreed upon Trial Scheduling and Discovery Plan, which the district court approved on June 16, 2020. [Appx., p. 31] [Order Setting Trial]. Chautauqua submitted their Initial Disclosures on July 9, 2020, and Butterfield filed her Initial Disclosures on July 15, 2020. [Appx., p. 37, 43, 247]. Butterfield served Interrogatories and Requests for Production on Chautauqua on November 5, 2020. [Pl. Notice of Service Pl. Request for Production and Interrogatories]. Chautauqua responded to Butterfield's First Set of Interrogatories and Requests for Production on February 5, 2021 and then supplemented their responses on June 7, 2021. [Appx., p. 247, 296, 416] [Notice of Discovery Response].

Butterfield filed her Designation of Expert Witnesses on March 16, 2021 and Disclosure of Expert Testimony on April 19, 2021. [Appx., p. 46, 70]. Chautauqua submitted their first set of Interrogatories and Requests for Production on April 22, 2021. [Appx., p. 139, 402]. On June 4, 2021, the parties entered into a confidentiality agreement and protective order for the production of documents to be produced in discovery, and Chautauqua filed their expert witness designation. [Appx., p. 406, 415]. On July 1, 2021, Chautauqua served their expert reports. [Appx., p. 417]. On July 16, 2021, Chautauqua then filed their Motion to Dismiss [Appx., p. 141, 144], which is the subject of this appeal.

ARGUMENT

I. The District Court Erred In Finding that Expert Testimony Is Required To Prove A *Prima Facie* Case of Negligence Against Defendants.

Butterfield preserved this issue for appellate review in Plaintiff's Resistance to Defendants' Motion to Dismiss [Appx., p. 236-242] and then in Plaintiff's Motion to Reconsider, Amend & Enlarge [Appx., p. 449-452]. The district court concluded that "this is not a *res ipsa loquitor* case" and ruled as follows:

> "[t]o the extent that a breach might be evident to laypersons without expert testimony, causation is not. And the certificate of merit affidavit is required whenever expert testimony 'is necessary to establish a prima facie case,' not just the duty of care and breach elements."

[Appx., p. 445].

The Iowa Court of Appeals reviews dismissals for correction of legal error. *McHugh v. Smith*, 966 N.W.2d 285, 287 (Iowa Ct. App. 2021) (*citing Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)); *see also* Iowa Ct. R. App. P. 6.907. "In doing so, [the court] accept[s] as true the factual allegations set forth in the petition but not its legal conclusions. A motion to dismiss is granted only when there are no conceivable state of facts under which the nonmoving party would be entitled to relief." *Struck v. Mercy Health Servs.*, No. 20-1228, 2021 WL 5105922 at *2 (Iowa Ct. App. Nov. 3, 2021). The Iowa

Court of Appeals also reviews questions of statutory interpretation for correction of legal error. *McHugh*, 966 N.W.2d at 287 (*citing to Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020)).

i. The District Court Erred in Not Considering the *Struck* case.

The district court issued its written order denying Butterfield's Motion to Reconsider on December 14, 2021. [Appx., p. 510-511]. But, prior to that order, on November 3, 2021, the Iowa Court of Appeals issued its unpublished decision in *Struck v. Mercy Health Servs.*, No. 20-1228, 2021 WL 5105922 (Iowa Ct. App. Nov. 3, 2021) that the district court did not consider. *Struck* specifically analyzed one of the very issues here, whether expert testimony is required for all claims. Iowa Code section 147.140 states, in part:

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

Iowa Code § 147.140 (1)(a). (emphasis added). This Court in *Struck* clarified the rule as it pertains to cases such as this: "[t]he standard of care is different,

however, when a negligence claim is based on . . . nonmedical, administrative, ministerial, or routine care. The applicable standard . . . is such **reasonable care as the patient's known condition may require. Expert testimony is unnecessary in these situations.**" *Struck*, No. 20-1228, 2021 WL 5105922, at *7. (emphasis added). In *Struck*, this Court reviewed the petition and determined that the claims involving general negligence (i.e. premises liability and lack of supervision by *non-professional* staff) did not require expert testimony and should not have been dismissed under § 147.140. *Struck*, No. 20-1228, 2021 WL 5105922 at *8.

Butterfield alleges two incidents in her Petition: (1) on May 19, 2018, Chautauqua staff transferred Butterfield and heard a pop from her left leg, which Butterfield then immediately complained of left leg pain [Appx., p. 13]; and (2) that Butterfield developed a pressure injury that significantly grew in size from January 10, 2019 to April 3, 2019 to the point of bone visualization, infection, and a foul odor. [Appx., p. 15-17]. Butterfield further alleges in her Petition that "as a direct result" of these incidents and Chautauqua's choices and lack of action, Butterfield sustained a left hip fracture, required extensive treatment and required surgical interventions. [Appx., p. 13-14, 17]. Butterfield need not identify a specific legal claim in her Petition.

To that end, Iowa "caselaw has long held that a petition is not required to identify a specific legal theory." *Struck*, No. 20-1228, 2021 WL 5105922 at *8. (citations omitted). This Court in *Struck* determined that a petition "must be liberally construed in order to effectuate justice" when reviewing a petition, and further concluded that "the pleader will be accorded the advantage of every reasonable intendment, even to implications necessarily inferred." *Id.* (internal citations and quotations omitted). Moreover, "[i]f the prima facie elements of the claim are stated, and this statement is fair notice to a defendant, the petition is sufficient." *Id.* (internal citations and quotations omitted).

In fact, like in *Struck*, "[a]lthough many allegations in [Butterfield's] petition are couched in terms of professional duties and the breach of those duties, the well-pled facts reflect the incident[s] that give[] rise to her claim for relief." *Struck*, No. 20-1228, 2021 WL 5105922 at 9. Butterfield's Petition explains that the injuries arose from an attempt to transfer as well as a pressure injury post-fracture. [Appx., p. 13, 15]. It further explains that there was a popping noise during the transfer and also explains that post-fracture, Butterfield was a high risk for developing pressure injuries and was primarily bedbound but did not have any pressure injuries immediately upon her readmission to the Facility post-fracture. [Appx., p. 13-14]. Thus, there was fair notice of Butterfield's claims against Chautauqua, which also constituted a

plain statement that Butterfield was entitled to relief. The district court erred in its failure to analyze and conclude that Butterfield's Petition provides fair notice of claims and constitute plain statements that she is entitled to relief. *See Struck*, No. 20-1228, 2021 WL 5105922 at 9-10.

The district court then erred in not taking the analysis a step further when it failed to address whether any claims involved ordinary negligence. As this Court in *Struck* recognized, there are Iowa appellate decisions that provide examples of fact scenarios to determine whether expert testimony is required, none of which the district court considered in its decision. Particularly, Butterfield cited to *Cockerton v. Mercy Hospital Medical Center*, 490 N.W.2d 856 (Iowa Ct. App. 1992) and *Davis v. Montgomery County Mem'l Hosp.*, No. 05-0865, 2006 Iowa App. LEXIS 762 (Iowa Ct. App. July 12, 2006), among others, in her Resistance. [Appx., p. 239-240]. *Cockerton*, concluded that "[t]he conduct in question is simply the way the x-ray technician handled [plaintiff] during the x-ray examination . . .this was not the kind of case requiring expert testimony . . . Rather, the case involves a situation where the hospital was required to exercise ordinary care. . ."); 490 N.W. 2d 856, 859 (Iowa Ct. App. 1992)). In *Davis v. Montgomery County Mem'l* Hosp., the Court determined that assisting a patient in ambulation without the use of a gait belt does not require expert testimony because the issue is "whether the assistance given was

adequate" and is non-medical, routine care. No. 05-0865, 2006 Iowa App. LEXIS 762, ¶¶ 14-15 (Iowa Ct. App. July 12, 2006).

Here, the district court erred by concentrating on the incorrect allegations in Butterfield's Petition, ultimately prejudging whether Butterfield had any remaining negligence claims that did not require expert testimony rather than "effectuat[ing] justice and giv[ing] [Butterfield] the advantage of all reasonable intendments." *See Struck*, No. 20-1228, 2021 WL 5105922 at 11. For that reason, this Court should determine that the Motion to Dismiss was improperly granted and reverse and remand.

ii. Expert Testimony Is Not Required Because Chautauqua's Conduct Is So Obvious That It Is Within The Comprehension Of The Average Person And Chautauqua Provided Routine, Custodial, Nonmedical, And Ministerial Care That Requires Only Common Knowledge And Experience To Understand. Thus, § 147.140 Does Not Apply.

The Iowa Supreme Court framed the test for determining whether an expert is necessary in *Thompson v. Embassy Rehabilitation and Care Center*, 604 N.W.2d 643 (Iowa 2000), stating that expert testimony is not required if all primary facts can be described to the jury accurately, and the jury is then as capable of comprehending those primary facts and drawing correct conclusions from the facts as a witness with special training and experience. *Thompson*, 604 N.W.2d at 646 (internal citations omitted). Additionally, expert testimony "is

not necessarily required merely because a case involves matters of science, special skill, special learning, knowledge, or experience which may be difficult for jurors to comprehend." *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 14 (Iowa 1999). "Causes of action which predicate recovery upon expert testimony are rare." *Id.* (internal citations omitted). "Accordingly, no expert testimony is required when the lack of care is so obvious that it is within the comprehension of the average person . . .or when the complained of actions involve nonmedical, administrative, ministerial, or routine care by the hospital. . ." *Johnson v. Genesis Med. Ctr. (In re Estate of Llewellyn)*, No. 03-1506, 2004 Iowa App. LEXIS, ¶¶ 11-12 (Iowa Ct. App. Nov. 15, 2004) (internal citations omitted). Experts are unnecessary in cases that involve administrative, ministerial, nonmedical, routine care. *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101-02 (Iowa 1971). "The character of a particular activity of a hospital – whether professional on the one hand, or nonmedical, administrative, ministerial or routine care, on the other is determined by the nature of the activity itself, not by its purpose." *Id.* at 102. "[I]f the conduct involves nonmedical, administrative, ministerial, or routine care, then the applicable rule is such reasonable care as the patient's known [mental and physical] condition may require. *Id.* at 101. Further, "[i]t is the obviousness of the physician's lack of care that triggers the exception, not the obviousness of the resulted injury."

Lary v. Han, 2012 Iowa App. LEXIS 568, ¶ 11, 821 N.W.2d 286 (Iowa Ct. App. 2012). "A bad result, standing alone, is not adequate to create a jury question; Instead, something more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect." *Id.* (internal citations and quotations omitted).

The district court erred in determining that § 147.140 applies by finding that this case is not a *res ipsa loquitur* case and determining that expert testimony is required. [Appx., p. 445]. Butterfield specifically requested in her Resistance that the district court consider several Iowa cases that have concluded expert testimony is not required, which the district court failed to do. [Appx., p. 237-242]. Butterfield's claims should have been considered in the light most favorable to her and all ambiguities and doubts should have been resolved in her favor as well. *See Stessman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685, 686 (Iowa 1987). Instead, the district court ignored the possibility of ordinary negligence claims due to the obviousness of Chautauqua's acts/omissions and failed to consider the non-medical, routine care provided by Chautauqua.

Specifically, the Iowa Supreme Court has determined that conduct by a defendant was so obvious as to be within the comprehension of laypersons in numerous cases. *See Wiles v. Myerly*, 210 N.W.2d 619 (Iowa 1973)

("Knowledge and experience teaches us that in the ordinary course of events one undergoing surgery does not sustain an unusual injury to a healthy part of his body not within the area of the operation in the absence of negligence."); *Frost v. Des Moines Still College*, 248 Iowa 294, 79 N.W.2d 306 (1957) ("It is a simple understandable rule of circumstantial evidence with a sound background of common sense and human experience, and difficulty comes only when we attempt to transform it into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it be applied. This is such a case."); *Stickleman v. Synhorst*, 243 Iowa 872, 52 N.W.2d 504 (1952) ("We are aware of no rule that the nature of an injury must be shown by medical testimony if the injury is such that it may satisfactorily be shown by other evidence. We think the nature of plaintiff's injury is sufficiently shown here."); *Whetstine v. Moravec*, 228 Iowa 352, 291 N.W. 425 (1940) ("It is common knowledge that in extracting a tooth or its roots, neither ordinarily passes into the trachea and thus into the lungs. In fact such an occurrence is most rare. In the words of the authorities it is a matter of such rare occurrence and unusual character, that its very happening carries with it a strong inherent probability of negligence."); *Welte v. Bello*, 482 N.W.2d 437, 441 (Iowa 1992) ("We believe it is within the common experience of laypersons that such an occurrence in the ordinary course of things would not have happened if

reasonable care had been used. The insertion of a needle into a vein is a common medical procedure that laypersons understand. It is a procedure that has become so common that laypersons know certain occurrences would not take place if ordinary care is used.").

The district court erred in disregarding Butterfield's claims regarding the obviousness of Chautauqua's conduct when only indicating this case is not a res ipsa loquitur case. [*See* Appx., p. 445].

> Res ipsa loquitur is Latin for the thing speaks for itself. It is a type of circumstantial evidence which allows the jury to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence.

Banks v. Beckwith, 762 N.W.2d 149, 151-52 (Iowa 2009) (internal citations and quotations omitted). When res ipsa loquitur is used, "the plaintiff is relieved of the burden of showing that specific acts of defendant were below accepted medical standards." *Id.* at 152. (citing *Sammons v. Smith*, 353 N.W.2d 380, 385 (Iowa 1984)). Although negligence must still be proven by the plaintiff, the plaintiff "does so by convincing the jury the injury would not have occurred absent some unspecified but impliedly negligent act." *Id.* Res ipsa loquitur doctrine is "a rule of evidence, not one of pleading or substantive law." *Id.* (citations omitted). Butterfield specifically argued to the district court that Chautauqua's conduct was so obvious in that a layperson could determine

simply by using his/her common sense, knowledge and experience that transferring an individual should not have caused a fractured leg and a pressure sore could not have developed *unless there was negligence involved*. [Appx., p. 238]. Butterfield then requested the district court to reconsider, amend, or enlarge its findings on this issue; but, the district court did not. [Appx., p. 449-450, 510-511].

Butterfield also requested that the district court consider *Kastler*, *Cockerton*, *Landes*, and *Davis*, which there is no indication the district court did. [Appx., p. 239-242]. In each of these cases, the Iowa courts determined that expert testimony was not necessary because the care provided was nonmedical, routine activity. [Appx., p. 239-240]. Specifically, both *Cockerton* and *Davis* involved a staff member of the defendant facilities negligently transporting the plaintiff, exactly similar to this case. *Id.*

In *Davis*, the Iowa Court of Appeals determined "[t]he crucial question the jury had to determine was not whether [the plaintiff] should have been allowed to go to the bathroom, but rather **whether the assistance given was adequate**." *Davis v. Montgomery County Mem'l Hosp.*, No. 05-0865, 2006 Iowa App. LEXIS 762, ¶ 14 (Iowa Ct. App. July 12, 2006). The *Davis* Court determined that ambulating a patient to the bathroom is nonmedical and routine. *Id.* at ¶¶ 14-15. In *Cockerton*, the Iowa Court of Appeals recognized

that the focus of the case was "the routine care that [the hospital] provided [the plaintiff] in transporting her and in handling her person during the x-ray examination." *Cockerton*, 490 N.W.2d at 859. *Cockerton* further stated that "[t]he conduct in question is simply the way the x-ray technician handled [the plaintiff]," and the court determined that, simply because the technician must meet certain Iowa Administrative Code requirements does not mean that all of the technician's conduct is professional in nature. *Id.* Ultimately, *Cockerton* determined the case did not involve expert testimony "to establish a deviation from an accepted standard of care," but rather "the case involve[d] a situation where the hospital was required to exercise ordinary care in providing a routine service in light of the patient's known condition." *Id.* Moreover, in *Thompson v. Embassy Rehabilitation and Care Center*, 604 N.W.2d 643 (Iowa 2000), the Iowa Supreme Court noted that acts of not regularly repositioning a resident properly "on the surface appear to have been ministerial and thus subject to a standard of proof not requiring expert testimony." *Thompson*, 604 N.W.2d at 646. Although *Thompson* ultimately required expert testimony, it was due to the specific facts involved that indicated forced repositioning since the resident was refusing, a fact that does not exist here. *Id.* The district court failed to recognize the similarities with the facts of the aforementioned cases – specifically, a transfer from bathroom to wheelchair does not cause a popping

noise or hip fracture if done correctly and safely [Appx., p. 239-240]; and a foul-smelling pressure sore with bone visualization does not occur with regular repositioning and monitoring of the wound. [Appx., p. 242]. Additionally, the pressure sore was a direct result of her immobility from the hip fracture. The district court ultimately failed to apply already established precedent when it found that "this is not a *res ipsa loquitur* case" and "that a breach might be evident to laypersons without expert testimony." [Appx., p. 239-242, 445].

iii. The District Court Erred In Concluding that Expert Testimony Is Required As To Causation.

Iowa Code § 147.140 requires "a certificate of merit affidavit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care." Iowa Code § 147.140 (1)(a). The district court stated that "[t]o the extent a breach might be evident to laypersons without expert testimony, causation is not. And the certificate of merit affidavit is required whenever expert testimony 'is necessary to establish a prima facie case,' not just the duty of care and breach elements." [Appx., p. 445]. In her Motion to Reconsider, Butterfield asked the district court to look to the legislative intent of Iowa Code § 147.140 during reconsideration; however, the district court denied Butterfield's Motion to Reconsider without sufficient explanation and erred in its interpretation of Iowa Code § 147.140. [Appx., p. 443-46, 450-52, 510-11]. Additionally, even if this Court finds that the district

court did not err in its interpretation of section 147.140, it should find that expert testimony is not required to establish causation for Butterfield's claims.

a. The District Court Erred In Its Interpretation of Iowa Code § 147.140 As To Causation.

The district court ruled in its September 2, 2021 Order that a "certificate of merit affidavit is required whenever expert testimony 'is necessary to establish a prima facie case,' not just the duty of care and breach elements." [Appx., p. 445]. Iowa Code § 147.140 requires the plaintiff to "serve upon the defendant a certificate of merit affidavit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care" for personal injury or wrongful death actions against health care providers, "which includes a cause of action for which expert testimony is necessary to establish a prima facie case." Iowa Code § 147.140 (1)(a). Based upon the legislative history of section 147.140, the certificate of merit affidavit is conflated with establishing a prima facie case, which neither the district court nor this Court in *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560, 965 N.W.2d 642 (Iowa Ct. App. July 21, 2021) considered. Specifically, the legislature *originally* included "causation" language prior to the statute's enactment:

> In any action for personal injury or wrongful death against a health care provider based upon the alleged negligence in the practice of that profession or

> occupation or in patient care, including a cause of action for which expert testimony is necessary to establish a prima facie case, the plaintiff shall, within ninety days of the defendant's answer, serve upon the defendant a certificate of merit affidavit for each expert witness listed pursuant to section 668.11, **who will testify with respect to the issues of standard of care, breach of standard of care, or causation**.

[Appx., p. 450-51, 457-90] (emphasis added). House Study Bill 105, House File 487, and Senate Study Bill 1087 all originally included the aforementioned language and also provided explanations, indicating that certificates of merit must be filed pertaining to standard of care, breach of standard of care, or causation experts. *Id.* These explanations included that the expert witness must certify his or her familiarity with the standard of care and certify the standard of care was breached; the healthcare provided failed to take or should have taken certain actions; and a causal link exists between the breach and injury. *Id.*

During these revisions, the legislature was specific as to when certificates of merit are required – for standard of care, breach of standard of care, and causation. [Appx., p. 457-90]. However, when Senate Study Bill 1087 was amended and became Senate File 465 (which then was renamed Iowa Code § 147.140), the legislature *chose* to only require certificates of merit for standard of care and breach of care experts, **not** for causation experts. [Appx., p. 451, 491-96]. The legislature amended the language from indicating that a

certificate of merit must be served "for each expert witness listed pursuant to section 668.11 who will testify with respect to the issues of standard of care, breach of standard of care, or causation" *to* "signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care." Iowa Code § 147.140(1)(a). [Appx., p. 457-90]. The series of revisions indicate that the legislature intended to allow causation experts regardless of whether a plaintiff filed a certificate of merit as to standard of care and breach of standard of care and further indicate that the legislature only intended on dismissal if expert testimony was required as it pertains to standard of care or breach thereof, which the district court failed to recognize despite indicating "that a breach *might* be evident to laypersons without expert testimony." [Appx., p. 445] (emphasis added). Moreover, there is no indication in this Court's opinion in *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560, 965 N.W.2d 642 (Iowa Ct. App. July 21, 2021) that the parties made arguments pertaining to the legislative history and intent, and it is unclear if the district court here relied on *Schmitt* as persuasive authority on this issue.

b. Expert Testimony Is Not Required To Establish Causation.

Even if this Court determines the district court did not err in its interpretation of Iowa Code § 147.140, Butterfield submits that expert

testimony is not needed to establish causation as to her claims. "The test for determining if expert testimony is required is whether, when the primary facts are accurately and intelligently described, the jurors are as capable of comprehending the primary facts and drawing correct conclusions from them as an expert." *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560, at *3, 965 N.W.2d 642 (Iowa Ct. App. July 21, 2021). "Absolute certainty is not required, and the evidence of causation does not need to be conclusive." *Vezeau-Crouch v. Abraham*, 2019 Iowa App. LEXIS 24, at *19 (Iowa Ct. App. 2019) (citations omitted). "Questions of proximate cause are ordinarily questions of fact that, only in exceptional cases, may be taken from the jury and decided as a matter of law." *Vogan v. Hayes Appraisal Assocs.*, 588 N.W.2d 420, 424 (Iowa 1999).

> Proximate cause has two components: (1) the defendant's conduct must have in fact caused the damages; and (2) the policy of the law must require the defendant to be legally responsible for them. Under the first standard, a plaintiff must at a minimum prove that the damages would not have occurred but for the defendant's negligence. In order to satisfy the cause-in-fact component, the plaintiff must also show the defendant's conduct was a substantial factor in bringing about the harm. Under the second standard, the court considers the proximity between the breach and the injury based largely on the concept of foreseeability.

Estate of Long v. Broadlawns Med. Ctr., 656 N.W.2d 71, 83 (Iowa 2002). Moreover, Iowa courts "do not indiscriminately impose a requirement for expert testimony in order to establish an element for tort recovery." *Roling v. Daily*, 596 N.W.2d 72, 75 (Iowa 1999). "Even if expert testimony would clearly be helpful to fact finders . . . it is not a condition precedent." *Estate of Long*, 656 N.W.2d at 83 (internal citations and quotations omitted). "[I]t is unnecessary to present expert testimony on causation in those situations in which the subject is within the common experience of laypersons." *Id.* (internal citations and quotations omitted).

Even if this Court determines the district court interpreted section 147.140 correctly, Butterfield's claims should survive even without expert testimony as to causation. Chautauqua admitted that they owed Butterfield a duty of care and knew or should have known they were required to ensure proper care and keep Butterfield safe. [Appx., p. 26-27]. On May 19, 2018, Chautauqua staff were assisting Butterfield in a transfer and heard a pop, which resulted in a left hip fracture and surgical intervention when Butterfield was sent to the hospital on May 25, 2018. [Appx., p. 13-14]. Then, upon Butterfield's return to the Facility on June 1, 2018, she spent majority of her time bedbound and eventually developed a pressure injury on January 10, 2019. [Appx., p. 14-15]. Chautauqua did nothing, and the pressure injury worsened.

[Appx., p. 15-16]. By April 3, 2019, Butterfield required surgical intervention as the pressure injury grew significantly, and there was bone visualization. [Appx., p. 16-17]. Butterfield was admitted to hospice care on April 25, 2019 and died on May 18, 2019. [Appx, p. 17]. These injuries and death would not have occurred but for Chautauqua's negligent transfer and failure to do *anything*, and their conduct was a substantial factor in bringing about the fracture, pressure injury, and death, all of which the district court ignored. The district court erred in determining that expert testimony was required to prove causation [Appx., p. 445] because a layperson could easily determine that: an adequate transfer would not create a popping noise in someone's leg; a popping noise could mean that a bone was fractured, especially when evidence of immediate pain exists [Appx., p. 13]; a fracture could lead to surgical intervention, especially when nothing was done subsequent to the "pop" [Appx., p. 13]; spending significant time in bed post-fracture without *any* care, including failing to reposition or notifying a doctor [Appx., p. 14] could lead to skin breakdowns; when **nothing** was done subsequent to finding a pressure injury, the pressure injury could worsen, become infected, grow in size, and require surgical intervention [Appx., p. 15-17]; and that death can result when injuries are ignored [Appx., p. 17].

II. The Court Erred When It Found That The Parties Could Not Enter Into An Agreement That Concluded A Certificate Of Merit Affidavit Was Not Needed.

Butterfield preserved this issue for appeal throughout her Resistance as well as Motion to Reconsider. [Appx., p. 242-46, 448-49]. The Iowa Court of Appeals reviews dismissals for correction of legal error. *McHugh v. Smith*, 966 N.W.2d 285, 287 (Iowa Ct. App. 2021) (*citing Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)); *see also* Iowa Ct. R. App. P. 6.907. The Iowa Court of Appeals also reviews questions of statutory interpretation for correction of legal error. *McHugh*, 966 N.W.2d at 287 (*citing Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020)).

The district court ruled "that no agreement or order allowed an extension of time" to serve the certificate of merit and also ruled that the course of the parties' dealings did not "excuse the failure to file the required certificate of merit affidavit." [Appx., p. 444-45]. The district court indicated that "[a]lthough the parties may agree to an *extension* of the affidavit deadline, there is no authority for them to agree to skip it altogether." [Appx., p. 445]. While Butterfield agrees that she did not explicitly request an extension of time to file a certificate of merit, requesting an extension was unnecessary because the parties, by agreement, determined a certificate of merit affidavit was not needed, and the district court erred in its ruling that the affidavit requirement

could not be skipped altogether by agreement of the parties and erred in its mention of the course of the parties' dealings.

The Iowa Supreme Court has stated

> A contract may be express or implied. When the parties manifest their agreement by words the contract is said to be express. When it is manifested by conduct it is said to be implied in fact. Both are true contracts formed by a mutual manifestation of assent by the parties to the same terms of the contract. The differentiation arises from the method of proving the existence thereof.

Rucker v. Taylor, 828 N.W.2d 595, 601 (Iowa 2013); *Ringland-Johnson-Crowley Co. v. First Cent. Serv. Corp.*, 255 N.W.2d 149, 152 (Iowa 1997); *Restatement (Second) of Contracts* § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."). The Restatement (Second) of Contracts concludes that

> Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

Restatement (Second) of Contracts § 4 cmt. a; *Rucker v. Taylor*, 828 N.W.2d 595, 601-02 (Iowa 2013); *See also 1 Joseph M. Perillo, Corbin on Contracts* § 1.19, at 55, 57-57 (rev. ed. 1993).

Butterfield and Chautauqua did enter into an implied agreement based upon their course of dealings and course of performance throughout the pendency of this case as well as an express agreement through the Discovery Plan and conversations between counsels, all of which indicate that a certificate of merit affidavit did not need to be filed due to the parties' agreements. [Appx., p. 244-45, 290-91].

Specifically, the parties agreed on a Trial Schedule and Discovery Plan on June 15, 2020, which was agreed upon and entered into *prior to* any expiration of the date for a certificate of merit to be filed. [Appx., p. 244, 290-91]. Prior to Butterfield submitting this proposed plan to the district court for approval, Butterfield's counsel submitted it to Chautauqua's counsel for review on June 9, 2020 and then followed up via email on June 14, 2020 after no response. [Appx., p. 245, 290-91]. After presumably reviewing the proposed plan, Chautauqua's counsel responded via email on June 15, 2020 stating "Jeff, other that (sic) changing the disclosure date to 7/15, **I am good with it.** Joe" [Appx., p. 245, 290-91] (emphasis added). Subsequent to this response, Chautauqua, through their counsel, engaged in substantial discovery and litigation, including, inter alia, filing initial disclosures; requesting extensions for discovery responses; sending Butterfield over 4,500 responsive documents; meeting and conferring with Butterfield's counsel; entering into a protective

order; providing a copy of their insurance policy to Butterfield; submitting their expert designations and expert reports; and began discussing the scheduling of thirteen depositions. [Appx., p. 244-45, 290-96, 321-32, 402-03, 415-24]. Both Chautauqua's actions and silence as well as Butterfield's conduct as a result supersede any certificate of merit requirement because there was both an implied agreement and express agreement between the parties.

Moreover, the district court concluded that "there is no authority for [the parties] to agree to skip [the required certificate of merit] altogether." [Appx., p. 445]. However, as this Court is aware, Iowa Code § 147.140 is a newer law with little binding authority to base rulings on. The district court indicated that it found *McHugh v. Smith*, 966 N.W.2d 285 (Iowa Ct. App. 2021) "particularly persuasive." [Appx., p. 444]. However, the district court failed to look to *McHugh* regarding this issue. Particularly, in *McHugh*, this Court noted that "the trial scheduling and discovery plan form did not list the deadline for serving the certificate of merit affidavit." *McHugh v. Smith*, 966 N.W.2d 285, 286 n.2 (Iowa Ct. App. 2021) (internal citations omitted). But, counsel in *McHugh* "did not ask the district court to rule on that issue. So [this Court] cannot consider that alternative claim on appeal." *Id.* Butterfield *did* ask the district court to rule on this issue, but the district court failed to do so. Even Chautauqua admits that "the Rule 23.5 Form 2 Trial Scheduling Discovery Plan

template that was filed does not even include a line for the certificate of merit" [Appx., p. 498] and that "[t]he discovery plan is silent on the issue." [Appx., p. 429]. Not only does that excuse not filing a certificate of merit affidavit, but that also shows the parties felt the Discovery Plan was in finalized form and omitted the need to file a certificate of merit affidavit, all of which the district court failed to consider.

III. The District Court Erred When It Failed to Consider That Chautauqua Waived The Requirement That A Certificate Of Merit Must Be Filed.

Butterfield preserved this issue for appeal throughout her Resistance as well as Motion to Reconsider. [Appx., p. 249-52, 452-53]. The Iowa Court of Appeals reviews dismissals for correction of legal error. *McHugh v. Smith*, 966 N.W.2d 285, 287 (Iowa Ct. App. 2021) (*citing Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)); *see also* Iowa Ct. R. App. P. 6.907. The Iowa Court of Appeals also reviews questions of statutory interpretation for correction of legal error. *McHugh*, 966 N.W.2d at 287 (*citing to Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020)).

The district court indicated that trial was imminent and that it "dispose[d] of the motion without extensive findings." [Appx., p. 444]. One of Butterfield's arguments that the district court seemed to ignore was the fact that Chautauqua waived any arguments that a certificate of merit must be filed

through their intentional choices to litigate this case on its merits. [Appx., p. 249-51].

"Waiver is defined as the voluntary or intentional relinquishment of a known right." *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982). "Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver." *Id.* "Though waiver is a question of intent, it need not be explicit. A party's conduct sufficiently demonstrates intent to waive a right if, in light of the surrounding facts and circumstances, it is unequivocally inconsistent with claiming that right." *Lalonde v. Gosnell*, 593 S.W.3d 212, 219, 62 Tex. Sup. Ct. J. 1226 (Texas 2019) (internal quotations and citations omitted). [Appx., p. 263-289].

Although this Court briefly discussed waiver in *McHugh*, this case poses a different analysis of Chautauqua's actions constituting a waiver, and the district court ignored these actions. [Appx., p. 249-51]. In *McHugh*, Defendant Smith sent McHugh discovery requests less than sixty days after his answer; Plaintiff McHugh asked for an extension to respond to Smith's discovery requests, which Smith agreed to a one-month extension. *McHugh*, 966 N.W.2d at 291. From that conduct alone, McHugh believed Smith implicitly agreed

that "he did not need the information to be relayed in the certificate of merit affidavit and was not prejudiced by any delay." *Id.* This Court indicated that "[n]othing in the statutory language supports McHugh's proposition that Dr. Smith constructively waived the requirement that she timely file the certificate of merit affidavit." *Id.* However, *McHugh* does not do a deep-dive analysis on the issue of waiver, and the procedural history in this case drastically differs from that of *McHugh*. [Appx., p. 452].

The district court erred in failing to consider just how drastically different the procedural history here is from *McHugh*. Chautauqua agreed to the Discovery Plan and actively engaged in extensive discovery themselves, not just merely sending discovery requests like in *McHugh*. [Appx., p. 249]. Chautauqua went so far as to provide their own expert designations and reports, none of which claimed Butterfield's allegations were frivolous, which is the very purpose of section 147.140, to weed out frivolous claims. [Appx., p. 249, 255-59]. Chautauqua, by their own actions, waived any dismissal under § 147.140, and the statute should not have been harshly applied by the district court as a result.

The district court further erred in not considering Butterfield's arguments that Iowa Code § 147.140 certificate of merit requirement is mandatory *not* jurisdictional. Meaning, notwithstanding the absence of a *statutory* deadline for

dismissal, the requirement can be waived. [Appx., p. 250]. Since the legislature did not indicate a deadline for dismissal within the statute, the party seeking dismissal is able to waive the filing requirement through that party's actions throughout the judicial process. [Appx., p. 250-51, 263-89]. None of the four cases that have been heard by this Court pertaining to § 147.140 has discussed this issue, which is why Butterfield suggested that the district court look to persuasive authority with statutes of similar nature, which the district court ignored. *Id.* Specifically, in *Lalonde v. Gosnell*, 593 S.W.3d 212, 62 Tex. Sup. Ct. J. 1226 (2016), the Texas Supreme Court analyzed its statute (Chapter 150 of the Texas Civil Practice and Remedies Code) that it similar to Iowa Code § 147.140 and determined that the defendants in that case "impliedly waived [the certificate of merit] requirement by substantially invoking the judicial process contrary to their statutory right to dismissal." *Lalonde*, 593 S.W.3d at 218. [Appx., p. 250-51, 263-89]. Chapter 150 "requires that a sworn 'certificate of merit' accompany any lawsuit" and "[f]ailure to contemporaneously file an affidavit from a similarly licensed professional attesting to the lawsuit's merits requires dismissal of the suit." *Id*. at 216. Moreover, the legislative intent of Chapter 150 is similar to that of section 147.140 in that the requirement "is a substantive hurdle that helps ensure frivolous claims are expeditiously

discharged . . . if the plaintiff fails to file a certificate of merit, the statute obviates the need to litigate the lawsuit altogether." *Id.*

This Court in *McHugh* also made clear that the legislative intent of section 147.140 was to "give[] the defending health professional a chance to arrest a baseless action **early in the process**." *McHugh*, 966 N.W.2d at 289. (emphasis added). The district court erred in failing to consider the totality of the circumstances, particularly the lengthy timeline Chautauqua actively engaged in discovery and the judicial process. [Appx., p. 250-51]. In *Lalonde*, a certificate of merit was never filed; but, the defendants actively and extensively engaged in the judicial process and waited until weeks before trial to seek dismissal. *Lalonde*, 593 S.W.3d at 216-17. [Appx., p. 250-51, 263-89]. The district court erred when it failed to consider Butterfield's waiver argument because, like *Lalonde*, Butterfield admits that a document titled "certificate of merit" was not filed but that Chautauqua actively and extensively engaged in discovery and the judicial process, so much so that a certificate of merit ceases to serve its intended function. [Appx., p. 251, 263-89]. *Lalonde*, 593 S.W.3d at 229. Chautauqua waited until only three months from trial to seek dismissal and after producing their own expert reports in the case, none of which indicated Butterfield's claims were frivolous. [Appx., p. 251, 263-89]. The parties were far past "early in the process," and the district court failed to

consider Chautauqua weaponizing § 147.140 to deny Butterfield her day in court after they unequivocally waived the affidavit requirement and showed their intent to litigate the case on its merits. [Appx., p. 251]. Also, section 147.140 was designed to expeditiously eliminate frivolous claims and arrest baseless actions early in the process, and the district court failed to consider such intent of the legislature by dismissing Butterfield's clearly meritorious claims.

IV. The District Court Erred When It Found That Butterfield Did Not Substantially Comply with § 147.140.

Butterfield preserved this issue for appeal throughout her Resistance as well as Motion to Reconsider. [Appx., p. 246-48, 453-54]. The Iowa Court of Appeals reviews dismissals for correction of legal error. *McHugh v. Smith*, 966 N.W.2d 285, 287 (Iowa Ct. App. 2021) (*citing Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)); *see also* Iowa Ct. R. App. P. 6.907. The Iowa Court of Appeals also reviews questions of statutory interpretation for correction of legal error. *McHugh*, 966 N.W.2d at 287 (*citing Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020)).

The Court in its September 2, 2021 Order illustrated a timeline and indicated that "[i]t demonstrates without question that Plaintiff failed to serve any certificate of merit affidavit within the required sixty days of Defendant's answer . . . Only the initial disclosures were made within the deadline, and those

disclosures clearly do not substantially comply with the certificate of merit affidavit's requirements." [Appx., p. 444]. The district court further concluded that "it can be argued that – at this point – Plaintiff has produced discovery that might substantially comply with the contents of the affidavit, it certainly had not done so by the affidavit deadline. [Appx., p. 445]. "Substantial compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *McHugh*, 966 N.W.2d at 288-89. (internal quotations and citations omitted). The district court erred when it determined that the facts and analysis in *McHugh* were analogous to the facts and circumstances here. [Appx., p. 444]. Particularly, Butterfield and Chautauqua had an agreed upon Discovery Plan; Chautauqua agreed to the merit of Butterfield's allegations; discovery was exchanged; and initial disclosures by both parties were provided, all before any certificate of merit affidavit deadline. [Appx., p. 247]. Further, Interrogatories and Requests for Production were exchanged, and responses were provided by Chautauqua after two extensions were requested by Chautauqua and granted by Butterfield; a confidentiality agreement was entered into by the parties; Chautauqua provided an insurance policy to Butterfield; and both parties exchanged expert disclosures and expert reports prior to Chautauqua filing their Motion to Dismiss. [Appx., p. 248]. The district court failed to consider that, unlike *McHugh*, the essential

components of Butterfield's filings throughout the course of the judicial process unequivocally showed that a colorable claim exists based upon the parties' agreement in the Discovery Plan and conduct throughout the litigation process, including Chautauqua's failure to file a Motion Dismiss until trial was imminent. [Appx., p. 248].

V. The District Court Erred When It Failed To Consider That Chautauqua Should Be Estopped From Dismissal.

Butterfield preserved this issue for appeal throughout her Resistance as well as Motion to Reconsider. [Appx., p. 252-53, 453-55]. The Iowa Court of Appeals reviews dismissals for correction of legal error. *McHugh v. Smith*, 966 N.W.2d 285, 287 (Iowa Ct. App. 2021) (*citing Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)); *see also* Iowa Ct. R. App. P. 6.907. The Iowa Court of Appeals also reviews questions of statutory interpretation for correction of legal error. *McHugh*, 966 N.W.2d at 287 (*citing to Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020)).

The elements of promissory estoppel are: "(1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promise was seeking an assurance upon which the promise could rely and without which he would not act; (3) the promise acted to his substantial detriment in a reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise." *Schoff v. Combined Ins. Co. of*

Am., 604 N.W.2d 43, 49 (Iowa 1999). No case law exists in Iowa pertaining to the issue of promissory estoppel as it relates to § 147.140, which the district court erred in failing to rule upon or consider. A clear and definite discovery schedule was created in this case through the Discovery Plan that was entered into by agreement between the parties on June 15, 2020, before any deadline to file a certificate of merit. [Appx., p. 253]. This Discovery Plan was a clear and definite promise with a clear understanding of the discovery requirements and deadlines throughout the case; therefore, Butterfield submitted her expert witness disclosures on March 16, 2021 and disclosure of expert testimony on April 19, 2021. [Appx., p. 253].

Butterfield acted to her substantial detriment in relying on the Discovery Plan, which was the full agreement of discovery deadlines between the parties. [Appx., p. 253]. Specifically, the district court failed to consider the length of time Chautauqua took to file their Motion to Dismiss and the amount of discovery both parties actively participated in. [Appx., p. 253]. The district court also failed to consider that both Butterfield counsel and Chautauqua counsel previously worked together in the *Estate of Jean Marie Birtwell v. Care Initiatives*, LACL146071, which Care Initiatives' counsel in *Birtwell* entered into the same agreement as he did here, and, thus, counsel for both *Birtwell* and *Butterfield* detrimentally relied on that conduct. [Appx., p. 253]. Further,

Chautauqua substantially invoked the judicial process, and injustice would be avoided by allowing the parties to litigate as both parties had intended in their Discovery Plan agreement. [Appx., p. 253]. The district court ignored Chautauqua's attempt to circumvent trial and failed to rule as to whether Chautauqua should be estopped in doing so. [Appx., p. 253].

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order of dismissal and allow the case to proceed with trial at the district court level.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.903(2)(i), Butterfield requests to submit this case with oral argument.

CERTIFICATE OF COST

It is hereby certified by the undersigned in accordance with Iowa R. App. P. 6.903(4)(j) that the actual amount paid for printing or duplicating paper copies of proof and final briefs required by the Rules of Appellate Procedure was $0.00.

/s/ Jeffrey A. Pitman
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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(e) and (f) and 6.903(1)(g)(1) and (2) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman typeface in 14-point font size and contains 8,818 number of words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

__/s/Jeffrey A. Pitman_____ __05/26/2022_____
Signature Date

CERTIFICATE OF FILING AND PROOF OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above and foregoing was filed electronically with the Clerk of the Iowa Supreme Court via EDMS on May 26, 2022.

The undersigned hereby certifies that a true and accurate copy of the above and foregoing was served on the other parties to this appeal via EDMS on May 26, 2022.

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