IN THE SUPREME COURT OF IOWA

FLOYD COUNTY CASE NO. LACV031539

NO. 22-0101

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

vs.

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

APPEAL FROM THE IOWA DISTRICT COURT FOR FLOYD COUNTY
THE HONORABLE COLLEEN WEILAND

APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Appellees disagrees with Appellant and believe this case involves issues requiring the application of existing and established legal principles and can be transferred to the Iowa Court of Appeals. There are at least five recent decisions issued

by the Iowa Court of Appeals regarding the application of Iowa Code § 147.140. Additionally, the Iowa Supreme Court issued a decision in Struck v. Mercy Health Servs., Iowa Corp., No. 20-1228, 2021 WL 1194011 Iowa Apr. 22, 2022).

STATEMENT OF THE CASE

Plaintiff filed this medical malpractice/wrongful death action on April 20, 2020. Defendants filed their Answer and Jury Demand on May 21, 2020. Iowa Code § 147.140(1)(a) requires Plaintiff to have filed a Certificate of Merit Affidavit from an expert witness qualified to offer standard of care opinions, within 60 days of Defendants' Answer. Plaintiff's deadline to submit a Certificate of Merit Affidavit was July 20, 2020. Plaintiff has never submitted a Certificate of Merit Affidavit, as required by Iowa Code § 147.140. Failure to substantially comply with the Certificate of Merit Affidavit obligations shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case. Iowa Code § 147.140(6) [emphasis added]. Plaintiff's failure to submit a Certificate of Merit is dispositive. Id.

Defendants filed a Motion to Dismiss on July 16, 2021, because Plaintiff failed to comply with the Certificate of Merit affidavit requirements set forth in Iowa Code § 147.140. (Motion to Dismiss; App. 141-143). The District Court heard the Motion to Dismiss on August 31, 2021. On September 2, 2021, the District Court granted Defendants' Motion to Dismiss, finding the Certificate of Merit statute was applicable to Plaintiff's claims and that Plaintiff failed to substantially comply with the statute. (Dismissal Order; App. 443-446). A subsequent Motion to Reconsider, Amend and Enlarge was also denied by the District Court on December 14, 2021. (Order on Motion to Reconsider; App. 510-511). Later, on January 12, 2022, Plaintiff filed a Notice of Appeal.

STATEMENT OF THE FACTS

Plaintiff filed a Petition on April 20, 2020, alleging Defendants were negligent because of the care and treatment provided at Chautauqua Guest Home #3 to Roberta Butterfield in 2018 and 2019. (Petition, ¶¶ 46-64; App. 17-23). Roberta Butterfield was a resident at Chautauqua Guest Home #3, located at 302 9th Street, Charles City, Iowa 50616 from

October 26, 2017, to May 18, 2019. (Petition, ¶ 12; App. 10). According to the Petition, Plaintiff alleges that Roberta Butterfield required extensive treatment and/or surgical intervention for the injuries she suffered while she was a resident of Chautauqua Guest Home #3, including a left hip fracture and subsequent surgical intervention. (Petition, ¶¶ 28-32; App. 13-14). Plaintiff also alleges that Defendants' failure to provide adequate treatment caused Roberta Butterfield to develop ischial pressure injuries and/or infections to her buttocks, which directly resulted in her death on May 19, 2018. (Petition, ¶ 45; App. 17).

However, because Plaintiff's cause of action accrued after July 1, 2017, the date on which Iowa Code § 147.140 took effect, Iowa Code § 147.140 applies and requires a Certificate of Merit Affidavit by an expert witness for causes of action for wrongful death against a health care provider based upon alleged negligence.

As explained in more detail below, under Iowa Code Section 147.140, Plaintiff was required to file a separate certificate of merit for each health care provider named in the

Petition, including Chautauqua Guest Home #3, if the claim against the provider requires expert testimony.

Plaintiff has never submitted a Certificate of Merit Affidavit, as required by Iowa Code § 147.140. Failure to substantially comply with the Certificate of Merit Affidavit obligations shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case. Iowa Code § 147.140(6) [emphasis added]. Submission of medical records from treating doctors or offering expert reports post-deadline is not substantial compliance. The deadline to file the certificate has now passed.

On September 2, 2021, the District Court dismissed Plaintiff's lawsuit with prejudice. (Dismissal Order; App. 443-446). Accordingly, all claims against Defendants must be dismissed with prejudice.

ARGUMENT

THE DISTRICT COURT CORRECTLY GRANTED DEFENDANT CHAUTAUQUA'S MOTION TO DISMISS, WHERE THE DISTRICT COURT HELD THAT PLAINTIFF DID NOT FILE A CERTIFICATE OF MERIT PURSUANT TO IOWA CODE § 147.140

A. Standard of Review

The standard of review employed by this Court for a district court's ruling on a motion to dismiss is for correction of errors at law. Hedlund v. State, 875 N.W.2d 720, 724 (Iowa 2016).

B. Preservation of Error

Defendants do not dispute that error was properly preserved for appeal on this issue.

C. Substantive Discussion

1. The District Court Properly Dismissed Plaintiff's Petition with Prejudice for Failing to Comply with Iowa Code § 147.140.

Iowa Code §147.140 was enacted by the Iowa Legislature and became law in 2017. The new legislation requires the plaintiff's expert to serve upon the defendant a "certificate of merit affidavit signed by an expert witness with respect to the standard of care and an alleged breach of the standard of care." Iowa Code § 147.140(1)(a). The certificate must be served "prior to the commencement of discovery in the case and within sixty days of the defendant's answer." Id. The statute requires a

certificate of merit contain the following two pieces of information: 1. A statement that the expert witness is familiar with the applicable standard of care; 2. A statement that the applicable standard of care was breached by the defendant. Id. § 147.140(1)(b). Additionally, the statute requires the certificate of merit "certify the purpose for calling the expert witness by providing under the oath of the expert witness" the foregoing two statements. Id.

Before going into the relevant arguments, it is important to note that Iowa courts have not been shy about dismissing these types of claims when the statute has not been followed and dismissal is warranted. Just recently, on April 22, 2022, the Iowa Supreme Court in Struck v. Mercy Health Servs., Iowa Corp., No. 20-1228, 2022 WL 1194011 (Iowa Apr. 22, 2022), vacated the decision of the court of appeals and affirmed the district court's judgment dismissing Struck's entire petition with prejudice under § 147.140.

In Schneider v. Jennie Edmundson Mem'l Hosp., No. 19-1642, 2021 WL 1016599 (Iowa Ct. App. Mar. 17, 2021), the plaintiff brought an action against seven separate healthcare

providers, and plaintiff failed to file a certificate of merit within sixty (60) days against three of those providers. Id. at *1. Shortly before the expiration of the sixty (60) days against the other four Defendants, plaintiff filed a motion to extend pursuant to Iowa Code § 147.140(4), citing the complexity of the case and the number of records. Id. at *2. The district court determined that the complexity of the case and the number of records did not constitute good cause and denied the motion for extension of time. Id. Thereafter, the Iowa Court of Appeals affirmed the decision and determined that the plaintiff did not substantially comply with Iowa Code § 147.140 by failing to meet the sixty (60) day deadline and dismissed plaintiff's claim with prejudice. Id. at *3.

In McHugh v. Smith, M.D., No. LACV187705, 2020 WL 2974058, at *2 (Iowa Dist. Apr. 07, 2020), the plaintiff failed to file a certificate of merit within the sixty (60) day deadline. Id. at *2. The plaintiff argued that the record, as it existed, clearly showed that the plaintiff's claim was not frivolous, and that this demonstrated substantial compliance with the statute. Id. The

district court disagreed and dismissed the plaintiff's claim with prejudice. Id. at *3.

In the present case, it is undisputed that Plaintiff's claims are for wrongful death and personal injury caused by medical negligence. It is equally clear that Plaintiff's claims of negligence by Defendants require expert testimony to establish a prima facie case against the nursing facility. Having found that §147.140 is applicable to this case and that Plaintiff is therefore required to file a certificate of merit affidavit, the next question for the Court is whether Plaintiffs have complied with such requirements.

Plaintiff intentionally failed to substantially comply with the 60-day deadline for serving a Certificate of Merit, as required by Iowa Code § 147.140(1)(a). Defendants' Answer was filed on May 21, 2020. Sixty days thereafter was July 20, 2020. To date, Plaintiff has made no filing identified or which may be construed as a Certificate of Merit. Iowa Code § 147.140 requires good cause and a motion prior to the expiration of the 60 days for the Certificate of Merit deadline to be extended. Iowa Code § 147.140(4). Plaintiff failed to file a Certificate of Merit, failed to

move for any extension of the 60-day deadline, and failed to show good cause. The District Court properly found that Plaintiff failed to substantially comply with Certificate of Merit affidavit requirements. The District Court's decision on should be upheld.

2. Iowa Code § 147.140 is applicable because expert testimony is required to prove a causal relationship to establish Plaintiff's prima facie case.

Plaintiff alleges that an expert is not needed if the conduct relates to nonmedical, administrative, ministerial or routine care. However, therein lies the problem because Plaintiff needs expert testimony to demonstrate that "Defendants' continuum and/or pattern of negligence of their employees…was a substantial factor in causing Roberta's injuries, including, but not limited to, her left hip fracture, buttocks and/or ischial pressure injury, infection, and/or her wrongful death on May 18, 2019." (Petition, ¶ 49; App. 19).

The argument that completely does away with Plaintiff's "no expert is needed" theory is the element of causation and establishing wrongful death. As noted below, the Iowa Court of

Appeals recent decision makes this very clear. See Schmitt v. Floyd Valley Healthcare, No. 20-0985, 2021 WL 3077022, at *2 (Iowa Ct. App. July 21, 2021) (Even though one claim arguably fell under the category of "nonmedical, administrative, ministerial, or routine care", the court held causation still required expert testimony necessitating a certificate under § 147.140).

Under Iowa law, Plaintiff must present expert testimony sufficient to establish the death in this case was caused by Defendant's negligence. See Bazel v. Mabee, 576 N.W.2d 385, 388 (Iowa Ct. App. 1998); Daley v. Hoagbin, 2000 WL 1298722, 2 (Iowa Ct. App. 2000). Due to its complex and scientific nature, medical causation almost always requires expert testimony. Anderson v. Bristol, Inc., 936 F. Supp. 2d 1039, 1067 (S.D. Iowa 2013) (citations omitted).

The Iowa Supreme Court has repeatedly emphasized the importance of proof the defendant caused the plaintiff's damages. It has made clear that no recovery will be permitted until the plaintiff has established the defendant's act or omission was the cause of the injury being claimed. Blackhawk

Building Systems, Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988). See also, Virden v. Betts and Beer Construction Co., 656 N.W.2d 805, 807 (Iowa 2003) (summary judgment may be rendered when the material facts fail to show a causal link between the negligence and the injury.)

Here, in order to present an issue for the jury on the causation element, Plaintiff must present evidence that demonstrates a probability that Chautauqua Guest Home # 3's conduct caused the harm [and wrongful death] Plaintiff alleges. See Oak Leaf County Club, Inc. v. Wilson, 257 N.W.2d 739, 746 (Iowa 1977). "[F]or substantial evidence to exist on causation, the plaintiff must show something more than the evidence is consistent with the plaintiff's theory on causation." Doe v. Central Iowa Health System, 766 N.W.2d 787, 792-93 (Iowa 2009). A mere possibility of a causal connection is insufficient to create an issue of fact, Bradshaw v. Iowa Methodist Hospital, 101 N.W.2d 167, 170 (Iowa 1960), because a plaintiff cannot rely on surmise, speculation or conjecture to establish causation. Harsha v. State Savings Bank, 346 N.W.2d 791, 800

(Iowa 1984). See also, Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa Ct. App.1996) (citation omitted). The evidence adduced by the plaintiff must show that plaintiff's theory is reasonably probable, not merely possible, and more probable than any other theory based thereon. Bryant v. Rankin, 468 F.2d 510, 515 (8th Cir. 1972) (applying Iowa law).

Moreover, in cases dealing with medical issues and causation, plaintiff must demonstrate the probability of their claim by expert testimony. McCleeary v. Wirtz, 222 N.W.2d 409, 413 (Iowa 1974) ("Causal connection is essentially a matter which must be founded upon expert evidence"). "[C]ommon knowledge and everyday experience would not suffice to permit a layman's expression of opinion" as to whether a medical provider's alleged negligence "was a substantial factor in bringing about the complained of result." Id.

Without such medical expert testimony, the court must find, as a matter of law, that the record evidence is insufficient to present the issue to the jury. Barnes v. Bovemeyer, 122 N.W.2d 312, 317 (Iowa 1963). See also, Van Iperen v. Van Brarner, 392 N.W.2d 480, 484 (Iowa 1986); Savage v. Christian

Hospital Northwest, 543 F.2d 44, 47 (8th Cir. 1976); and Walstad v. University of Minnesota Hospitals, 442 F.2d 634, 639 (8th Cir. 1971) ("when the causal relation issue is not one within the common knowledge of laymen, causation of fact cannot be determined without expert testimony").

On July 21, 2021, the Iowa Court of Appeals recently took up this exact issue. Schmitt v. Floyd Valley Healthcare, No. 20-0985, 2021 WL 3077022, at *2 (Iowa Ct. App. July 21, 2021). The district court determined that all but one of the Schmitts' claims required expert witness testimony on the question of standard of care. And although it found that one claim arguably fell under the category of "nonmedical, administrative, ministerial, or routine care" and for which the jurors were capable of comprehending and drawing correct conclusions about the standard of care as a witness with specialized knowledge, the court held causation still required expert testimony. Thus, the Schmitts were required to file a certificate of merit affidavit under section 147.140 and dismissal was warranted. Id. At *3.

In the present case, even if Plaintiff could establish one or more breaches of the standard of care without expert testimony, it would be well beyond the knowledge of layperson jurors to determine whether such a failure actually "was a substantial factor in causing Roberta's injuries, including, but not limited to, her left hip fracture, buttocks and/or ischial pressure injury, infection, and/or her wrongful death on May 18, 2019." (Petition, ¶ 49; App. 19).

Thus, while §147.140 does not require that a certificate of merit affidavit address the issue of causation, it does require that if expert witness testimony will ultimately be required in this case to establish a causal relationship between the alleged violation(s) and the alleged harm(s) (an element of a prima facie case), then a certificate of merit affidavit must be filed. The statute requires that a certificate of merit affidavit must be filed in any action "which includes a cause of action for which expert testimony is necessary to establish a prima facie case." Id.

To prove a causal relationship between the alleged acts of negligence and the wrongful death in this case, expert testimony will be necessary. How a fractured hip, and how the

development of pressure sores caused Roberta Butterfield to die is well beyond the common experience of ordinary jurors. A layperson would have to have sufficient comprehension of the situation to determine if and how the alleged negligent supervision did or did not cause or contributorily cause the injury.

The layperson would have to know concepts including but not limited to the medical industry's standards for supervision of a medical professional treating a patient with plaintiff's condition; what is and is not acceptable in the supervision of said medical professional; an understanding of the patient's condition and why particular actions are taken or not taken; an understanding of how actions and procedures, whether taken or not taken, affect the patient's condition.

It is obvious that Plaintiff believed that expert witness testimony was necessary and adopted this litigation strategy. Plaintiff offered the reports of Dr. Richard Dupee, a board-certified Geriatrician and Registered Nurse Jamie Verger. Plaintiff cannot meritoriously argue that its case does not require the use of expert testimony, all the while preparing for

the use of expert testimony. Plaintiff cannot be allowed to disclaim the necessity for expert testimony as a means of evading its statutory obligations then, once it is "home free", recant and offer expert testimony.

It is mandatory that in response to this motion, the Court is to dismiss with prejudice each cause of action as to which expert witness testimony is necessary to establish a prima facie case. Section 147.140(c)(6) (Failure to substantially comply with subsection 1 shall result…) Since all claims against these Defendants sound in medical negligence requiring expert testimony, all counts against each defendant should be dismissed.

The legislative history of the Iowa statute itself is also of limited assistance. Although Plaintiff's counsel details the evolution of the language in the statute during its time in committee with the legislature, his discussion does not shed light on what the Iowa legislature might have meant by its use of the phrase "prima facie case." Meaning, the court must rely on the plain meaning of the statutory language and relevant case law.

However, this Court need not rummage through the legislative history or search for other interpretive aids, as the Iowa Court of Appeals just recently addressed this exact issue. See Schmitt v. Floyd Valley Healthcare, No. 20-0985, 2021 WL 3077022, at *2 (Iowa Ct. App. July 21, 2021). A decision which Plaintiff asks this Court to ignore, and that was fully briefed by Defendants.

Under these circumstances, Plaintiff is unable to prove the allegations of negligence against Defendant without expert witness testimony.

3. Struck decision has been vacated.

Plaintiff also faults the District Court for not considering the Iowa Court of Appeals decision in Struck v. Mercy Health Servs., Iowa Corp., No. 20-1228, 2021 WL 5105922 (Iowa Ct. App. Nov. 3, 2021). However, this case has just recently been vacated on April 22, 2022, by the Iowa Supreme Court. See Struck v. Mercy Health Servs., Iowa Corp., No. 20-1228, 2022 WL 1194011 (Iowa Apr. 22, 2022)

It is important to note that Plaintiff's counsel's reliance on Struck is a major argument in his appeal brief. The Struck case

now supports Defendant's position that Plaintiff "pleaded no claim outside the scope of section 147.140…[and] is bound by the allegations actually pleaded within the four corners of her petition." Id. at 5. In relevant part, the Court of Appeals decision stated:

> If the district court determines after remand, and after the facts supporting the surviving claims are fleshed out, that a claim requires expert testimony, then the court should dismiss it as Struck did not challenge on appeal the district court's conclusion that she failed to timely file a certificate of merit. Struck concedes, and we affirm, the dismissal of all claims against all the remaining defendants. We also affirm the dismissal of any claims against Mercy relating to the negligent hiring, retention, or supervision of professional staff as such claims would require expert testimony. Accordingly, we affirm in part but reverse the dismissal of any claim or claims of ordinary negligence against Mercy.8

Id. The Court of Appeals dismissed the claims that required expert witness testimony (negligent supervision) and left it to the district court to determine whether claims of premises liability and negligence of non-professional staff required expert testimony. Id.

However, the Iowa Supreme Court rejected the decision of the Iowa Court of Appeals and held:

> The court of appeals determined that Struck's "surviving" negligence claims should be "fleshed out" in further proceedings on remand to determine whether expert testimony is required. That approach violates the command of section 147.140(6), which mandates the dismissal of pleadings filed without the requisite certificate of merit. The statute is meant to end cases early (sixty days after the answer) when expert testimony is required. We decline to allow plaintiffs to evade the statutory requirement on appeal by relabeling a professional negligence claim as one of ordinary negligence. Struck failed to comply with the certificate of merit requirement in Iowa Code section 147.140, and the district court correctly granted the defendants' motions to dismiss under section 147.140(6). Our liberal pleading rules do not require a different result.

Struck v. Mercy Health Servs., Iowa Corp., No. 20-1228, 2022 WL 1194011, at *6 (Iowa Apr. 22, 2022). The Iowa Supreme Court also noted that this "is not a case where the hospital patient slipped on a wet floor or tripped over a loose rug." Id. at * 7. Struck's claims were subject to the time-bar for medical malpractice actions. Id.

Likewise, in this case, no such issues are present here. In her Petition, Plaintiff alleges that Defendants' failure to provide adequate treatment caused Roberta Butterfield to develop ischial pressure injuries and/or infections to her buttocks,

which directly resulted in her death on May 19, 2018. (Petition, ¶ 45; App. 17).

Plaintiff's claims are clearly medical negligence claims in support of her wrongful death action and require competent expert testimony. Expert testimony is required to establish causation in a medical malpractice action for wrongful death where proof of causation requires a certain degree of expertise.

Like the Plaintiff in Struck, what Plaintiff wants to do is parcel out her allegations of ordinary negligence and separate it from the wrongful death claim. She wants to turn this into a personal injury claim only, despite the claims asserted and the allegations in her petition. If the Plaintiff really had ordinary negligence claims that don't require expert testimony, she should have alleged them in her petition or moved for leave to amend to add them, neither of which she did. See Struck v. Mercy Health Servs., Iowa Corp., No. 20-1228, 2022 WL 1194011, at *5 (Iowa Apr. 22, 2022).

There is no legally recognized way to parcel out the conduct which evidences only ordinary negligence apart from the injury or wrongful death, the elements of duty, breach,

causation [scope of liability] and injury [wrongful death] are the same issues and tried in the same phase.

4. Iowa Code § 147.140 is applicable and the introduction of expert testimony is required because all of Plaintiff's allegations involve medical judgment.

Hypothetically, even if this case had not been a wrongful death claim, this case is not one simply of routine care and expert testimony is still needed. Plaintiff has already submitted two expert reports with approximately 70 pages of opinions regarding Roberta Butterfield's declining health and ultimate death. (See Plaintiff's Designation of Expert Witness Testimony, April 19, 2021). However, the reports were filed after the 60-day deadline in § 147.140. The filing of the expert reports necessitated the filing of a Motion to Dismiss, as Plaintiff, in essence, admitted that expert testimony would be needed. Based on the allegations set forth in Plaintiff's petition, there is no credible argument that this is not a complex medical case requiring expert witness testimony.

Expert testimony is required in any case when "a lay person sitting as trier of fact lacks the knowledge to render a

competent judgment as to negligence and proximate cause in complex matters requiring professional expertise." Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Const., Inc., 445 N.W.2d 789, 791 (Iowa 1989); see also Welte v. Bello, 482 N.W.2d 437, 441-42 (Iowa 1992)(discussing whether act or omission was within "common experience of persons" in deciding whether expert was necessary). Expert testimony is required if the primary facts cannot be intelligently described to the jury without an expert or the jury is not "as capable of comprehending the primary facts and of drawing correct conclusions from them as" an expert. Thompson v. Embassy Rehab. & Care Ctr., 604 N.W.2d 643, 646 (Iowa 2000) (quoting Schlader v. Interstate Power Co., 591 N.W.2d 10, 14 (Iowa 1999)). Expert testimony is required to establish the defendant's standard of care if "the proper course of action [is] not a matter that would be within the common understanding of the jury." Id.; see also Miller v. Trimark Physicians Grp., Inc., 2003 WL 223469933 *2 (Iowa Ct. App. 2003) (even though the primary facts could be accurately described to the jury, expert testimony was required to establish the appropriate standard of care, i.e.,

"to establish signs or symptoms that [defendant] should have observed and precautions that should have been taken under the circumstances.").

If, instead, the claims are based on "nonmedical, administrative, ministerial, or routine care," experts are unnecessary. Kastler v. Iowa Methodist Hosp., 193 N.W.2d 98, 101-02 (Iowa 1971) ("the standard is such reasonable care for patients as their known mental and physical condition may require"); Cockerton v. Mercy Hosp. Med. Ctr., 490 N.W.2d 856, 859 (Iowa Ct. App. 1992) "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." Kastler, 193 N.W.2d at 102. The court decides which category the activity falls into. Id.

In Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98, 101-02 (Iowa 1971), the Iowa Supreme Court distinguished between the standard of care required with respect to "professional activities" of hospitals versus "non-medical, administrative, ministerial, or routine care" provided by hospitals:

> With respect to professional activities of hospitals, we adhere to our rule that the standard is the care "which obtains in hospitals generally under similar circumstances." .... [W]ith respect to nonmedical, administrative, ministerial, or routine care, we adopt the rule that the standard is such reasonable care for patients as their known mental and physical condition may require. We will not at this time attempt to formulate a precise distinction between the two kinds of activities.

See Davis v. Montgomery County Mem'l Hosp., 723 N.W.2d 448 (Iowa Ct. App. 2006).

In Miller v. Trimark Physicians Group, Inc., 672 N.W.2d 334 (Iowa Ct. App. 2003), Miller had finger surgery and, a week later, returned to his physician for a dressing change. After the doctor removed the bandage and left the examining room for approximately one minute to obtain a new splint, Miller fainted from the site of his injury and fell from the examining table to the floor, injuring his nose. Id. Miller sued the defendant, claiming that the doctor was negligent in leaving him unattended after removing his bandages when he knew or should have known of the possibility that Miller might black out at the sight of his hand and injure himself. Id. The Court held that the whether the physician owed duty to protect Miller from

fainting after he unwrapped patient's injured finger and whether physician breached that duty by leaving patient unattended for approximately one minute were issues not within common understanding of laypersons, and thus, patient's failure to designate expert witness in medical malpractice action precluded him from making prima facie case. Id. In its holding, the Iowa Court of Appeals relied on the District Court reasoning, which stated:

> Expert testimony is required to discuss the appropriate standard of care for preventing fainting in someone with no symptoms or no record of fainting spells. Expert testimony is also required to establish signs or symptoms that Dr. Wolff should have observed and precautions that should have been taken under the circumstances. Without expert testimony, laypersons will have to draw complex medical conclusions about what caused the Plaintiff to faint and about any standard of care that may have been breached by Dr. Wolff. As expert testimony is required and the Plaintiff failed to designate an expert, the Defendants' motion for summary judgment should be granted.

Miller v. Trimark Physicians Group, Inc., 672 N.W.2d 334 (Iowa Ct. App. 2003).

In fact, the need for expert testimony in pressure ulcer cases is well established and has been in Iowa for the past 20

years. There is case exactly on point. In Thompson v. Embassy Rehab. & Care Ctr., 604 N.W.2d 643 (Iowa 2000), Thompson contended that defendants were negligent in the management of a bedsore that developed into a severe coccyx ulcer. Id. at 644. Specifically, Thompson alleged that the defendants failed to position him in a way that would lessen the pressure on the affected area and defendants failed to seek inpatient hospital care and necessary surgery for his condition when the need therefor arose. Id. However, Thompson failed to designate an expert witness to testify concerning the standard of care under the circumstances. The Iowa Supreme Court affirmed summary judgment in favor of a nursing home, holding "the decision to perform surgery required a medical judgment" and whether the nursing staff was negligent in not repositioning him properly in response to the physician's and nurse's instructions were also matters of medical judgment. Thus, expert testimony as to standard of care was necessary for the negligence claim. Id. at 646.

In another case, Davis v. Montgomery County Hospital, 2006 WL 1896217 (Iowa Ct. App. 2006), the court determined

that expert testimony unnecessary where the question involved was not *how* a gait belt was used in transferring a patient to the bathroom, but *whether it was* used.

Here, the question in this case is whether the precautionary measures implemented for Roberta Butterfield were appropriate and within the standard of care. This question is outside the common understanding of a jury of laypersons. In the Petition, Plaintiff provides a long list of purported violations of the standard of care. These include claims that Chautauqua Guest Homes #3 "failed to provide necessary care, assessments, planning, supervision, management, documentation, administration, assistance, care, and treatment to Roberta." (Petition, ¶ 47; App. 17-19).

Furthermore, in relevant part, Plaintiff alleges the following: Failing to properly assess Roberta; Failing to develop, update, and implement a Plan of Care related to injuries, skin breakdown, pressure injuries, wounds, infection, malnutrition, and/or dehydration; Failing to implement appropriate and necessary interventions, Failing to ensure appropriate equipment, assistance devices, lifts, wheelchairs, and/or gait

belts were safely and properly utilized installed, and/or maintained; Failing to appropriately train and/or instruct, supervise, and hire its employees; Failing to ensure that a resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable and/or failing to ensure a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and/or prevent new sores from developing; Failing to properly arrange for and/or administer physician orders and/or ensure Roberta received services, care, medications, and/or treatments in compliance with her physician's orders; and Failing to have in place appropriate policies and procedures to ensure that all staff were knowledgeable about, including but not limited to, patient risks, proper use of medical equipment, gait belts, lifts, and/or mobility assistive devices, the need to document and/or provide care in accordance with the residents' needs, Plan of Care and/or Care Plan, and/or physician orders, and/or the need for proper and/or adequate supervision. (Petition, ¶ 47; App. 17-19).

None of these claims are based on "nonmedical, administrative, ministerial or routine care." These are, instead, cases where medical judgment is involved and require expert testimony as to the standard of care and whether that standard has been breached. The medical issues in this case are complex and varied and require testimony from experts in various fields. The issue of Defendants' negligence is not simply a matter of common knowledge. Rather, it requires expert testimony regarding the standard of care, whether there was a breach of that standard, and, further, if Roberta Butterfield's damages [and death] were caused by negligence of the Defendants. The case revolves around whether Roberta Butterfield developed an avoidable stage 4 pressure injury at Chautauqua Guest Home due to the lack assessment, care planning of preventative measures. Whether Chautauqua staff lacked a knowledge of etiology, staging, prevention and treatment of pressure injuries. For example, a few such issues in which the jury would need assistance from an expert witness include Roberta Butterfield's pre-existing health conditions, the causes of her skin breakdown, the relationship between her hip fracture and her

declining health, and whether her skin was already compromised. Clearly, this is a matter that requires expert testimony.

Without expert testimony, how can a lay juror know when skin breakdowns occur? What is considered reasonable care for skin breakdowns? Cloth bandages? No bandage at all? Keeping the wound dry or moist? Antivirals or antibiotics? Like Thompson, both the primary facts and the proper course of action under the circumstances are outside the jury's understanding without expert testimony.

Plaintiff argues that the conditions surrounding Roberta Butterfield's transfer do not need expert witness testimony. Plaintiff's position is problematic, as it forces a jury to look at this case with blinders, ignoring all the other allegations of negligence pled in the petition in favor of the event leading to the fracture. The cases relied upon by Plaintiffs all involve a patient fall in a hospital, and that is the only basis of the case. See Kastler v. Iowa Methodist Hospital, 193 N.W. 2d 98 (Iowa 1971); Landes v. Women's Christian Ass'n, 504 N.W.2d 139

(Iowa Ct. App. 1993); Cockerton v. Mercy Hosp. Med. Ctr., 490 N.W.2d 856 (Iowa Ct. App. 1992).

In each of these, the courts found that expert testimony was not required because the falls occurred during routine care like showering or going to the bathroom, or the fall occurred while the patient was being transported to another room for treatment. None of these cases involved compounding the effects of a fall with a pressure sore and wrongful death. None of these cases focused on the critical question, how should someone in Roberta Butterfield's condition have to be transferred? Whether she was a one-assist, two-assist and/or other means of transfer based on Roberta Butterfield's condition, requires expert testimony. Also, whether the break was due to negligence transfer or was spontaneous. Clearly medical expert testimony is needed. Would Plaintiff really go to trial on this case without expert witnesses? A jury must not consider the allegations of negligence piecemeal or in a vacuum, but rather take the Plaintiff's petition in its entirety. Such claims require expert witness testimony.

5. Plaintiff's "implied agreement" argument fails

On Appeal, Plaintiff argues that the parties implicitly agreed that a certificate of merit was not needed in this case. Namely, "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…" (Appellant's Brief, p. 32). With respect, this is not a serious argument. One of the problems that Defendants are having responding to this argument stems from the fact that Plaintiff's "implied agreement" argument keeps changing from one pleading to the next.

In his initial resistance to Defendants' Motion to Dismiss, Plaintiff's counsel cited to a prior case [Birtwell] in which both defense and plaintiff's counsel participated. At that time Plaintiff argued, "Plaintiffs ultimately looked to the course of dealings with Defense Counsel in Birtwell and throughout the pendency of this case, which clearly depict that there was an established, implied in fact agreement between the parties that a certificate of merit affidavit was not necessary." (Plaintiff's Resistance to Motion to Dismiss, p. 13).

At that time, Defendants rejected any suggestion that litigation strategies taken in earlier cases would be binding in this matter. There is no case in any jurisdiction in this country that supports Plaintiff's position, and the likely reason for this is that it would be unfair, and in some ways unethical, for the client to be obligated to a settlement or agreement in a totally unrelated case.

Now, in this appeal, Plaintiff essentially argues that because the parties filed a discovery plan that did not include a deadline regarding the certificate of merit, that this indicated that the parties agreed to omit the certificate of merit affidavit deadline and requirement. (Appellant's Brief, p. 33).

That no date was specified in the discovery plan regarding the filing of a certificate of merit, does not establish that a binding contract was created or that the requirement was waived. The failure to include a specific date for the certificate of merit requirement does not render § 147.140 void. The deadline is codified in the statute, a requirement that is mandatory. Plaintiff's counsel had only to look at the language in § 147.140.

Importantly, 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. In ¶ 16 of the discovery plan there is also a section entitled, "Other. List additional agreements of the parties for the Trial Scheduling and Discovery Plan." (Trial Scheduling Order, 06/15/20; App. 31-36). That section is left blank. It stands to reason that if the parties intended to waive the § 147.140 requirements by agreement, that would have been documented. There are simply no grounds to show that parties intended to waive § 147.140 requirements, and the Court should reject Plaintiff's entire argument.

6. Plaintiff's "waiver" or "estoppel" argument fails.

Plaintiff argues that compliance with the statutory certificate of merit requirements is excused, or the statute is non-applicable once a case passes into the discovery stage and experts are disclosed. Plaintiffs argue that "Chautauqua, by their own actions, waived any dismissal under § 147.140…" (Appellant's Brief, p. 37). However, nothing in the statute supports this position.

Iowa Code § 147.140 (6) states that a petition filed without an expert certification shall be dismissed. Unlike other Iowa statutes, "shall" is mandatory and does not denote judicial discretion. The Iowa Legislature's choice of the words "shall result, upon motion, in dismissal with prejudice" instead of "subject to dismissal" indicates that the Iowa Legislature intended that the court have no discretion with respect to dismissal and that a petition filed without an expert affidavit would be void and must be automatically dismissed.

There are no time limits on when a §147.140 motion can be brought, or a case dismissed for noncompliance with the statute. Plaintiff is asking the Court to read provisions into §147.140 that simply do not exist. The legislature could have, but did not, include such provisions. See McHugh v. Smith, 2021 WL 1016596 *5 (Iowa Ct. App. 2021) (declining to read into §147.140 or to find that the defendant "constructively waived" the certificate requirement); Schultze v. Landmark Hotel Corp., 463 N.W.2d 47, 50 (Iowa 1990) ("We do not have the prerogative to read into a statute an intent and meaning not expressed"). Plaintiff is bound by the statutes as currently

written. Nor is any alleged lack of prejudice at issue. See McHugh, 2021 WL 1016596 *5 (declining to "read in a requirement for defendants to show they were prejudiced" by noncompliance with §147.140).

In McHugh, the plaintiff made the same argument as Plaintiff here—it was obvious the claim was not frivolous given subsequently disclosed information, there was no prejudice, and she should be excused from the statute. Id. **3, 5-6. The McHugh Court disagreed and found the statute's requirements could not be excused even when subsequent information was provided during discovery that supported the plaintiffs' case. Id. **4-5. As the McHugh Court found, one purpose of §147.140 is to "relieve defendants of the burden to ferret out the details of plaintiffs' malpractice claims" and timing of the certificate is material. Id. *5.

Here, Plaintiff's failure to comply with the statute as to their claim against Defendants deprived Defendants of timely notification of the nature of Plaintiff's claim against it. See also Nedved v. Welch, 585 N.W.2d 238, 241 (Iowa 1998) (some prejudice is "presumed to occur when experts are not

designated by the statutory deadline"). At no point did counsel for Chautauqua Guest Homes #3 represent that it was waiving the requirements imposed by § 147.140. The fact that counsel agreed to the discovery plan is not manifestation of the party's intent to forgo the certificate of merit. Plaintiff's counsel made no effort to enter into any agreement, and the burden is on the plaintiff to comply with § 147.140 not the defendant. The statute places no obligation on a defendant to file a dismissal motion within a set timeframe.

Moreover, Plaintiff's reliance on the LaLonde decision is not helpful here, not just because it arises out of Texas. The simple fact that a party participated in discovery at some level in the litigation does not indicate a waiver of the statutory requirement. In relevant part, the Texas court held:

> For example, conduct that is merely defensive or responsive to litigation initiated and carried on by the other party does not in and of itself give rise to waiver. Hence, filing an answer "out of an abundance of caution" is "inconsequential" and "attempting to learn about the case" when the defect in an expert's certification may not be evident would not be "inconsistent with the intent to assert the right to dismissal." Nor is mere delay, like the eight-month time frame in Crosstex, ordinarily sufficient to imply waiver.

LaLonde v. Gosnell, 593 S.W.3d 212, 221–22 (Tex. 2019), reh'g denied (Oct. 4, 2019).

Here, Defendants' participation in discovery is insufficient to establish waiver or estoppel because it was not inconsistent with the intent to assert the right to dismissal. Attempting to learn more about the case in which one is a party does not demonstrate an intent to waive the right to move for dismissal under section § 147.140, especially when, as here, most of the Defendants' participation was in response to discovery initiated by the Plaintiff. The same could be said for submitting their initial disclosures, as those have statutory deadline. Defendants are compelled to submit those, or risk sanctions. Apparently, Plaintiff now argues that no expert testimony is needed at all. It stands to reason that Defendants' decision to wait for the expert opinions was a good one because it shows that such testimony is necessary. There are simply no grounds for a waiver or estoppel. Ultimately, all Iowa courts considering the "waiver" or similar "estoppel" issue have found in favor of dismissal.

7. Plaintiff's "substantial compliance" argument fails.

Plaintiff patently failed to substantially comply with the 60-day deadline for serving a Certificate of Merit, as required by Iowa Code § 147.140(1)(a). Defendants' answer was filed on May 21, 2020. Sixty days thereafter was July 20, 2020. To date, Plaintiff has made no filing identified or which may be construed as a Certificate of Merit. Iowa Code § 147.140 requires good cause and a motion prior to the expiration of the 60 days for the Certificate of Merit deadline to be extended. Iowa Code § 147.140(4). Plaintiff failed to file a Certificate of Merit, failed to move for any extension of the 60-day deadline, and failed to show good cause. Plaintiffs failed to substantially comply with Certificate of Merit affidavit requirements.

Plaintiff's numerous deviations from the certificate of merit requirements combined to deprive Defendants of the ability to determine that Plaintiff had a non-frivolous claim for negligence or negligent supervision or oversight. Just as in Schmitt and McHugh, Plaintiff's claim that the information provided to the defendant in their initial disclosure substantially complied with that objective is misplaced. See Schmitt v. Floyd Valley

Healthcare, No. 20-0985, 2021 WL 3077022, at *2 (Iowa Ct. App. July 21, 2021).

In fact, the only documents provided to Defendants that predate the 60-day deadline include the trial schedule and discovery plan and initial disclosures. Neither of these records are in affidavit form or otherwise submitted under oath. Additionally, and far more importantly, these records do not contain any of the "proof" or "expert opinions" that Plaintiffs assert they contain. Neither of these documents, at any point, contains any opinion of any physician on any topic related to Roberta Butterfield's previous care. Neither of these documents, at any point, provide certification of an expert's familiarity with the applicable standard of care or that it was breached by Defendants.

The District Court reached the same conclusion when it held, "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." (Dismissal Order, p. 2; App. 444). The rest of documents and discovery responses Plaintiff relies upon were all submitted

after the deadline, so these cannot be basis for showing substantial compliance.

CONCLUSION

Accordingly, the District Court properly dismissed Appellant's claim with prejudice.

REQUEST FOR ORAL ARGUMENT

Appellees requests that they be heard for oral argument in this appeal.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R.App.P. 6.903(1)(g)(1) or (2) because this brief contains approximately 7099 words, excluding the part of the brief exempted by Iowa R.App.P. 6.903(1)(g)(1).

2. 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 proportionally spaced typeface using Microsoft Word 2010 in 14 font size and Bookman Old Style type style.

/s/ Joseph D. Thornton — May 26, 2022
Signature — Date

COST CERTIFICATE

I, JOSEPH D. THORNTON, hereby certify that the actual cost of reproducing the necessary copies of the preceding Appellee's Proof Brief consisting of 49 pages was $0 and that same amount has been actually paid in full by me.

/s/ Joseph D. Thornton
JOSEPH D. THORNTON

CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

I, Joseph D. Thornton, hereby certify that on May 26, 2022, the above and foregoing document was served, via Iowa EMS, Electronic Service, upon the clerk of the Iowa Supreme Court and upon the following persons:

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