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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PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION OF AUGUST 17, 2022

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QUESTIONS PRESENTED FOR REVIEW

1. Does Iowa Code § 147.140 trigger the filing of a certificate of merit affidavit when an expert is necessary as to causation?

2. Was a certificate of merit affidavit necessary?

3. Did Plaintiff and Defendants enter into an Agreement that determined a certificate of merit affidavit need not be filed?

4. Did Defendants waive their statutory right to dismissal based upon their own actions of engaging in discovery and agreeing to a Discovery Plan that excluded the necessity of filing of a certificate of merit affidavit?

5. Should Defendants be estopped from dismissal for substantially invoking the judicial jurisdiction and the judicial process to Plaintiff's detriment?

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STATEMENT SUPPORTING FURTHER REVIEW

This case presents issues of broad public importance that the Iowa Supreme Court should ultimately determine pursuant to Iowa Rule of Appellate Procedure 6.1103(1)(b)(4). Only this Court can clarify the interpretation of the language of § 147.140. The first paragraph of § 147.140 requires plaintiffs to serve upon defendant a certificate of merit affidavit within 60 days of defendant's answer and prior to the commencement of discovery with respect to the issue of standard of care and an alleged breach of the standard of care. §147.140(1)(a). The next paragraph, § 147.140(1)(b), specifies that the affidavit must include a statement that the standard of care was breached. The statute states that this requirement applies to both personal injury and wrongful death cases against health care providers, "which includes a cause of action for which expert testimony is necessary to establish a prima facie case." *Id.* As a result of the phrase "prima facie case," some Iowa courts have included an additional burden of filing a certificate of merit affidavit regarding causation. This interpretation of § 147.140 has added a requirement that is not mandated by the terms of the statute and ignores the legislative purpose and history behind this statute. The purpose of the statute was to arrest a baseless action early in the process if a qualified expert does not certify that the defendant breached the standard of care.

Plaintiff submits that according to the plain language of § 147.140, it is triggered only when expert testimony is necessary to prove an alleged breach of the standard of care but not causation. The word causation is nowhere in this statute. This issue alone is of broad public importance because there is both confusion and conflation between the "standard of care" language and "prima facie case" language and the legislature's purpose behind § 147.140 pursuant to the legislative history. To interpret § 147.140 to require a certificate of merit on causation contradicts the policy changes made by the legislature before the enactment of § 147.140 and requires clarification by this Court.

Moreover, this case presents important questions of law that have not yet, but should be, decided by the Supreme Court of Iowa pursuant to Iowa Rule of Appellate Procedure 6.1103(1)(b)(2). The questions Plaintiff presents have yet to be answered when analyzing § 147.140, including whether the parties can enter into an agreement that determines a certificate of merit need not be filed and whether Defendants can be estopped from dismissal after Plaintiff detrimentally relies on Defendants' clear promise and after the Defendants have participated in the court process and the court system. The answers to these questions will shape the overall meaning of § 147.140 and precedent moving forward.

BRIEF SUPPORTING FURTHER REVIEW

STATEMENT OF FACTS

This appeal arises out of the district court's September 2, 2021, order granting Defendant's § 147.140 Motion to Dismiss with prejudice and denying Plaintiff's Motion to Reconsider. (Appx., p. 141, 144, 443, 510). The Estate of Roberta Ann Butterfield (hereinafter "Butterfield" or "Plaintiff") brought personal injury, wrongful death, and loss of consortium claims against Defendants for the injuries and death of Mrs. Butterfield while she was a resident at Chautauqua, a skilled nursing facility. (Appx., p. 9, 22-23).

Butterfield was a resident at Chautauqua from October 26, 2017, until her death on May 18, 2019. (Appx., p. 10). On May 19, 2018, Chautauqua staff attempted to transfer Butterfield out of the bathroom and into her wheelchair and heard a "pop" mid-transfer. (Appx., p. 13). Butterfield immediately complained of left leg pain. *Id.* It took six days for Chautauqua staff to transfer Butterfield to the hospital. (Appx., p. 13-14). At the hospital, Butterfield was diagnosed with a left hip fracture and required surgical intervention on May 27, 2018. (Appx., p. 14). Butterfield was readmitted to Chautauqua on June 1, 2018 and was free from any skin breakdown or pressure injury at the time of her readmission. (Appx., p. 14). Due to her immobility and fracture, she spent significant time in bed; yet Chautauqua staff did nothing to prevent skin breakdown. *Id.* As a result, by January 10, 2019,

Butterfield developed a fluid-filled blister (Appx., p. 15) that grew in size and became infected with a strong foul odor. (Appx., p. 15-16). By April 13, 2019, the pressure injury was a stage 4 with bone visualization and required surgical intervention. (Appx., p. 16-17). One month later, Butterfield died as a result of Defendants' inactions. (Appx., p. 17).

Butterfield filed her Petition on April 20, 2020, and Defendants filed their Answer on May 21, 2020. (Appx., p. 9, 22-23, 25-30). Extensive discovery was engaged in by both parties, including a June 15, 2020, agreed upon Discovery Plan and the exchange of expert disclosures and expert reports. (Appx., p. 247-248). 453 days after Butterfield filed her Petition, Defendants filed their Motion to Dismiss under Iowa Code § 147.140. (Appx., p. 141, 144). Butterfield filed her Resistance on July 28, 2021, and Defendants filed their Reply Brief on August 2, 2021. (Appx., p. 232, 425). Unreported arguments were heard by the district court on August 31, 2021, and the district court dismissed Butterfield's claims with prejudice on September 2, 2021, under Iowa Code § 147.140. (Appx., p. 443). *See* the District Court Order attached. Butterfield filed a timely Motion to Reconsider under Iowa R. Civ. P. 1.904(2), which Defendants resisted on September 21, 2021. (Appx., p. 447, 497). Butterfield filed a Response to Defendants' Resistance on September 27, 2021 (Appx., p. 505), and, ultimately, the district court denied Butterfield's Motion to Reconsider in its December 14, 2021, written ruling. (Appx., p. 510). Butterfield

appealed, and the Iowa Court of Appeals affirmed the district court's order. *See* Court of Appeals Opinion attached. Butterfield's timely application for further review to this Court follows.

ARGUMENT

I. Iowa Code § 147.140 Does Not Trigger the Filing of a Certificate of Merit Affidavit as to Causation.

The Iowa Supreme Court reviews statutory interpretation for correction of errors at law. *Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022). Butterfield preserved this issue at the district court level and on appeal. *See generally* Appx.; *See also* Court of App. Opinion.

Iowa Code § 147.140 requires plaintiffs in any action 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," 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." Iowa Code § 147.140(1)(a). The certificate of merit must include a statement that the standard of care was breached by the health care provider. § 147.140(1)(b) The Court of Appeals determined Plaintiff "failed to establish a prima facie case because causation required expert testimony" (Court of App. Opinion, p. 5). Both the district court and the Court of Appeals failed to interpret the plain language of the statute and look at the legislative purpose and history of § 147.140.

The purpose of statutory interpretation is to determine legislative intent. *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291 (Iowa Ct. App. April 13, 2022) at *7. "In interpreting a statute, we first consider the plain meaning of the relevant language, read in context of the entire statute, to determine if there is an ambiguity." *Id.* In all cases, we read the statute as a whole to reach "a sensible and logical construction." *Id.* at *7. The legislative purpose of § 147.140 is simply to require the certificate of one expert…to show that the plaintiff's claim at least has colorable merit. *McHugh v. Smith*, No. 20-0724, 2021 Iowa App 254, 966 N.W.2d 285 (Iowa Ct. App. Mar. 17, 2021) at *9. That explanation is a cogent rationale for the sixty-day deadline. *McHugh* at *9. § 147.140 gives the defending health professional a chance to arrest a baseless action early in the process if a qualified expert does not certify the defendant breached the standard of care. *McHugh* at *9.

Section 147.140 does not include the word causation in any form. If the legislature wanted to include a requirement that the expert affidavit also state the breach of the standard of care caused the injury or death, it would have done so. The legislature chose to exclude a causation requirement. The phrase "which includes a cause of action for which expert testimony is necessary to establish a prima facie case" merely identifies the type of cause of action in which a certificate of merit is required and not the requirements for the expert affidavit. This is made clear by the

plain language of § 147.140(1)(b) which does not require an expert statement regarding causation.

The term "causation" was originally included in § 147.140 by the legislature but was removed when finalizing § 147.140. The prior versions of § 147.140 throughout the House and Senate had the following language:

> 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.**

(emphasis added). (Appx., p. 450-51, 457-90). The last sentence in these original proposed Bills is the most important for the Court to consider because there is both confusion and conflation between the language "prima facie case" and "standard of care" and the legislature's true intent behind § 147.140 pursuant to the legislative history.

Specifically, the legislature revised § 147.140 to state, in part:

> In any action for personal injury or wrongful death against a health care provider . . ., which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the plaintiff shall . . . serve . . . 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. (emphasis added)

§ 147.140(1)(a). The Court of Appeals failed to look at the plain language of § 147.140 and the legislative history when it decided that an affidavit on causation was required. The revision took out the language "causation." This Court previously determined that "[t]he legislature's decision to clarify [a] remedial provision . . . must be given effect." *Schmett v. State Objections Panel*, 973 N.W.2d 300, 304 (Iowa 2022). (internal citations omitted). Moreover, "[m]eaning is expressed by omission as well as by inclusion . . ." *Id.* The removal and omission of the term "causation" in § 147.140's final version indicates the legislature intended that it would not require a certificate of merit regarding causation and would allow expert testimony as to causation regardless of if a certificate of merit was filed as to standard of care.

To determine § 147.140 includes a causation requirement goes against the policy changes made by the legislature before the enactment of § 147.140. The original Study Bill and House File explain that the expert witness must certify his or her familiarity with, not only the applicable standard of care and if that standard was breached, but also that a causal link between the breach of the standard of care and the injury. (Appx., p. 467, 476, 489). House Study Bill 105 explained "[i]n an action for personal injury or wrongful death against a health care provider based upon alleged negligence . . . the bill requires the plaintiff, within 90 days of the defendant's

answer, to serve upon the defendant a certificate of merit affidavit for each expert who will testify with respect to the issues of standard of care, breach of standard of care, or causation." (Appx., p. 466-67). House Study Bill 105 continues to state "[a] certificate of merit affidavit must be signed by the expert witness and certify the purpose for calling the expert witness by providing under the oath of the expert witness the expert witness's . . . statement of the manner by which the breach of the standard of care was the cause of the injury." (Appx., p. 467) (emphasis added). Both House File 487 and Senate Study Bill 1087 have the same explanations. (Appx., p. 476, 489). However, when the *final* revisions were made and Senate Bill 1087 became Senate File 465, the legislature unequivocally removed "causation" as part of § 147.140. (Appx., p. 491-496).

Looking to the language in House Study Bill 105, House File 487, and Senate Study Bill 1087, it is clear that the removal of "causation" indicates the legislature intended that a plaintiff be required to serve a certificate of merit affidavit upon the defendant for each expert who will testify as to standard of care and breach of the standard of care *but not as to causation*. Moreover, § 147.140 eliminated any need for a certificate of merit affidavit for when expert testimony is necessary to prove causation in a case. Notably, the "prima facie case" language remained in each revision; yet, the legislature clearly removed the "causation" language, which

indicates the legislature did not intend that § 147.140 apply to causation experts. Therefore, a certificate of merit affidavit requirement on causation is not required.

If the "prima facie case" language is interpreted to require a causation affidavit, it would create an ambiguity in the statute. That is, it creates an ambiguity between the requirements for the affidavit in § 147.140(b) and the requirements in § 147.140(a). Statutes should not be read to create ambiguity when the statutory language and legislative purpose is clear.

Plaintiff requests this Court clarify that the plain language of § 147.140 and legislative intent does not require a causation certificate of merit affidavit and reverse the Court of Appeals and remand back to district court.

II. The Court of Appeals Erred in Determining that a Certificate of Merit was Necessary.

The Iowa Supreme Court reviews both statutory interpretation and a district court's ruling on a motion to dismiss for correction of errors at law. *Struck*, 973 N.W.2d at 538. "For purposes of reviewing a ruling on a motion to dismiss, [this Court] accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Id.* (internal citations omitted). The petition must be construed "in its most favorable light, resolving all doubts and ambiguities in [the plaintiff's] favor." *Id.* (internal quotations and citations omitted). Butterfield preserved this issue at both the district court level and on appeal. *See generally* Appx.; *See also* Court of App. Opinion. The Court of Appeals agreed with Butterfield's contention

that a certificate of merit regarding standard of care was not necessary. The Appellate Court concluded that Iowa "precedent supports the Estate's contention that the care at issue was likely ministerial or routine in nature." Court of App. Opinion, p. 4; *citing to Thompson v. Embassy Rehab. & Care Ctr.*, 604 N.W.2d 643, 646 (Iowa 2000) (finding the responsibility to reposition a patient to avoid bedsores appeared to be ministerial but the patient's resistance to such care presented special circumstances requiring expert testimony); *also citing to Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 141 (Iowa Ct. App. 1993) (finding that taking a patient to the bathroom was nonmedical or routine care). However, the Court of Appeals ultimately affirmed the district court's ruling on this issue determining that "expert witness testimony was needed with respect to the element of causation, which triggers the statutory requirement for a certificate of merit affidavit." Court of App. Opinion, p. 5. The analysis of the appellate court should have ended once it determined that the care at issue was likely ministerial or routine in nature and a certificate of merit was not necessary. Once the Court of Appeals determined that the care at issue was likely ministerial or routine in nature, it turned its attention to whether the alleged negligence was causal and within the common knowledge of a non-medically trained person. That is, whether a certificate of merit affidavit regarding causation was necessary. It interpreted § 147.140(a) to require an affidavit regarding causation even though that is not required under § 147.140(b). The Court

of Appeals indicated "[w]e do not believe that understanding the causation behind a subtrochanteric intertrochanteric hip fracture, an ischial pressure injury, or the death of a woman with a myriad of underlying health conditions is within the common knowledge of a non-medically trained person." Court of App. Opinion, p. 5. Plaintiff contends that this further analysis regarding a causation affidavit was in error.

However, if the cause of the injuries is to be reviewed as to whether they are within the common knowledge of a lay person, then the Plaintiff has met that burden. The Appellate Court is overcomplicating the pled facts of this case and combining three separate injuries – the hip fracture, the pressure wound, and the death. Defendants have already admitted they owed Butterfield a duty of care and knew or should have known they were required to ensure proper care to Butterfield. (Appx., p. 26-27). It is common knowledge that "popping" noise with immediate pain (Appx., p. 13-14) is indicative of one needing to seek medical attention, and a non-medically trained person could comprehend a "popping" noise *could* indicate a fracture.

A non-medically trained person, using his or her own experiences, could also understand that a fracture could result in required surgery and immobilization. Further, upon Butterfield's return to Chautauqua from the hospital, she spent majority of her time bedbound due to the immobilization from the fracture, and a layperson could understand that sitting in the same spot or position for too long *could*

lead to numbness, redness, discomfort, and even skin breakdowns, which is precisely what happened to Butterfield – remaining in the same position caused redness and blisters that eventually transformed into a larger, open pressure wound and required surgical intervention due to Chautauqua's complete inactions. (Appx., p. 14-17). If this Court agrees, then Plaintiff should be allowed to litigate her negligence claims regarding the hip fracture, surgery and her pressure wound that resulted in surgery. A non-medically trained person could comprehend that death *could* result when an individual sustains injuries like a fracture and pressure injury with exposed bone, and those injuries worsen but are ignored.

Butterfield's case is not about "a myriad of underlying health conditions" that the Court of Appeals suggested but rather is about the basic understanding that continued failures to act by the Defendants resulted in a left fracture, a significant personal injury, which *could and did* worsen Butterfield's condition and substantially contributed to her death. Chautauqua's negligence includes, but is not limited to, when staff transferred Butterfield which caused the popping noise and failed to act after staff heard the popping noise and did not contact the doctor and did not send Butterfield to the hospital until six days later (Appx., p. 13-14); did not reposition her upon her return when she was totally dependent on staff for such a basic task (Appx., p. 14-15); did not treat her pressure wound *at all*, causing it to become infected and increase so much in size that her bone was exposed. (Appx., p.

16-17). Looking at Chautauqua's *actions* of transferring her in a manner that causes her knee to "pop" and *inactions*, non-medically trained persons could determine, by their experiences alone, that the transfer caused the leg fracture and/or the failure to act when injuries are present caused worsening of those injuries and death as a result of those injuries. Thus, the Court of Appeals erred in determining expert testimony was required in order for Plaintiff to prove causation.

III. The Court of Appeals Erred in Determining that the Parties Did Not and Could Not Enter into an Agreement that a Certificate of Merit Need Not be Filed.

The Iowa Supreme Court reviews a district court's ruling on a motion to dismiss for correction of errors at law. *Struck*, 973 N.W.2d at 538. Butterfield preserved this issue at the district court level and on appeal. *See generally* Appx.; *See also* Court of App. Opinion. The legislative purpose of § 147.140 was to arrest baseless actions early in the judicial process. The Court of Appeals did not consider this legislative purpose of Section 147.140. The Court of Appeals incorrectly determined that "engagement in discovery while the certificate of merit affidavit remains absent from the parties' discovery plan does not constitute a definite offer to refrain from filing a motion to dismiss on this ground." Court of App. Opinion, p. 6. The Court of Appeals further stated that "[e]ven supposing a contract was formed, there is not authority for the court to ignore its obligation to dismiss the case once the appropriate motion is filed." *Id.* Ultimately, the Court of Appeals erred in

determining that the Plaintiff and Defendants "did not and could not contract out of this mandatory result." *Id.*

The Court of Appeals misconstrued Plaintiff's argument. 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 submitting to the district court, Plaintiff's counsel submitted this proposed Agreement to Defendants' counsel via email, who wanted to change the disclosure date but otherwise indicated "I am good with it." (Appx., p. 245, 290-91). The Trial Schedule and Discovery Plan was then approved by the district court, and both parties engaged in substantial discovery and litigation.

IV. Defendants expressly agreed to a Discovery Plan that excluded the certificate of merit deadline, filed initial disclosures, requested extensions for discovery responses, sent Butterfield over 4,500 responsive documents, met and conferred with Butterfield's counsel, entered into a protective order, provided a copy of their insurance policy, received Plaintiff's expert designations, submitted their expert designations, received Plaintiff's expert reports, submitted their expert reports, and began discussing the scheduling of 13 depositions. (Appx., p. 244-45, 290-96, 321-32, 402-03, 415-24). There was both an express Agreement through the Discovery Plan and implied Agreement through the parties' actions. The Court of Appeals failed to consider that Defendants impliedly *and* expressly agreed that a certificate of merit affidavit was not necessary. **The Court of Appeals Erred When It Determined that Defendants Did Not Waive their Right to Dismissal.**

The Iowa Supreme Court reviews a district court's ruling on a motion to dismiss for correction of errors at law. *Struck*, 973 N.W.2d at 538. Butterfield

preserved this issue at the district court level and on appeal. *See generally* Appx.; *See also* Court of App. Opinion. "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). "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). The Court of Appeals erroneously relied on *McHugh v. Smith*, 2021 Iowa App. 254, 966 N.W.2d 285 (Iowa Ct. App. Mar. 17, 2021) when analyzing Butterfield's arguments regarding waiver. Court of App. Opinion, p. 7. Butterfield is *not* arguing that the agreement to an extension involving discovery requests constitutes waiver, which is what the *McHugh* Court analyzed. Defendants actively and extensively engaged in discovery and the judicial process and the jurisdiction of the court, so much so that a certificate of merit ceases to serve its intended function: Defendants filed an answer (Appx., p. 25); the parties agreed to a Discovery Plan and district court approved it (Appx., p. 31); and Defendants engaged in substantial discovery, including production of over 4,500 documents, entering into a protective order, producing an insurance policy, designating experts, producing three expert reports, and discussion of scheduling 13 depositions. (Appx., p. 255-259, 290-424). Three months before trial and after

designating three experts, none of which indicated Plaintiff's claims were frivolous (Appx., p. 255-259), Defendants filed their § 147.140 Motion to Dismiss. Defendants submitted to the jurisdiction of the court and engaged in the judicial process such that the purpose of Section 147.140 is defeated.

In *Struck*, this Court looked to other states and determined that "[a]t least twenty-eight other states have enacted certificate or affidavit of merit statutes." *Struck*, 973 N.W.2d at 541. This Court stated that "[a]s the Pennsylvania Supreme Court recognized, the certificate of merit requirement serves to 'identify and weed non-meritorious malpractice claims from the judicial system efficiently and promptly.'" *Id.* at 542; *Womer v. Hilliker*, 589 Pa. 256, 908 A.2d 269, 275 (Pa. 2006). This Court also cited to a New York Appellate Court case, *Rabinovich v. Maimonides Med. Ctr.*, 179 A.D.3d 88, 91, 113 N.Y.S.3d 198 (N.Y. App. Div. 2019), to further analyze the purpose of § 147.140. *Struck*, 973 N.W.2d at 542.[1]

The Court of Appeals in *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291 (Iowa Ct. App. April 13, 2022) briefly discussed waiver. In *Butler*, plaintiffs argued that "if defendants initiate discovery before sixty days pass, a plaintiff's obligation to serve the [certificate of merit] affidavit disappears." *Butler*, 2022 Iowa

[1] It should be noted that *Struck* did not discuss waiver in the context that Butterfield does. *See Struck*, 973 N.W.2d at 539 (noting Struck did not raise an issue at the district court level and thus waived it).

App. at *10. *Butler* ultimately determined that when viewing § 147.140, the court found "no hint that a defendant can waive the plaintiff's obligation to timely serve an affidavit." *Id.* at *11. Butterfield's waiver claims are distinguishable.

If the Court would look to other states in analyzing Butterfield's claims that Defendants waived any right to dismissal under § 147.140, the Court would conclude that this "right" can be waived. Allowing Defendants to have this right to dismissal available for use whenever it might be advantageous for them, despite knowing Plaintiff's claims are meritorious, is wholly draconian and completely disrupts, not only the legislative intent of § 147.140, but the entire judicial process.

Plaintiff encourages this Court to consider the Texas Supreme Court case, *Lalonde v. Gosnell*, 593 S.W.3d 212, 219, 62 Tex. Sup. Ct. J. 1226 (Texas 2019), which has nearly an identical certificate of merit requirement as § 147.140 as well as a similar purpose to "ensure frivolous claims are expeditiously discharged." *Lalonde*, 593 S.W.3d at 216. Like in *Lalonde*, the Iowa certificate of merit requirement should be mandatory not jurisdictional, which means notwithstanding the absence of a *statutory* deadline for dismissal, the requirement can be waived. (Appx., p. 250); *Id*. at 218. Texas Chapter 150 is very similar to § 147.140 in that it requires a sworn certificate of merit affidavit be filed early on in the case and failure to "file an affidavit from a similarly licensed professional attesting to the lawsuit's merits" requires dismissal of the lawsuit. *Lalonde*, 593 S.W.3d at 216.

In *Lalonde*, the Texas Supreme Court recognized that dismissal was not sought by the defendants until "mere weeks before trial," which was 1,219 days after suit was filed. *Id.* at 217. Like here, plaintiffs in *Lalonde* did not file a certificate of merit; but the court recognized that defendants filed an answer; the parties agreed to a scheduling order; and the parties voluntarily participated in mediation. *Id.* The *Lalonde* Court applied a totality of the circumstances test and concluded that the defendants impliedly waived the certificate of merit requirement by substantially invoking in the judicial process. *Id.* at 229. Specifically, *Lalonde* concluded that "both a certificate of merit and the consequence for failing to file one are mandatory [and] . . .when defendants have so engaged the judicial process that a certificate of merit ceases to serve its intended function, the requirement of its filing is waived." *Id.* Both the district court and Court of Appeals erred in failing to consider *Lalonde*, given this Court's consideration in other persuasive precedent on certificate of merit requirements.

Defendants actively and extensively engaged in discovery and the judicial process, so much so that a certificate of merit ceases to serve its intended function – Defendants filed an answer (Appx., p. 25); the parties agreed to a Discovery Plan and district court approved it (Appx., p. 31); and Defendants engaged in substantial discovery, including production of over 4,500 documents, entering into a protective order, producing an insurance policy, designating experts, producing three expert

reports, and discussion of scheduling 13 depositions. (Appx., p. 255-259, 290-424). Three months before trial and after designating three experts, none of which indicated Plaintiff's claims were frivolous (Appx., p. 255-259), Defendants filed their § 147.140 Motion to Dismiss. Defendants unequivocally relinquished their right to dismissal after substantial invocation of the judicial process and their implied intent to waive the certificate of merit requirement. The Court of Appeals failed to consider that Defendants' right to dismissal is mandatory rather than jurisdictional; therefore, it can be waived.

V. The Defendants Should Be Estopped from Dismissal and the Court of Appeals Erred in Concluding No Promise Existed Between the Parties.

The Iowa Supreme Court reviews a district court's ruling on a motion to dismiss for correction of errors at law. *Struck*, 973 N.W.2d at 538. Butterfield preserved this issue at the district court level and on appeal. *See generally* Appx.; *See also* Court of App. Opinion. Promissory estoppel requires: "(1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise." Court of App. Opinion, p. 8. (*citing to Kunde v. Est. of Bowman*, 920 N.W.2d 803, 810 (Iowa 2018)).

The Court of Appeals erred in determining that there was no clear or definite promise between the parties. Court of App. Opinion, p. 8. A clear and definite Trial Schedule and Discovery Plan was entered into by agreement between the parties on June 15, 2020, *before* a certificate of merit deadline. (Appx., p. 31-35). In the Discovery Plan, "[a]t least one signature to the [plan] is required. The signer certifies that all listed parties have joined in this [plan], subject to any objections noted." (Appx., p. 35). No objections were noted. *Id.* The Discovery Plan was signed by Plaintiff's attorney; but Defendants' attorney via email, indicated to Plaintiff's counsel that Defendants agreed to the proposed plan. (Appx., p. 290-91). This proposed plan specifically omitted a certificate of merit affidavit deadline. (Appx., p. 31-35). It was a clear and definite promise with a clear understanding of the discovery requirements and deadlines throughout the case, and both parties adhered to this discovery plan and the allowed stipulations for extensions. *See generally* Appx. Based upon communications between the parties' counsels, there was a clear understanding that Plaintiff was seeking assurances that the Discovery Plan would be the full and final document (Appx., p. 290-91), and Plaintiff reasonably relied on these assurances as well as Defendants' conduct to her substantial detriment. The Discovery Plan was a full agreement of the discovery deadlines, and the Court of Appeals failed to consider the length of time Defendants took to file a Motion to Dismiss, the amount of discovery Defendants actively participated in, and the parties

prior similarly situated dealings in the *Estate of Jean Marie Birtwell v. Care Initiatives*, LACL146071.

Moreover, Defendants' intent and choice was to litigate this case on its merits and substantially invoked the judicial process contrary to their statutory right to dismissal. Injustice can be avoided only by allowing the parties to continue to litigate this matter. In fact, it would be a detriment to the judicial process and unjust to allow Defendants to utilize § 147.140 during any stage in the litigation process despite Defendants clear intent to litigate Plaintiff's claims. Ultimately, § 147.140 was not intended to allow Defendants a way to circumvent trial after clear evidence that Defendants believe Butterfield's claims are meritorious. Defendants have substantially invoked the judicial process, acquiesced that Plaintiff's claims are not frivolous by their conduct, and certified Plaintiff's case has merit through the Discovery Plan and expert disclosures. Plaintiff detrimentally relied on Defendants' conduct, and Defendants should not be entitled to dismissal of the case.

CONCLUSION

For the foregoing reasons, the Court should further review the decision by the Court of Appeals and reverse and remand the case to the district court. Affirming the district court and Court of Appeals decisions would go against the purpose of § 147.140, would directly contradict the legislative history and intent, and would draconianly ban the Plaintiff's right to her day in court.

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 and served on the other parties to this appeal via EDMS on September 6, 2022.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS

This brief complies with the typeface requirements and type-volume limitation of Iowa R. 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 5,586 number of words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Jeffrey A. Pitman
Signature

09/06/2022
Date

IN THE COURT OF APPEALS OF IOWA

No. 22-0101
Filed August 17, 2022

ESTATE OF ROBERTA ANN BUTTERFIELD by BRADLEY DEAN BUTTERFIELD and DEANNE MARIE ROGERS, Co-Administrators,
Plaintiffs-Appellants,

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, Colleen D. Weiland, Judge.

An estate appeals the district court's dismissal of its claims against a skilled nursing facility for failure to provide a certificate of merit affidavit pursuant to Iowa Code section 147.140 (2020). **AFFIRMED.**

Jeffrey A. Pitman of Pitman, Kalkhoff, Sicula & Dentice, S.C., Milwaukee, Wisconsin, and John T. Hemminger of Law Offices of John T. Hemminger, Des Moines, for appellant.

Joseph D. Thornton of Smith Peterson Law Firm, LLP, Council Bluffs, for appellee.

Considered by Ahlers, P.J., and Badding and Chicchelly, JJ.

CHICCHELLY, Judge.

The Estate of Roberta Ann Butterfield appeals the district court's dismissal of its claims against Chautauqua Guest Home, Inc. for failure to provide a certificate of merit affidavit pursuant to Iowa Code section 147.140 (2020). The Estate contends it was not required to submit an affidavit under the statute, and if such an affidavit was required, then (1) the parties impliedly contracted out of the requirement, (2) Chautauqua waived the requirement, (3) the Estate substantially complied with the requirement, and/or (4) Chautauqua should be estopped from dismissal. Finding an affidavit was required and none of these arguments remedy the Estate's shortcoming, we affirm the dismissal.

I. Background Facts and Proceedings.

Roberta Ann Butterfield was a resident of Chautauqua, a skilled nursing facility, from October 2017 through May 2019. On or about May 19, 2018, Chautauqua staff heard a "pop" while transferring Butterfield from the bathroom into her wheelchair. Butterfield promptly complained of left leg pain. Chautauqua transferred Butterfield to a hospital six days later. She was diagnosed with a subtrochanteric intertrochanteric left hip fracture and underwent surgical intervention on May 27. Butterfield was readmitted to Chautauqua on June 1.

Butterfield spent significant time in bed after her return to Chautauqua. By January 10, 2019, she developed an ischial pressure injury in the form of a fluid-filled blister on her left buttocks area. This pressure injury grew over time and became infected. By April 3, the pressure injury advanced to stage four with bone visualization and required surgical intervention. Butterfield died on May 18.

In April 2020, the Estate filed an action against Chautauqua for personal injury, wrongful death, and loss of consortium. The petition alleged Chautuaqua was negligent in the care and treatment provided to Butterfield, which resulted in her injuries and death. Chautauqua answered on May 21. On June 15, the parties agreed to a trial scheduling and discovery plan, which the district court approved. Over the next year, the parties exchanged initial disclosures, interrogatories, requests for production, and reports of expert witnesses.

On July 16, 2021, Chautauqua moved to dismiss based on the Estate's failure to timely file a certificate of merit affidavit pursuant to Iowa Code section 147.140. After briefing and an unreported hearing, the district court granted Chautauqua's motion and dismissed the case with prejudice. The court also denied the Estate's motion to reconsider, amend, and enlarge the dismissal order. The Estate filed a timely appeal.

II. Review.

"We review a district court's ruling on a motion to dismiss for the correction of errors at law." *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022) (quoting *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)). "For purposes of reviewing a ruling on a motion to dismiss, we accept as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Id.* (citation omitted). "[W]e will affirm a dismissal only if the petition shows no right of recovery under any state of facts." *Id*. (alteration in original) (citation omitted). "We construe the petition in 'its most favorable light, resolving all doubts and ambiguities in [the plaintiff's] favor.'" *Id.* (alteration in original) (citation omitted).

We likewise review rulings involving statutory interpretation for correction of errors at law. *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

III. Discussion.

"[Iowa Code section 147.140] was enacted to enable early dismissal of meritless malpractice actions that require expert testimony to proceed." *Struck*, 973 N.W.2d at 536. "This statute provides that the plaintiff in a medical malpractice action requiring expert testimony must file a certificate of merit signed by a qualified expert within sixty days of the defendant's answer." *Id.* at 538 (citing Iowa Code § 147.140(1)). "Failure to substantially comply with [the certificate of merit requirement] 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." *Id.* at 538–39 (quoting Iowa Code § 147.140(6)). The Estate never filed a certificate of merit affidavit in this case, nor did it request an extension of the deadline for good cause as allowed under Iowa Code section 147.140(4).

A. Application of Iowa Code section 147.140.

The Estate contends that no certificate of merit affidavit was required because expert testimony is not necessary to establish the standard of care owed to Butterfield. It is true that claims for negligence arising from nonmedical, administrative, ministerial, or routine patient care do not require expert testimony to establish a standard of care. *See Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 102 (Iowa 1971) (finding "the standard is such reasonable care for patients as their known mental and physical condition may require"). Our precedent supports the Estate's contention that the care at issue was likely ministerial or routine in nature. *See Thompson v. Embassy Rehab. & Care Ctr.*, 604 N.W.2d 643, 646

(Iowa 2000) (finding the responsibility to reposition a patient to avoid bedsores appeared to be ministerial but the patient's resistance to such care presented special circumstances requiring expert testimony); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 141 (Iowa Ct. App.1993) (finding that taking a patient to the bathroom was nonmedical or routine care).

Even so, we agree with the district court's finding that the Estate failed to establish a prima facie case because causation required expert testimony. While section 147.140 does not require the certificate of merit affidavit to attest specifically to causation, the requirement for an affidavit is triggered by "a cause of action for which expert testimony is necessary to establish a prima facie case." Iowa Code § 147.140. "[A] causal relationship between the violation [of the applicable standard of care] and injury sustained" is a necessary element to establish a prima facie case of medical negligence. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 401 (Iowa 2017). We do not believe that understanding the causation behind a subtrochanteric intertrochanteric hip fracture, an ischial pressure injury, or the death of a woman with a myriad of underlying health conditions is within the common knowledge of a non-medically trained person. Therefore, expert witness testimony was needed with respect to the element of causation, which triggers the statutory requirement for a certificate of merit affidavit. *See Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 WL 3077022, at *2 (Iowa Ct. App. July 21, 2021) (finding a claim that arguably fell in the category of nonmedical or routine care still required a certificate of merit affidavit because expert testimony was necessary on causation).

Nor does this action present a case of res ipsa loquitur. The doctrine of res ipsa loquitur permits an inference of negligence when, among other conditions, "the occurrence, in the ordinary course of things, would not have happened if reasonable care had been used." *Miller v. Trimark Physicians Grp., Inc.*, No. 03-0055, 2003 WL 22346933, at *3 (Iowa Ct. App. Oct. 15, 2003) (citing *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 831 (Iowa 2000)). Proving this condition required an expert. Because a prima facie case could not be established without an expert, we find Iowa Code section 147.140 required a certificate of merit affidavit in this instance.

B. Implied contract.

The Estate asserts the district court erred in concluding that the parties could not contract out of the requirement for a certificate of merit affidavit. It contends the parties impliedly agreed that no affidavit was necessary in this case by way of their course of dealings and the discovery plan. However, engagement in discovery while the certificate of merit affidavit remains absent from the parties' discovery plan does not constitute a definite offer to refrain from filing a motion to dismiss on this ground. Even supposing a contract was formed, there is not authority for the court to ignore its obligation to dismiss the case once the appropriate motion is filed. The statute is clear: "Failure to substantially comply with subsection 1 [the filing of the certificate of merit affidavit] *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). We find the parties did not and could not contract out of this mandatory result.

C. Waiver.

The Estate argues Chautauqua waived the statutory requirement for a certificate of merit affidavit. Similar to the foregoing contractual analysis, we do not find the requisite intent to waive the certificate of merit affidavit. The statute sets forth a mandatory course of action with no expiration or other timeline. We have previously found that agreeing to an extension involving discovery requests does not "constructively waive" the requirement for a timely certificate of merit affidavit. *See McHugh v. Smith*, No. 20-0724, 2021 WL 1016596, at *5 (Iowa Ct. App. Mar. 17, 2021). Accordingly, we find Chautauqua did not waive the requirement.

D. Substantial compliance.

The Estate maintains it substantially complied with the statutory requirements for a certificate of merit affidavit. "Substantial compliance means 'compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" *Id.* at *3 (quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993)). We are sympathetic to the plaintiff's position that subsequent discovery filings may have supported a meritorious claim. However, we have previously held that failure to provide such evidence within the tight timeline set forth in section 147.140 will not constitute substantial compliance. *See id.* at *3, *5 (finding the plaintiff's substantial compliance argument failed even though discovery filed after the affidavit deadline "may have established that [the plaintiff's] claim was not frivolous had she timely submitted it"). The Estate contends we should look to its filings throughout the course of the judicial process, but the initial disclosures were the only substantive filing made within the sixty-day

window allowed by the statute. These disclosures did not fulfill the requirement for a signed affidavit from a qualified expert that was expected under section 147.140. Because "the timing of the certificate of merit affidavit is material," we find the subsequent filings do not constitute substantial compliance with the statute. *See id.* at *5.

E. Estoppel.

The Estate claims the doctrine of promissory estoppel should have precluded granting Chautauqua's motion to dismiss. Promissory estoppel requires:

> (1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise.

Kunde v. Est. of Bowman, 920 N.W.2d 803, 810 (Iowa 2018) (citation omitted). The Estate alleges the parties' discovery plan constituted a clear and definite promise. Consistent with our foregoing analysis, we are unconvinced that simply agreeing to the parties' discovery plan without reference to a certificate of merit affidavit comprises a clear or definite promise. Therefore, we find Chautauqua should not be estopped from dismissal.

IV. Disposition.

We conclude that a certificate of merit affidavit was required in this case and failure to supply one was not relieved by the actions of either party. For these

reasons, we affirm the district court order dismissing the Estate's entire petition with prejudice.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
22-0101	Estate of Butterfield v. Chautauqua Guest Home, Inc.

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