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

DEFENDANTS-APPELLEES' RESISTANCE TO PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER REVIEW—DECISION OF THE IOWA COURT OF APPEALS, AUGUST 17, 2022

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals Properly Affirm the District Court's Dismissal of Plaintiff-Appellant's Petition with Prejudice for Failing to Comply with Iowa Code Section 147.140?

Iowa Code § 147.140
Iowa R. App. P. 6.1103
Anderson v. Bristol, Inc., 936 F. Supp. 2d 1039, 1067 (S.D. Iowa 2013)
Barnes v. Bovemeyer, 122 N.W.2d 312 (Iowa 1963)
Bazel v. Mabee, 576 N.W.2d 385 (Iowa Ct. App. 1998)
Blackhawk Building Systems, Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988)
Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc., No. 22-0101, 2022 WL 3440703 (Iowa Ct. App. Aug. 17, 2022)
Daley v. Hoagbin, 2000 WL 1298722 (Iowa Ct. App. 2000)
Kennis v. Mercy Hosp. Med. Ctr., 491 N.W.2d 161 (Iowa 1992)
LaLonde v. Gosnell, 593 S.W.3d 212 (Tex. 2019)
McCleeary v. Wirtz, 222 N.W.2d 409 (Iowa 1974)
McHugh v. Smith, M.D., No. LACV187705, 2020 WL 2974058 (Iowa Dist. Apr. 07, 2020)
Nedved v. Welch, 585 N.W.2d 238 (Iowa 1998)
Savage v. Christian Hospital Northwest, 543 F.2d 44 (8th Cir. 1976)
Schmitt v. Floyd Valley Healthcare, No. 20-0985, 2021 WL 3077022 (Iowa Ct. App. July 21, 2021)
Schultze v. Landmark Hotel Corp., 463 N.W.2d 47 (Iowa 1990)
Van Iperen v. Van Brarner, 392 N.W.2d 480 (Iowa 1986)
Virden v. Betts and Beer Construction Co., 656 N.W.2d 805 (Iowa 2003)
Walstad v. University of Minnesota Hospitals, 442 F.2d 634 (8th Cir. 1971)

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STATEMENT RESISTING FURTHER REVIEW

"Further review by the supreme court is not a matter of right, but of judicial discretion." Iowa R. App. P. 6.1103(1)(b). "An application for further review will not be granted in normal circumstances." Id. The circumstances in which further review is appropriate is a matter of the Supreme Court's discretion. Id. While not exhaustive, the following reasons indicate the character of reasons which the Court will consider:

> (1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter;
> (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court;
> (3) The court of appeals has decided a case where there is an important question of changing legal principles;
> (4) The case presents an issue of broad public importance that the supreme court should ultimately determine

Iowa R. App. P. 6.1103(1)(b)(1)–(4). An application cannot simply recite one of the grounds provided by Iowa Rule of Appellate Procedure 6.1103 and must instead "contain a direct

and concise statement of the reasons why the case warrants further review." Iowa R. App. P. 6.1103(1)(c)(3).

On August 17, 2022, the Iowa Court of Appeals affirmed the District Court's determination that Iowa Code section 147.140 applied to Plaintiff's medical negligence claims and that Plaintiff failed to substantially comply with the statute's requirements.

On September 6, 2022, Plaintiff filed this Application for Further Review. Plaintiff fails to cite any of the grounds provided by Iowa Rule of Appellate Procedure 6.1103 nor provide "a direct and concise statement of the reasons why the case warrants further review." Iowa R. App. P. 6.1103(1)(b)–(c). Plaintiff's Application poses no substantial question of constitutional law or important unsettled area of law. Nor is this a case implicating changing legal principles or presenting an issue of broad public importance.

Plaintiff alleged a wrongful death medical negligence claim regarding Defendants' care of Roberta Butterfield. Under Iowa law, a 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).

Plaintiff admits that they failed to comply with the certificate of merit requirements of Iowa Code section 147.140. Instead, Plaintiff launches into a speculative debate of the legislative history and argues that her case does not require expert witness testimony. Plaintiff argues that the Iowa Legislature "chose to exclude a causation requirement" from § 147.140. (Application for Further Review, p. 10). However, the Iowa Court of Appeals has already 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.

In the five years since § 147.140 was enacted, the Iowa legislature has made no effort to amend the statute to support a contrary interpretation. If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute.

Certainly, the Court is not at liberty to try to find hidden motivations and meanings not expressed in the statute.

Accordingly, this Court should disregard Plaintiff's desperate attempt to force a spin on the legislative history as it is not an accurate reflection of the legislative intent. The statute speaks for itself as the Court of Appeals properly decided.

WHEREFORE, Defendants-Appellees pray that this Court deny the Application for Further Review and affirm the decision of the Iowa Court of Appeals in this case.

STATEMENT OF 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 9 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). On August 17, 2022, the Iowa Court of Appeals affirmed the dismissal.

ARGUMENT

The Court of Appeals Properly Affirmed the District Court's Dismissal of Appellants' Petition with Prejudice for Failing to Comply with Iowa Code Section 147.140

A. Appellants Need Expert Testimony to Establish a Prima Facie Case on their Claims, Making Iowa Code Section 147.140 Applicable.

Plaintiff's claims are clearly medical negligence claims in support of her wrongful death action and require competent expert testimony. To establish a prima facie case for medical malpractice, a plaintiff must "show evidence which establishes the applicable standard of care, demonstrate this standard has

been violated, and develop a causal relationship between the violation and the alleged harm." Kennis v. Mercy Hosp. Med. Ctr., 491 N.W.2d 161, 165 (Iowa 1992)

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.)

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 a similar 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).

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.

The Iowa Court of Appeals agreed and held:

> 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).

Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc., No. 22-0101, 2022 WL 3440703, at *2 (Iowa Ct. App. Aug. 17, 2022)

Likewise, 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.

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 hidden meanings, 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).

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.

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 allegations in her petition. 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. That is how Plaintiff has pled her case. Under these circumstances, Plaintiff is unable to prove the allegations of negligence against Defendant without expert witness testimony.

B. Plaintiff-Appellant failed to file the certificate of merit affidavit required by Iowa Code section 147.140

Iowa Code §147.140 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.

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 and Court of Appeals

properly found that Plaintiff failed to substantially comply with Certificate of Merit affidavit requirements.

C. Plaintiff-Appellant'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). 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 Iowa Court of Appeals rejected Plaintiff's entire argument. In relevant part, the Court of Appeals held:

> 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.

Est. of Butterfield by Butterfield v. Chautauqua Guest Home, Inc., No. 22-0101, 2022 WL 3440703, at *3 (Iowa Ct. App. Aug. 17, 2022).

D. Plaintiff-Appellant'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 a 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.

CONCLUSION

Accordingly, the Iowa Court of Appeals properly affirmed the District Court's dismissal of Plaintiff-Appellant's claim with prejudice.

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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 4,250 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 — September 12, 2022
Signature — Date

CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

I, Joseph D. Thornton, hereby certify that on the 12th day of September 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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