

IN THE SUPREME COURT OF IOWA

No. 20-1228

Woodbury County No. LACV190500

JACQUELINE STRUCK,

Petitioner/Appellant,

vs.

MERCY HEALTH SERVICES-IOWA CORP. SIOUX CITY

A/K/A MERCY MEDICAL CENTER – SIOUX CITY,

RODNEY J. DEAN, MD, ALBERT OKINE, PA,

ROBBIE L. ROBINSON, NP, AND EILEEN MIDDLETON, PA,

Respondents/Appellees,

APPEAL FROM THE IOWA DISTRICT COURT FOR WOODBURY
COUNTY

THE HONORABLE ZACHARY HINDMAN

FINAL BRIEF FOR PETITIONER/APPELLANT

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STATEMENT OF THE ISSUES

The District Court erred when it found Plaintiff's failure to file a certificate of merit under Iowa Code §147.140 was dispositive of all negligence claims made by the Plaintiff against Mercy Health Services and the various defendants, and dismissed all claims.

ROUTING STATEMENT

This case presents issues involving the application of existing law as to the applicability of a certificate of merit, required by Iowa Code

§147.140, to all negligence claims, including general negligence for a premises liability claim, negligence by non-party staff, as well as professional negligence, negligent hiring and retention and supervision and the case should be transferred accordingly to the Court of Appeals. See Iowa R App P §6.1101(3).

STATEMENT OF THE CASE

The petition in this matter was filed on January 24, 2020. App. 3-7. The Petition was served on the various defendants, Mercy Health Services- Iowa, Rodney J. Dean, MD, Albert Okine, PA, Jeremy J. Vande Zande, MD, and Eileen Middleton, PA. App 8-14. An application for alternative service as to Robbie Robinson, NP, to be served by publication was denied by the District Court. App. 25-38. A joint answer was filed by Rodney Dean, MD, Albert Okine, PA, and Eileen Middleton, PA, on February 19, 2020. Defendant Mercy Health Services filed and answer on March 12, 2020. Defendant Jeremy Vande Zande, MD, filed an answer on April 22, 2020. App. 39-43.

Due to the then developing pandemic, limited discovery was conducted prior the Defendants' motions to dismiss for failure to file a certificate of merit required by Iowa Code §147.140 were filed on May 12 and May 19, 2020. App. 44-50. Plaintiff filed a resistance to the motions

on May 22, and May 28, 2020. App. 51-52. Defendants filed substantially similar replies on June 2 and June 5, 2020. App. 55-57. A hearing was held on the motions on June 12, 2020. The District Court entered an Order August 22, 2020, dismissing the claims against Mercy Health Services-Iowa, Rodney J. Dean, MD, Albert Okine, PA, Jeremy J. Vande Zande, MD, and Eileen Middleton, PA. App. 67-96. A timely Notice of Appeal was then filed on September 21, 2020.

STATEMENT OF FACTS

Plaintiff, Jacqueline Struck, was a patient at Mercy Health Services (hereinafter “Mercy Medical Center”) when she suffered personal injuries arising out of a fall at Mercy Medical Center on or about January 25, 2018. App. 3-7. Plaintiff is a resident of Iowa. The Defendant Mercy Medical Center is an Iowa corporation which owned and/or possessed the property where the fall occurred. It is additionally alleged that Mercy Medical Center hired and retained the other named Defendants and were also responsible for the actions of non-party staff and day-to-day operations at the property. App. 3-7. The Defendants Rodney J Dean, MD, Albert Okine, PA, Jeremy J. Vande Zande, MD, and Eileen Middleton, PA are licensed professionals who provided care for and/or were present at the time of Plaintiff’s fall. App. 3-7. Plaintiff claims that in addition to

possible acts of professional negligence, she may also have been injured due to acts of general negligence by the named defendants or non-party staff in failing to take steps to protect Plaintiff from a fall and injury as well as negligence in ways not presently known to the Plaintiff. App. 3-7. The Plaintiff filed an action in Woodbury County on January 24, 2020. App. 3-7. The Petition was served on Defendants. The Defendants filed timely answers to the Petition.

Due to the then developing pandemic, limited discovery was conducted prior the Defendants' motions to dismiss for failure to file a certificate of merit required by Iowa Code §147.140 were filed on May 12 and May 19, 2020. App. 44-50. Plaintiff filed a resistance to the motions on May 22, and May 28, 2020. App. 51-54. Defendants filed substantially similar replies on June 2 and June 5, 2020. App. 55-57. A hearing was held on the motions on June 12, 2020. The District Court entered an Order August 22, 2020, dismissing the claims against Mercy Health Services-Iowa, Rodney J. Dean, MD, Albert Okine, PA, Jeremy J. Vande Zande, MD, and Eileen Middleton, PA. App. 67-96. A timely Notice of Appeal was then filed on September 21, 2020.

STANDARD OF REVIEW

The Appellate Court reviews a District Court's ruling on a motion to dismiss for errors at law. Iowa R.App. P. 4; *Meier v. SENECAUT III*, 641 N.W.2d 532 (Iowa 2002) Although not bound by the District Court's legal conclusions, the reviewing court is bound by the court's findings of fact if they are supported by substantial evidence. *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998).

ERROR PRESERVATION

The matters in this appeal were timely preserved by the filing of the notice of appeal on September 21, 2020.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT FOUND THAT ALL OF PLAINTIFF'S NEGLIGENCE CLAIMS SHOULD BE DISMISSED FOR FAILING TO SUBSTANTIALLY COMPLY WITH THE IOWA CODE § 147.140 CERTIFICATE OF MERIT REQUIREMENT.

Iowa is a notice pleading state and all doubts and ambiguities should have been resolved in Plaintiff's favor in addressing the motions to dismiss.

While the District Court provided a well-reasoned analysis for why the claims for professional negligence should be dismissed for failure to substantially comply with Iowa Code §147.140, it's analysis as to why all claims for negligent hiring, retention, supervision and general negligence

claims against the owner/occupier of property where the plaintiff fell and was injured went too far and was error. See *Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980). The ruling incorrectly presupposes that all of plaintiff's claims are against persons covered by Iowa Code §147.140. Certainly the named individual health care provider defendants are covered by Iowa Code §147.140 as to medical negligence claims. However, not all claims are based on those defendants' professional skills and in fact some claims are beyond the scope of §147.140 and do not rely on the defendants' professions. See *Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980)

The Motions to Dismiss were based on a relatively new code section intended to make claims against Iowa health care professionals more difficult, by granting an extra procedural protection beyond those already codified in Iowa law, by requiring plaintiffs to provide a causation opinion within a short time frame after service of the original notice. The motions in the case at bar, were not Motions for Summary Judgment filed after discovery was completed so as to flesh out all of the negligence claims plaintiff provided notice of when she filed her petition. *Id.*, but motions to Dismiss for failing to comply with the new code §147.140.

Lamantia addressed a case filed against employees of a municipality for which notice, then required under Iowa Code Chapter 613A.5, Iowa's tort claims act, was not provided. Much as the case here where the Certificate of Merit required under Iowa Code §147.140 is now required for professional negligence claims, was not filed. *Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980) In *Lamantia*, the District Court failed to take into account notice pleading and that claims outside Iowa's Tort Claims Act may be included in Plaintiff's petition under notice pleading. *Id.* So too here, the District Court erred when it failed to consider that tort claims outside those covered by Iowa Code §174.140 still exist, including claims under premises liability and respondent superior, wherein persons not covered by §147.140, acting on behalf of the defendants or under their direction and supervision, may have been negligent and responsible for plaintiff's damages. See *Id.*

Iowa is a notice pleading state. *Doerring v. Kramer*, 556 N.W.2d 816 (Iowa App. 1996) As such Plaintiff must provide only a short and plain statement of the claim, she is not required to plead all of the facts. *Dudley v. GMT Corp.*, 541 N.W.2d 259, 261 (Iowa App. 1995). The Supreme Court has stated:

“Since the advent of notice pleading under Iowa Rule of Civil Procedure 69(a), it is a rare case which will not survive a rule 104(b) motion. As a result, disposition of unmeritorious claims in advance of trial must now ordinarily be accomplished by other pretrial procedures which permit narrowing of the issues and piercing of the bare allegations contained in the petition.”

Haupt v. Miller, 514 N.W.2d 905, 909 (Iowa 1994) (quoting *American Nat'l Bank v. Sivers*, 387 N.W.2d 138, 140 (Iowa 1986)). The Certificate of Merit is required to be filed within sixty (60) days of a defendant's answer which does not provide time for adequate discovery to flesh out the various claims of negligence referred to in plaintiff's petition and the District Court should not be thrust into the role of trying to determine any and all negligence claims a party may be intending, without the benefit of those theories being fleshed out in discovery. See *Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980)

The Defendants contention that one theory rather than another is evident in the pleading misses the point of notice pleading “if the prima facie elements of the claim are stated, and this statement is fair notice to a defendant, the petition is sufficient.” See *Misco Leasing, Inc. v. Keller*, 490 F.2d 545, 548 (10th Cir. 1974) (stating the dimensions of suit are not determined by pleadings; pleading of theory of recovery not required). Under notice pleading, petition is only required to apprise a defendant

"of the incident out of which the claim arose and the general nature of the action." *Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980) (quoting *Roberts v. Acres*, 495 F.2d 57, 58 (7th Cir. 1974)). Contrary to the District Court's analysis, the expert testimony, anticipated by Iowa Code §147.140, is not necessary to establish a prima facie case for premises liability or negligent acts of non-professional staff employed by the Defendant Mercy Medical Center.

In its analysis, the *Lamantia* Court found the provisions for discovery are so flexible and the availability of pretrial procedure and summary judgment so effective, that any attempted surprise that was a concern, before notice pleading, is aborted very easily, false issues detected, and "the gravamen of the dispute brought frankly into the open for the inspection of the Court. The other remedies for defining issues in terms of their lowest common denominators are much more efficient and have the additional merit of advancing the case towards its ultimate resolution on the merits." *Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980)

As this was a Motion to Dismiss, the Plaintiff's claims should have been assessed in the light most favorable to the Plaintiff, and all doubts and ambiguities resolved in her favor. *Holsapple v. McGrath*, 521 N.W.2d 711, 712 (Iowa 1994) The Court is to look to the pleadings to determine

if they were so deficient plaintiff was deprived of notice of the claims made. *Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994). In this case, the District Court erred in failing to resolve all doubts and ambiguities in the Plaintiff's favor. See *Doerring v. Kramer*, 556 N.W.2d 816, 818 (Iowa App. 1996) Instead it appears the District Court performed an analysis wherein doubts and ambiguities were resolved in the favor of all claims being covered by, or tied to §147.140. Under the District Court's analysis the myriad defendants were given the benefit of the doubt and the Court ignored the possibility of negligence claims pertaining to Plaintiff's falling on Mercy Medical Center's property while a patient there, despite Plaintiff's reference to non-party staff and negligence in ways not known to plaintiff at the time the petition was filed. These non-party staff, who would not be named in records available to plaintiff, could include, maintenance staff and others not covered by Iowa Code §147.140, over which Mercy Medical Center was responsible for their actions.

In *Doerring v. Kramer*, the District Court committed error when it dismissed a counter-claim filed by a party. On appeal the Court found that under Iowa's liberal notice pleading the counter claim should not have been dismissed. The Court found that "one reason for liberality in pleading requirements is the broad scope of various pretrial devices for

discovery of facts and formulation of issues.” (Citing *Kester v. Bruns*, 326 N.W.2d 279, 284 (Iowa 1982)). *Doerring v. Kramer*, 556 N.W.2d 816 (Iowa App. 1996) The case at bar involves a patient who fell while a patient in the Defendant, Mercy Medical Center. Professional negligence claims were alleged, but that does not mean that all negligent acts involved professional negligence as presumed by the District Court. Unfortunately, discovery was not allowed to be adequately conducted so as to determine what other actors or negligent acts may have been involved, as Defendants were quick to jump on a new procedural hurdle, Iowa Code §147.140, to try and prevent Plaintiff from pursuing her claim for personal injuries. The District Court should have dismissed the professional negligence claims, based on §147.140, only and allowed the case to continue for the broad scope of discovery to flesh out the facts, formulate the issues and determine the various theories of liability. *Id.* Instead the District Court erred and dismissed all of Plaintiff’s claims.

CONCLUSION

The District Court erred in finding that all possible negligence claims made by the plaintiff, necessarily relied upon professional negligence requiring expert testimony on causation, and therefore

required a certificate of merit be filed. This honorable Court should reverse the District Court as to claims regarding negligence not directly involving professional negligence, and remand to allow for discovery to be conducted by the parties and for further proceedings.

REQUEST FOR ORAL ARGUMENT

Jacqueline Struck hereby requests oral argument on these issues.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface

using Cambria in 14-point type and contains 2,911 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Thomp J. Pattermann
Signature

April 8, 2021
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certify that they, or a person acting on their behalf, filed the Final Brief of Appellant with the Clerk of the Iowa Supreme Court via EDMS on April 8, 2021.

The undersigned further certifies that on April 8, 2021 they, or a person acting on their behalf, did serve the attached Final Brief on the other parties to this appeal via EDMS and by mailing one (1) copy hereof to each of the following counsel of record:

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ATTORNEY COST CERTIFICATE

I hereby certify the cost of printing the foregoing Petitioner-
Appellant Final Brief was the sum of \$0.00.

/s/ Thomp J. Pattermann
Signature

April 8, 2021
Date