

IN THE SUPREME COURT OF IOWA

No. 20-1228

**JACQUELINE STRUCK,
Plaintiff-Appellants,**

vs.

**MERCY HEALTH SERVICES, IOWA CORP. aka MERCY MEDICAL
CENTER, SIOUX CITY, RODNEY J. DEAN, M.D., ALBERT OKINE, P.A.
JEREMY J. VANDE ZANDE, M.D. ROBBIE L. ROBINSON, N.P. and
EILEEN MIDDLETON, P.A.,
Defendants-Appellees.**

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT

**THE HONORABLE ZACHARY HINDMAN
PRESIDING JUDGE**

DEFENDANT-APPELLEE'S FINAL BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the District Court correctly held that the Certificate of Merit affidavit requirements apply to all of Appellant’s causes of action against Appellees Dean, Okine, and Middleton.

Doe v. Cent. Iowa Health Sys., 766 N.W.2d 787 (Iowa 2009)
Susie v. Family Health Care of Siouxland, P.L.C., 942 N.W.2d 333 (Iowa 2020)
Iowa Code § 147.140
Iowa R. App. P. 6.907

- II. Whether the District Court correctly held that Appellant failed to substantially comply with the Certificate of Merit affidavit requirements, such that dismissal of her causes of action against Appellees Dean, Okine, and Middleton was correct.

Iowa Code § 147.140
Iowa R. App. P. 6.907
Iowa R. Civ. P. 1.511

ROUTING STATEMENT

Appellees agree with Appellant that, as this case presents the application of existing legal principles, the Supreme Court should appropriately transfer it to the Court of Appeals. *See* Iowa. R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Appellees generally agree with Appellant's Statement of the Case. Appellees only wish to add that the Answer of Appellees' Dean, Okine, and Middleton was filed on February 19, 2020. Appellant had sixty (60) days from the date of Appellees' Answer, or until April 19, 2020, to provide Appellees with a Certificate of Merit Affidavit, pursuant to Iowa Code § 147.140. On May 12, 2020, after Appellant failed to meet this deadline, Appellees moved to dismiss for failure to file a Certificate of Merit.

Furthermore, while Appellees do agree that the timeframe surrounding the filing of the Petition, Appellees' Answer, and Appellees' Motion to Dismiss coincided with the "then developing pandemic," Appellee does not concede that the pandemic played a role in "limit[ing] discovery," as Appellant seems to allege. *See* Appellant's Brief at 5. A review of the court filings in this case shows that all parties, including Appellant, were full participants in this action, despite any complications caused by COVID-19. For instance, on April 3, 2020, with the "then developing pandemic" in full swing, Appellant filed a motion and proposed order to grant

additional time to serve one of the named Defendants. *See generally* App. 25. Accordingly, the pandemic cannot serve as an excuse for Appellant's failure to comply with Iowa Code 147.140 and any suggestion to the contrary in Appellant's Statement of the Case should be rejected by the Court.

STATEMENT OF THE FACTS

Appellant filed her petition on January 24, 2020. App. 1. In her petition, Struck alleges that she was admitted to Mercy Health Center on January 18, 2018. App. 4. Struck further alleges that, as a result of the alleged negligence of the Defendants, including Appellees Dean, Okine, and Middleton, in the provision of health care services to her, she was injured as a result of a slip and fall on January 25, 2018. App. 5–6.

In her petition, Struck alleged a single count of negligence against all named Defendants. App. 5–6. However, as noted by the District Court, a closer read of her allegations show that she made two categories of negligence claims. App. 68. The first category of claims were those of professional negligence. App. 68. Plaintiff alleged that all Defendants failed to use the proper care, skill, and knowledge ordinarily possessed by medical professionals and that their treatment of Struck violated the acceptable standard of care. The second category of allegations made by Struck was that Defendant Mercy was negligent in its hiring and retention of staff,

all of whom were responsible for Struck's care, treatment, and resultant fall and injuries. App. 68.

On May 12, 2020, Appellees Dean, Okine, and Middleton filed a joint motion to dismiss all claims against them on the grounds that Struck failed to comply with Iowa's Certificate of Merit affidavit requirement. Iowa Code § 147.140. App. 46. The relevant statute provides that, within sixty (60) days of a defendant's answer, a plaintiff must file an 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). Where a plaintiff fails to substantially comply with the Certificate of Merit requirements the result, upon motion by the relevant defendant, is "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).

A hearing on the motions to dismiss was held on June 12, 2020. App. 58. Struck, in addition to reasserting arguments based on when the sixty (60)-day period begins to run and her request for an extension of the deadline, asserted for the first time that her negligent hiring and retention claims against Defendant Mercy did not fall within the category of claims for which a Certificate of Merit affidavit is required, pursuant to Iowa Code § 147.140. App. 60–61.

On August 22, 2020, the District Court ruled in favor of Defendants, granting each motion to dismiss in its entirety. App. 95. The court determined that all of

Struck's claims were subject to Iowa Code § 147.140 and that her failure to "substantially comply" with the statute proved fatal. App. 95. On appeal, Struck admits that, with respect to what she concedes are professional negligence claims, dismissal pursuant to Iowa Code § 147.140 was proper. ["The District Court *should have dismissed the professional negligence claims, based on § 147.140, only and allowed [her other claims] to continue.*" Appellant's Brief at 12 (emphasis added).] As noted by the District Court, with respect to Appellees Dean, Okine, and Middleton, the claims asserted by Struck are plainly professional negligence claims. App. 78. There are no claims made by Appellant in her petition against Appellees which are not professional negligence claims.

ARGUMENT

I. The District Court Correctly Found that all Claims Against These Appellees are Professional Negligence Claims

A. Preservation of Error

Appellees agree that the issue of whether Appellant's claims were professional negligence claims such that compliance with Iowa Code § 147.140 was required was preserved for appellate review.

B. Scope of Review

Appellees agree that an appellate court's scope of review is for correction of errors at law and that the reviewing court is bound by the District Court's factual

finding which are supported by substantial evidence. *See* Iowa R. App. P. 6.907 (setting forth proper standard for appellate review).

C. All claims against these Appellees are professional negligence claims.

On May 5, 2017 then Governor of Iowa Terry Branstad signed into law a bill that reformed medical malpractice laws in the State of Iowa. Among the statutory reforms were a newly amended Section 147.139 and new statutes Section 147.136A and Section 147.140. All three statutory reforms took effect on July 1, 2017. All three sections applied to causes of action that accrued after July 1, 2017. Section 147.140 is but one part of the statutory reform of medical malpractice laws enacted by the Iowa legislature in 2017 and it references the new expert witness requirements of Section 147.139.

Iowa Code § 147.140(1) provides:

147.140 Expert witness – Certificate of Merit Affidavit.

1. a. In any action of personal injury or wrongful death against a health care provider based upon the alleged negligence in the practice of that profession or occupation or in patient care, which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the Plaintiff shall, prior to the commencement of discovery in the case and within sixty days of the Defendant's answer, serve upon the Defendant a Certificate of Merit signed by an expert witness and respect to the issue of standard of care and an alleged breach of the standard of care. The expert witness must meet the qualifying standards of section 147.139.

b. 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 all of the following:

(1) The expert witness's statement of familiarity with the applicable standard of care.

(2) The expert witness's statement that the standard of care was breached by the health care provider named in the petition.

c. A Plaintiff shall serve a separate Certificate of Merit Affidavit on each Defendant named in the Petition.

The statute also provides the consequence for failure to serve a Certificate of Merit Affidavit: "Failure to substantially comply with § 1 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).

Subsection 1(a) identifies the elements which are required for the Certificate of Merit statute to apply: (1) "action[s] for personal injury or wrongful death," (2) "against a health care provider," (3) "based upon the alleged negligence in the practice of that profession," and (4) the cause of action is one "for which expert testimony is necessary to establish a prima facie case." Iowa Code § 147.140(1)(a). "A prima facie case of medical negligence requires plaintiff to establish the applicable standard of care, a violation of that standard, and a causal relationship between the violation and the injury." *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 337 (Iowa 2020). Proving the standard of care and breach

of that standard requires expert testimony when the causal connection “is not within the knowledge and experience of an ordinary layperson.” *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 793 (Iowa 2009).

In her Petition, Struck alleges that Dean, Okine, and Middleton provided health care services to Struck, thereby establishing a physician-patient relationship between themselves and Struck. App. 4. As a result of that relationship, Struck alleges that Appellees owed a duty to her “to possess and use the care, skill and knowledge ordinarily possessed and used under circumstances [sic] by other members of their profession engaged in similar practice.” App. 4. Struck further alleges that she slipped and fell on January 25, 2018, during her hospital stay at Mercy, and said slip and fall was the result, at least in part, of medications administered to her by Defendants. App. 5. Struck then alleged, in the sole count of her Petition, that the “*professional negligence*” of Dean, Okine, Middleton and other named Defendants violated “*the standard of care*” and resulted in her damages. App. 5. Any claims that negligent hiring or retention resulted in Struck’s slip and fall do not apply to Dean, Okine, and Middleton. App. 5.

As is clear from the face of her allegations, each of Struck’s claims against Dean, Okine, and Middleton seek to recover (1) for personal injury, (2) against a health care provider, (3) based on the alleged negligent practice of medicine, (4) for which expert testimony is needed to establish a prima facie case. *See Iowa Code §*

147.140(1)(a). With respect to these claims of professional negligence, the Certificate of Merit requirements undoubtedly apply. What is also beyond doubt is that Appellant did not substantially comply with Certificate of Merit requirements—she admits as much in her proof brief. Accordingly, the District Court properly concluded that the Certificate of Merit requirements applied to Struck’s claims against Dean, Okine, and Middleton and that she failed to comply with said requirements, making dismissal with prejudice of her action against Dean, Okine, and Middleton the proper and statutorily compelled remedy. Judge Hindman’s Order of August 22, 2020 granting Appellees’ Motion to Dismiss should be affirmed.

II. Because all Claims Against These Appellees are Professional Negligence Claims, the District Court Correctly Dismissed Appellant’s Claims for her Failure to Substantially Comply with Iowa Code § 147.140.

A. Preservation of Error

Appellees agree that the issue of whether Appellant failed to substantially comply with Iowa Code § 147.140 was preserved for appellate review. However, to the extent that Appellant concedes that her claim against Dean, Okine, and Middleton sounds in professional negligence and that her professional negligence actions were properly dismissed pursuant to her failure to comply with Iowa Code § 147.140, such facts should be treated as conclusively established for purposes of appellate review. *See* Iowa R. Civ. P. 1.511 (admitted matters treated as conclusively established for purposes of pending action).

B. Scope of Review

Appellees agree that an appellate court's scope of review is for correction of errors at law and that the reviewing court is bound by the District Court's factual finding which are supported by substantial evidence. *See* Iowa R. App. P. 6.907 (setting forth proper standard for appellate review).

C. The District Court properly found, and Appellant concedes, that Appellant failed to substantially comply with the Certificate of Merit requirements, making dismissal of Appellant's case proper.

Upon determining that all of Plaintiffs claims were professional negligence claims such that Certificate of Merit requirements applied, the District Court next turned to whether Struck had substantially complied with said requirements or whether her failure to do so should result in required dismissal with prejudice of her claims. App. 91 (citing Iowa Code § 147.140(6)). The District Court ultimately rejected the arguments asserted by Appellant that she had substantially complied with Certificate of Merit requirements, making dismissal of her claims with prejudice the statutorily compelled remedy. App. 91–95.

On appeal, Appellant does not reassert those same substantial compliance arguments. In fact, Appellant concedes that “[t]he District Court *should have dismissed the professional negligence claims, based on § 147.140*” and contends that, because some of her claims were not professional negligence claims, they should have been allowed to proceed. Appellant's Brief at 12 (emphasis added).

As discussed above, Appellant’s claims against Appellees Dean, Okine, and Middleton contain allegations of only professional medical negligence. App. 5. Any potential liability for negligent hiring and retention resulting in Struck’s fall or any undeveloped claims of premises liability which should have been gleaned from Struck’s Petition—claims for which there is a colorable argument, as recognized but rejected by the District Court, that Certificate of Merit requirements would not apply—would not rest with Dean, Okine, and Middleton. *See* App. 5 (asserting negligent hiring and retention of staff claim solely against Appellee Mercy). As the District Court properly found, and as Appellant concedes, that she did not substantially comply with the requirements of Iowa Code § 147.140. That section applies to all professional negligence claims made against Dean, Okine, and Middleton. As Struck only asserts professional negligence claims against them, the District Court’s Order dismissing Appellant’s claims against Dean, Okine, and Middleton with prejudice was correct.

CONCLUSION

All of Appellant’s claims against Appellees Dean, Okine, and Middleton are professional negligence claims. Accordingly, Iowa Code § 147.140 applies. The District Court properly found, as Appellant concedes in her Proof Brief, that she failed to substantially comply with § 147.140—the compliance standard set forth by the statute. Iowa Code § 147.140(6). Accordingly, the remedy imposed for failure to

substantially comply with Certificate of Merit requirements, dismissal of Appellant's claims against Appellees Dean, Okine, and Middleton, with prejudice, was appropriately rendered by the District Court.

REQUEST FOR ORAL ARGUMENT

The Appellees-Defendants request that this case be submitted with oral argument.

DATED this 9th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Defendants-Appellees, Rodney J. Dean, M.D.; Albert Okine, P.A.; and Eileen Middleton, P.A., pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), hereby certifies that this brief contains 2,446 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000-word maximum permitted length of the brief.

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Appellees' Proof Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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PROOF OF SERVICE

I, the undersigned, hereby certify that I did serve the attached Defendant-Appellees' Proof Brief on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Defendants-Appellees' Proof Brief was the sum of \$0.00 exclusive of service tax, postage, and delivery charges.

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