

IN THE SUPREME COURT OF IOWA

JACQUELINE STRUCK, an Individual,

Plaintiff-Appellant,

vs.

MERCY HEALTH SERVICES-IOWA  
CORP. A/K/A MERCY MEDICAL  
CENTER-SIOUX CITY, RODNEY J.  
DEAN, M.D., ALBERT OKINE, P.A.,  
AND EILEEN MIDDLETON, PA,

Defendants-Appellees,

and

JEREMY J. VANDE ZANDE, M.D.,  
and ROBBIE L. ROBINSON, NP,

Defendants.

Supreme Court No. 20-1228

Woodbury County No. LACV 190500

**APPEAL FROM THE IOWA DISTRICT COURT  
FOR WOODBURY COUNTY  
HON. ZACHARY HINDMAN**

**Defendant-Appellee Mercy Health Services-Iowa Corp.  
a/k/a Mercy Medical Center-Sioux City's Final Brief**

Frederick T. Harris, #AT0003198  
LAMSON DUGAN & MURRAY LLP  
10306 Regency Parkway Drive, Omaha, NE 68114  
Tel: (402) 397-7300 | Fax: (402) 397-7824  
[rharris@ldmlaw.com](mailto:rharris@ldmlaw.com)

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## STATEMENT OF ISSUES

### **I. The district court correctly determined that Iowa Code § 147.140 is applicable to Plaintiff's claims of negligent hiring and retention**

*Bierman v. Weier*, 826 N.W.2d 436 (Iowa 2013)

*Cox v. Jones*, 470 N.W.2d 23 (Iowa 1991)

*Godar v. Edwards*, 588 N.W.2d 701 (Iowa 1999)

*GreatAmerican Fin. Servs. Corp. v. Natalya Rodionova Med. Care, P.C.*,  
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*Struve v. Struve*, 930 N.W.2d 368 (Iowa 2019)

*Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333 (Iowa  
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*Peppmeier v. Murphy*, 708 N.W.2d 57 (Iowa 2005)

Iowa Code § 135B.1

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Black's Law Dictionary, (11th ed. 2019)

### **II. Plaintiff's argument regarding notice pleading is both irrelevant and unpersuasive**

*Doerring v. Kramer*, 556 N.W.2d 816 (Iowa Ct. App. 1996)

*Lamantia v. Sojka*, 298 N.W.2d 245 (Iowa 1980)

## **ROUTING STATEMENT**

Defendant-Appellee, Mercy Health Services-Iowa, Corp. a/k/a Mercy Medical Center – Sioux City (hereinafter referred to as “Mercy Medical Center”), states that this case is appropriate for transfer to the Iowa Court of Appeals as it involves existing legal principles, and the issues are appropriate for summary disposition. Iowa R. App. P. 6.1101(3).

### **STATEMENT OF THE CASE**

#### **Nature of the Case**

This medical malpractice case alleges that Defendants failed to exercise the proper standard of care as healthcare providers in providing treatment to Plaintiff resulting in injuries she sustained on January 25, 2018. App. 3-7. On March 12, 2020, Mercy Medical Center filed its Answer. App. 19-24. On May 19, 2020, more than 60 days after Mercy Medical Center filed its Answer, it filed its Motion to Dismiss for Failure to Comply with Iowa Code Section 147.140 (Certificate of Merit). App. 46-50. Plaintiff filed her resistance to Mercy Medical Center’s Motion to Dismiss arguing that the time to file the Certificate of Merit had not yet started to run because not all Defendants had filed answers. In her resistance to the Motion to Dismiss, Plaintiff argued that a Certificate of Merit should not be required until all parties are present so as to avoid multiple deadlines.

Plaintiff further requested an extension of the deadline to file a Certificate of Merit until either 60-days after the final Defendant filed an answer or 60 days after Plaintiff filed an application for entry of a default against the final Defendant. App. 53-54. Plaintiff did not argue until the hearing on June 12, 2020 that Iowa Code § 147.140 should not apply to Plaintiff's claims against Mercy Medical Center regarding negligent hiring and retention. App. 70-71. The district court found that Iowa Code § 147.140 applied to the claims made by Plaintiff against Defendants including Mercy Medical Center and dismissed Plaintiff's case with prejudice for failing to substantially comply with Iowa Code § 147.140. App. 67-96.

### **Statement of Facts**

Plaintiff, Jacqueline Struck ("Plaintiff"), filed this case individually on January 24, 2020. App. 3-7. Plaintiff alleged she brought this action "to recover damages as a result of personal injuries arising out of a slip and fall incident which occurred on or about January 25, 2018. App. 3. Plaintiff was admitted to Mercy Medical Center on or about January 18, 2018 with extrapyramidal symptoms including dizziness, headaches, and unsteadiness when upright or standing. App. 4. Plaintiff claims that on January 25, 2018, she was suffering from dizziness and lightheadedness and, upon standing, fell and struck her chin on the floor. App. 5. Plaintiff alleges that



Defendants breached their duty to possess and use care, skill, and knowledge ordinarily possessed and used under like circumstances by other members of the profession. Plaintiff further alleges that Defendants negligently failed to properly supervise her considering her medications and the risks they posed for dizziness, failed to take steps to ensure she was safe from falls and injury, and were negligent in other ways not yet known. Plaintiff's Petition makes only one claim against Defendants for negligence, which is split into two parts. The first part of Plaintiff's negligence claim is against all Defendants for professional negligence. The second part of Plaintiff's negligence claim is against Mercy Medical Center for negligently hiring the co-Defendants and "non-party staff who were individually and jointly responsible for [Plaintiff's] care and treatment." App. 5. Plaintiff asserts that all Defendants breached their duty to her "to possess and use, care, skill and knowledge ordinarily possessed and used under like circumstances by other members of their profession." App. 5. Mercy Medical Center denies it was in any manner negligent. App. 19-24.

### **Course of Proceedings and Disposition of the Case**

Plaintiff filed her Petition on January 24, 2020. App. 3-7. Mercy Medical Center filed its Answer on March 12, 2020. App. 19-24. Under Iowa Code § 147.140, Plaintiff's certificate of merit affidavit was to be

served upon Mercy Medical Center no later than May 11, 2020, or sixty days from Mercy Medical Center's Answer. On May 19, 2020, Mercy Medical Center filed its Motion to Dismiss for Failure to Comply with Iowa Code Section 147.140 (Certificate of Merit). App. 46-50. On May 12, 2020, Defendants Rodney J. Dean, M.D.; Albert Okine, P.A.; and Eileen Middleton, P.A. filed a Motion to Dismiss Pursuant to Iowa Code Section 147.140(c)(6). App. 44-45. Plaintiff responded to both motions to dismiss by alleging that the time to file the certificate of merit pursuant to Iowa Code § 147.140 had not yet begun to run because not all defendants had been served and filed answers. Plaintiff argued that all parties should be "present in the litigation, otherwise multiple certificate deadlines may apply." Additionally, Plaintiff requested an extension to file the certificate of merit until sixty days after the final Defendant had been served and either filed an answer or Plaintiff has moved for default. App. 53-54.

On June 12, 2020, a hearing was held on the motions to dismiss. The district court granted the motions to dismiss and denied Plaintiff's request for extension of time to comply with Iowa Code § 147.140. The district court found that Iowa Code § 147.140 applied to Plaintiff's claims of professional negligence and to Plaintiff's claimed negligent hiring and retention by Mercy Medical Center. App. 67-96.

Plaintiff appeals from the district court's dismissal of all negligent claims – except professional negligence – against Mercy Medical Center with prejudice. Specifically, Plaintiff asserts that the district court erred in dismissing her claims of negligent hiring and retention, negligent supervision, premises liability, respondeat superior, and general negligence. In addition to not appealing the dismissal of her claim for professional negligence for failing to comply with Iowa Code § 147.140, Plaintiff does not dispute the district court's rejection of her other arguments in resistance to the motion to dismiss including her request for an extension of time to serve the certificate of merit and her argument that the sixty-day timeframe in § 147.140 had not begun to run.

## ARGUMENT

### I. Standard of review

An appellate court reviews a district court's ruling on a motion to dismiss for errors at law. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citing Iowa R. App. P. 4). Although the Court is not bound by the district court's legal conclusions, it is bound by any findings of fact if they are supported by substantial evidence. *Id.* (citing *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998)).

Review of a statute must be construed to give effect to the statute's plain language. *TLC Home Health Care, L.L.C. v. Iowa Dep't of Human Servs.*, 638 N.W.2d 708, 713 (Iowa 2002). "When the language of a statute is clear, [the appellate court is] obliged to enforce it as written." *Darrow v. Quaker Oats Co.*, 570 N.W.2d 649, 651 (Iowa 1997). Further, "[w]hen the terms of a statute are unambiguous, a court ordinarily need not resort to rules of statutory construction." *Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 49 (Iowa 1990). If, however, there is ambiguity in the statute, the court may rely on other tools of statutory construction. *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017).

## II. Error Preservation Statement

Mercy Medical Center agrees that Plaintiff has preserved the alleged errors regarding the dismissal of the negligent hiring and negligent retention claims. Plaintiff did not preserve arguments pertaining to negligent supervision, premises liability, and general negligence. Plaintiff did not raise these issues before the district court and the district court did not decide on these issues. As such, Plaintiff cannot raise these issues on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (citations omitted) (explaining that “a fundamental doctrine of appellate review [is] that issues must ordinarily be both raised and decided by the district court before [the Court] will decide them on appeal;” if a “district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.”). See also *Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)) and *Gustafson v. Zephier*, 949 N.W.2d 661 (Iowa Ct. App. 2020) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002)).

**III. The district court correctly determined that Iowa Code § 147.140 is applicable to Plaintiff's claims of negligent hiring and retention**

The question before the Court is whether Plaintiff's claim for negligent hiring and retention is subject to the certificate of merit requirement in Iowa Code § 147.140. Under the facts of this case, the claim for negligent hiring and retention is subject to Iowa Code § 147.140 and Plaintiff was required to serve a certificate of merit within sixty days of Mercy Medical Center's answer. However, Plaintiff's appeal mischaracterizes the decision of the district court. Plaintiff's arguments on appeal fail because they are not relevant considerations under Iowa Code § 147.140.

Plaintiff attempts to recast her medical malpractice claim as one for negligent hiring and retention of non-healthcare provider staff. The district court properly interpreted Plaintiff's claims as making allegations against a healthcare provider and determined that Iowa Code § 147.140 applied to those claims. Plaintiff's argument on appeal ignores integral portions of the district court's well-reasoned opinion but relies entirely on the argument that Iowa's liberal notice pleading standard should allow the other negligence claims as they pertain to claims against Mercy Medical Center's non-professional staff. Plaintiff's failure to address any of the actual statutory requirements triggering the need to serve a certificate of merit similarly

reveals the inherent flaws in Plaintiff's appeal. As such, the dismissal of Plaintiff's claim for negligent hiring and retention for failure to comply with Iowa Code § 147.140 should be affirmed.

The district court, in its Order, methodically broke down each element of § 147.140 to determine if the negligent hiring and retention claims were also covered by the certificate of merit requirement. The district court correctly interpreted the meaning of Iowa Code § 147.140 and determined that a certificate of merit was required for Plaintiff's negligence claims. A certificate of merit is required: (1) "[i]n *any action* for personal injury," (2) "*against* a health care provider," (3) that is "based upon the alleged negligence in the practice of that profession or occupation or in patient care," and (4) that "includes a cause of action for which expert testimony is necessary to establish a prima facie case." Iowa Code § 147.140(1)(a) (emphasis added).

**A. Plaintiff's claims against Mercy Medical Center meet the first two requirements under Iowa Code § 147.140 because Plaintiff makes a claim for personal injury against a healthcare provider**

The inquiry into whether a certificate of merit is required begins with whether there is a personal injury against a healthcare provider. See *Id.* (applying the certificate of merit requirement to "any action for personal

injury . . . against a health care provider”). The district court properly found that Plaintiff’s claim for negligent hiring and retention met these elements.

In the present matter, Plaintiff alleges that she was experiencing dizziness and lightheadedness when, upon standing, she fell. The fall resulted in the alleged injury to her chin. Plaintiff’s action is, indisputably, one for personal injury, meeting the first requirement of Iowa Code § 147.140. As all of Plaintiff’s claims arise from this personal injury, the first element is met on all of Plaintiff’s negligence claims.

The district court properly found that Mercy Medical Center is a healthcare provider as defined in Iowa Code § 147.136A. In relevant part, § 147.136A(1)(a) defines a healthcare provider as “a hospital as defined in section 134B.1. . . or any other person or entity who is licensed, certified, or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or in the practice of a profession.” Iowa Code § 147.136A. A hospital is defined as:

A place which is devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care over a period exceeding twenty-four hours of two or more nonrelated individuals suffering from illness, injury, or deformity, or a place which is devoted primarily to the rendering over a period exceeding twenty-four hours of obstetrical or other medical or nursing care for two or more nonrelated individuals, or any institution, place, building or agency in which any accommodation is primarily maintained, furnished or offered for the care over a period exceeding twenty-four hours of two or more nonrelated aged or infirm persons requiring or



receiving chronic or convalescent care; and shall include sanatoriums or other related institutions within the meaning of this chapter . . . ‘Hospital’ shall include, in any event, any facilities wholly or partially constructed or to be constructed with federal financial assistance, pursuant to Pub. L. No. 79-725, 60 Stat. 1040, approved August 13, 1943.

Iowa Code § 135B.1. Mercy Medical Center falls under the definition of a healthcare provider pursuant to Iowa Code § 147.140, thus any claims against Mercy Medical Center by Plaintiff meet the second requirement.

Plaintiff attempts on appeal to argue that through discovery, it may have been discovered that non-party and non-professional staff, such as maintenance staff, at Mercy Medical Center may be responsible for Plaintiff’s harm or may have been negligent in some presently unknown way. This assertion is inherently flawed in two ways. First, by arguing that the district court incorrectly presumed that the individuals responsible for her claims are those covered by Iowa Code § 147.140, Plaintiff misrepresents the clear and unambiguous meaning of the language: “an action for personal injury . . . against a health care provider.” Second, this argument is flawed because Plaintiff specifically limited her pleadings to actions by healthcare workers.

Plaintiff does not dispute that Mercy Medical Center is a healthcare provider. As already discussed, a certificate of merit is required “[i]n *any action for personal injury . . . against a health care provider.*” Iowa Code

§ 147.140(1)(a) (emphasis added). Plaintiff filed her action for personal injury against Mercy Medical Center, a healthcare provider. Thus, even if non-professional employees (or more precisely, non-healthcare providers) are somehow responsible in any part for Plaintiff's injury, it would have no bearing on whether a certificate of merit is required for claims made against Mercy Medical Center, a healthcare provider, for Plaintiff's personal injuries.

At no point in Plaintiff's Petition, does she allege or assert that non-professional staff, or individuals who are not healthcare providers, are – or may potentially be – responsible for Plaintiff's harm. The Petition refers to “non-party” staff at various points, but this is in relation to “non-party staff who were individually and jointly responsible for her care and treatment.” App. 3-5. Such allegations necessarily exclude non-professional staff, which is in direct contradiction to Plaintiff's argument on appeal. Such considerations are not applicable under the pleadings and are not relevant to whether the action is against a health care provider.

Plaintiff's assertion fundamentally misrepresents the clear and unambiguous meaning of Iowa Code § 147.140. Plaintiff's argument concerning non-professional and non-party staff in no manner changes the analysis above or that set forth in the district court's decision. Because

Plaintiff's personal injury action is brought against Mercy Medical Center, a healthcare provider, all negligence claims regarding Mercy Medical Center have the potential to be subject to the certificate of merit requirement.

Whether non-party staff or non-professional staff were involved or negligent does not render the statute inapplicable in Plaintiff's claims against Mercy Medical Center.

**B. Plaintiff's claims of negligent hiring and retention are based upon allegations of negligence by nurses and other health care providers employed by Mercy Medical Center in the practice of its profession, occupation, or in providing patient care**

The district court correctly determined that Plaintiff's claims of negligent hiring and negligent retention are based upon allegations of negligence in the practice of Mercy Medical Center's occupation. See Iowa Code § 147.140(1)(a) (requiring a certificate of merit when "the alleged negligence [is] in the practice of that profession or occupation or in patient care").

Although the district court found that hiring and retention do not fall under Mercy Medical Center's "profession" as defined by Iowa Code § 147.1(6), the district court properly found that hiring and firing are a part of Mercy Medical Center's occupation. The term "occupation" is not defined in Iowa's statutory law, nor does it appear to be defined in relevant terms under Iowa case law. As such, the district court properly applied the

dictionary definition and common usage of the word “occupation.” See *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 519 (Iowa 2012) (quoting *Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 197 (Iowa 2003)) (stating that when words are not statutorily defined, a court may refer to “prior decisions of this court and others, similar statutes, dictionary definition, and common usage.”) See also *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 223 (Iowa 2014).

As discussed by the district court, the Merriam-Webster Dictionary defines “occupation” as “an activity in which one engages” and “the principal business of one’s life.” The district court found these definitions consistent with the common usage of the word “occupation.” Plaintiff alleges in her Petition that Mercy Medical Center “hired, retained other defendants and were responsible for the actions of non-party staff and day to day operations and procedures” and that Mercy Medical Center negligently hired and retained the co-Defendants “and non-party staff who were individually and jointly responsible for her care and treatment.” App. 3-5. Hiring employees and determining whether to retain those employees is part of Mercy Medical Center’s regular business operations, and thus included in Mercy Medical Center’s “occupation.” As such, the district court correctly

held that hiring and firing is within Mercy Medical Center’s “occupation” pursuant to Iowa Code § 147.140(1)(a).

Plaintiff maintains that Iowa Code § 147.140 applies only to claims from professional negligence and therefore a certificate of merit is not required for other claims of negligence. However, Iowa Code § 147.140 does not limit its applicability only to claims of professional negligence. Importantly the Iowa Legislature did not include the words “professional negligence” or “medical malpractice” but instead applied the certificate of merit requirement to actions “based upon the alleged negligence in the *practice of that profession or occupation or in patient care*”. Iowa Code § 147.140(1)(a) (emphasis added). The rules of statutory interpretation require the Court to look at the language of the statute as a whole. See *Iowa Dep’t of Human Servs. v. Lohman*, 841 N.W.2d 867, 879 (Iowa 2014) (recognizing that statutory construction requires assessing the statute in its entirety and not just isolated words and phrases to avoid constructions that render part of a statute redundant, irrelevant, or absurd). The exclusion of any specific restrictions to claims of medical malpractice or only claims of professional negligence is evidence of an intent to not limit the certificate of merit requirement to only those claims. See *Struve v. Struve*, 930 N.W.2d 368, 376-77 (Iowa 2019) (acknowledging that legislative intent can be

expressed by the omission as well as by inclusion). By including the words “profession,” “occupation,” and “patient care” while excluding any reference that the certificate of merit requirement applies specifically to claims of professional negligence or medical malpractice demonstrates that the legislature intended that a certificate of merit may be required for other claims of negligence against healthcare providers.

**C. Plaintiff’s claims of negligent hiring and retention require expert testimony to establish a prima facie case**

The district court correctly found that claims of negligent hiring and negligent retention, under the facts of this particular case, require expert testimony in order to establish a prima facie case. The district court correctly applied the Black’s Law Dictionary definition of a prima facie case as a “party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” Black’s Law Dictionary, (11th ed. 2019). A prima facie case is traditionally referred to in the context of a motion for summary judgment, and the failure to meet the prima facie case generally results in judgment as a matter of law in favor of the moving party. See e.g. *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 336-37 (Iowa 2020) (explaining that if the nonmoving party is unable to generate a prima facie case on the summary judgment record, the moving party is entitled to judgment as a matter of law) (citations omitted);

*Bierman v. Weier*, 826 N.W.2d 436, 440 (Iowa 2013) (finding that the moving party was entitled to summary judgment because the plaintiff “failed to provide sufficient proof to establish a prima facie case under the established standards applicable to such defendants.”); *Morris v. Leaf*, 534 N.W.2d 388, 389 (Iowa 1995) (stating that “[t]he party resisting summary judgment must set forth specific facts constituting competent evidence to support a prima facie claim”) (citations omitted); and *GreatAmerican Fin. Servs. Corp. v. Natalya Rodionova Med. Care, P.C.*, 947 N.W.2d 416 (Iowa Ct. App. 2020) (dissent) (stating that the party resisting a motion for summary judgment must set forth specific facts that constitute competent evidence showing a prima facie claim). Thus, the fourth requirement of Iowa Code § 147.140 that requires the claim include “a cause of action for which expert testimony is necessary to establish a prima facie case”, was properly interpreted to mean that a certificate of merit is needed for causes of action that require expert testimony in order to prove the elements of the claim. Iowa Code § 147.140(1)(a).

The district court acknowledged that expert testimony is not normally a requirement to prove the prima facie case of negligent hiring or negligent retention, however, under the facts of Plaintiff’s negligent hiring and retention claim, expert evidence would be necessary for her to prevail. A

claim for negligent hiring requires: (1) that the employer knew, or should have known in the exercise of ordinary care, of its employee's unfitness at the time of hiring; (2) that through the negligent hiring of the employee, the employee's incompetence, unfitness, or dangerous characteristics proximately caused the resulting injuries; and (3) there is an employment or agency relationship between the tortfeasor and the defendant-employer. In Iowa, a claim for negligent hiring includes an action for negligent retention. *Godar v. Edwards*, 588 N.W.2d 701, 708-9 (Iowa 1999).

Plaintiff alleges in her Petition that Defendants "as healthcare providers . . . owed a duty to provide reasonable and appropriate healthcare services" and that "Defendants breached their duty to [Plaintiff] to possess and use, care, skill and knowledge ordinarily possessed and used under like circumstances by other members of their profession engaged in similar practice." App. 4-5. Additionally, Plaintiff states in her Petition that she was harmed when she felt dizzy and lightheaded upon standing and fell and struck her chin and that she was given medications while at Mercy Medical Center that were contraindicated with her other medications.

In order to prove that the named and unnamed employees were negligently hired and/or negligently retained by Mercy Medical Center, Plaintiff would still need to prove that the employee was incompetent, unfit,



or dangerous. This would require Plaintiff to address whether Mercy Medical Center employees engaged in the alleged negligent actions and whether those actions deviated from the standard of care making them either incompetent, unfit, or dangerous. Expert testimony is necessary to prove the standard of care and breach.

In order to prove that Mercy Medical Center negligently hired or retained an employee who failed to possess and use the care and skill and knowledge ordinarily possessed and used by other members of their profession, she would still need to prove breach of that professional standard of care. This requires expert testimony. See *Cox v. Jones*, 470 N.W.2d 23, 26-27 (Iowa 1991) (finding that issues beyond the common knowledge of laypersons required expert testimony); and *Peppmeier v. Murphy*, 708 N.W.2d 57, 62 (Iowa 2005) (explaining that expert testimony is required to establish negligence of a physician). If expert testimony is necessary to establish the standard of care, breach, and causation for a medical malpractice claim, expert testimony would also be needed when breach of the professional standard of care is at issue in other claims.

Furthermore, Plaintiff's only allegations of duty and breach of duty arise from the medical treatment she received while at Mercy Medical Center. The factual basis for all of Plaintiff's negligence claims arise from

her allegation that the treatment she received and arise from the same factual allegations surrounding her fall and her allegations that Defendants breached their professional duty in her care and treatment. In order to prove any claim of negligence, expert testimony is required to demonstrate Plaintiff received her injuries for the reasons she alleges. Plaintiff would also need to prove that Mercy Medical Center knew or should have known of its employee's incompetence, unfitness, or dangerous characteristics which would require proof that the employee engaged in such behaviors and that they were not in compliance with the requisite standard of care.

#### **IV. Plaintiff's argument regarding notice pleading is both irrelevant and unpersuasive<sup>1</sup>**

Plaintiff attempts to deflect from the relevant issues presented by making an untimely argument that she pled numerous other claims that should not have been dismissed under the liberal notice pleading standard. Plaintiff's notice pleading argument relies predominantly on the case *Lamantia v. Sojka*. This reliance is misplaced. The issue before the Court in *Lamantia* was whether dismissal of all of the plaintiff's claims for failure to comply with the tort claims act was in error. *Lamantia v. Sojka*, 298 N.W.2d

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<sup>1</sup> Plaintiff only raised the issue of negligent hiring and retention before the district court. Although the only issue preserved for appeal was negligent hiring and retention, Mercy Medical Center will still address Plaintiff's notice pleading argument.

245, 246 (Iowa 1980). The plaintiff in *Lamantia* did not comply with the notice pleading requirements under the tort claims act. However, the plaintiff pled common law claims as well, which existed independently of the tort claims act and its notice requirements. *Id.* at 247. The Court found that the pleadings in *Lamantia* were sufficient to put the defendants on notice of claims outside the scope of their employment. The Court opined that the pleadings neither specifically stated whether the alleged actions were outside or within the scope of employment. The plaintiff further made allegations of bad faith, which were outside the scope of the tort claims act. Because the pleadings did not limit the plaintiff's allegations to actions under the tort claims act, the Court in *Lamantia* found that, under a notice pleading standard, the plaintiff stated common law claims and was not bound by the tort claims act notice requirement. *Id.*

Contrary to the pleadings at issue in *Lamantia*, Plaintiff in the present action *did* limit her pleadings to those actions arising from a duty of professional care. Plaintiff states in her Petition that the cause of her fall was from standing while dizzy and lightheaded, that she was given medications that contraindicated with medications she was already taking. Plaintiff's Petition further limited her claims to those arising from the actions of defendants and non-party staff who were individually and jointly

responsible for her care and treatment. Although Plaintiff did plead that defendants were negligent in other ways not presently known, she qualified this statement by directly relating it to the alleged breach of the duty to use the care, skill, and knowledge ordinarily possessed and used by other members of their profession. These specific allegations do not leave open the possibility for claims of negligence – unrelated to a professional duty – even under Iowa’s liberal notice pleading standard. See *Id.* (requiring that a petition apprise a defendant of the incident out of which the claim arose as well as the general nature of the action); and *Doerring v. Kramer*, 556 N.W.2d 816, 818 (Iowa Ct. App. 1996) (stating that “even the liberal notice pleading rules require a simple statement of the prima facie elements of a claim.”).

Even if the court determines that the liberal notice pleading standards should have been considered by the district court to include all possible claims of negligence, Plaintiff did not make any allegations related to premises liability because all factual allegations contained in the Petition pertain to Plaintiff’s symptoms of dizziness and lightheadedness as well as alleged issues with her medications.

Furthermore, the only duty pled by Plaintiff is that of a professional duty of care. Even under liberal notice pleading standards, a court cannot

invent allegations that simply are not presented in the Petition. Thus, even though Plaintiff alludes to a “slip and fall” and “other negligence” in her petition, every such allegation made pertains to actions of professional care.

### **CONCLUSION**

The certificate of merit requirement in Iowa Code § 147.140 applies to Plaintiff’s claims of negligent hiring and retention against Mercy Medical Center. Based on Plaintiff’s Petition, all four elements of Iowa Code § 147.140 are met. Plaintiff claims negligence against Mercy Medical Center, a healthcare provider, arising from a personal injury she suffered while a patient at Mercy Medical Center. The claims of negligent hiring and retention necessarily involve Mercy Medical Center’s regular business practice and thus is part of its “occupation.” Finally, Plaintiff’s pleadings relate solely to the actions and duties of Defendants in their care and treatment of Plaintiff. The Petition does not, under a reading in the light most favorable to Plaintiff, provide any allegations of negligence unrelated to a professional duty of care. For that reason, expert testimony is necessary to prove the standard of care and breach and thus to prove the prima facie case. The judgment of the district court should be affirmed.

## REQUEST FOR ORAL ARGUMENT

Mercy Medical Center hereby requests oral argument on these issues.

MERCY HEALTH SERVICES-IOWA,  
CORP. SIOUX CITY A/K/A MERCY  
MEDICAL CENTER-SIOUX CITY,  
Defendant-Appellee,

BY: /s/ Frederick T. Harris  
Frederick T. Harris, #AT0003198  
LAMSON DUGAN & MURRAY LLP  
10306 Regency Parkway Drive  
Omaha, NE 68114  
Tel: (402) 397-7300 | Fax: (402) 397-7824  
rharris@ldmlaw.com  
*ATTORNEY FOR SAID DEFENDANT-  
APPELLEE*

## 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 Times New Roman in 14 point type and contains 4,961 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Frederick T. Harris  
Signature

April 7, 2021  
Date

## **CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies this brief was electronically filed and served on the 7th day of April, 2021 upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

Thomp J. Pattermann  
Law Office of Gallner & Pattermann, P.C.  
300 W. Broadway, Ste. 145  
Council Bluffs, IA 51503  
[tjpattermann@sgallnerlaw.com](mailto:tjpattermann@sgallnerlaw.com)

John C. Gray  
1128 Historic 4th Street  
P.O. Box 3086  
Sioux City, Iowa 51102  
[John.gray@heidmanlaw.com](mailto:John.gray@heidmanlaw.com)



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I hereby certify the cost of printing the foregoing Defendants-Appellees' Final Brief was the sum of \$0.00.

/s/ Frederick T. Harris  
Signature

April 7, 2021  
Date

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