IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 22-0405
Pottawattamie County No. LACV121621

JAHN PATRICK KIRLIN and SARA KIRLIN,

Plaintiffs-Appellants,

vs.

BARCLAY A. MONASTER, M.D., CHRISTIAN WILLIAM JONES, M.D., and PHYSICIANS CLINIC, INC. d/b/a METHODIST PHYSICIANS CLINIC–COUNCIL BLUFFS,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
HON. MICHAEL HOOPER

Final Brief for Defendant-Appellee Barclay A. Monaster, M.D.

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(c)-(d) because it presents substantial issues of first impression and fundamental and urgent issues of broad public important requiring ultimate determination by the Supreme Court.

STATEMENT OF THE CASE

The question presented is whether a plaintiff can voluntarily dismiss a case and subsequently refile it in order to avoid a mandatory dismissal with prejudice pursuant to Iowa Code section 147.140. A short answer is no. The statute is clear and requires dismissal with prejudice upon plaintiff's failure to prove a prima facie case.

In this medical malpractice case, Plaintiffs filed a petition alleging that Defendant failed to exercise the proper standard of care as healthcare providers in providing treatment to Plaintiff Jahn Kirlin. App. 539–43. Pursuant to Iowa Code section 147.140(1)(a), Plaintiffs had sixty (60) days from this Defendant's answer to serve a certificate from an expert witness to prove their case had colorable merit. Plaintiffs failed to substantially comply with this requirement, and Defendant filed a motion to dismiss with prejudice pursuant to Iowa Code § 147.140(6). App. 553–75. Subsequently, Plaintiffs

filed a notice of voluntary dismissal. App. 583. The case was administratively closed without adjudication.

On April 14, 2021, Plaintiffs refiled their petition. App. 7–10. Defendant filed a motion to dismiss pursuant to Iowa Code section 147.140(6) for failure to serve a certificate of merit in the first case, and subsequently a motion for summary judgment. App. 34–56, 148–67. The court granted Defendant's motion for summary judgment and dismissed the case with prejudice. App. 288–94. This appeal followed.

The Iowa Supreme Court has very recently issued an opinion discussing Iowa Code section 147.140. *See Struck v. Mercy Health Servs.-Iowa Corp*., No. 20-1228, 2022 Iowa Sup. LEXIS 44, at *2-3 (Iowa Apr. 22, 2022). This opinion explains the mandatory nature of the statute. The case presently before the Court should be decided consistently with the *Struck* opinion, affirming the district court's holding that a plaintiff cannot voluntarily dismiss their case and refile it to avoid the mandatory dismissal with prejudice.

STATEMENT OF FACTS

Plaintiffs filed a petition on September 11, 2020, and an amended petition on September 14, 2020. App. 539–43. They alleged that Plaintiff Jahn Kirlin presented himself to the Physicians Clinic with neck pain, and consulted with Dr. Jones on April 4, 2019, and Dr. Monaster on April 15,

2019. App. 540. On April 16, 2019, Plaintiff Jahn Kirlin went to a chiropractor and experienced stroke symptoms. App. 541. Plaintiffs sued Defendants Dr. Monaster, Dr. Jones, and vicariously the Physicians Clinic, for alleged negligence in providing medical care. App. 541–42.

The court granted Defendant additional time to move or plead, and on October 19, 2020, Defendant filed an answer. App. 546–552.

Pursuant to Iowa Code section 147.140(1)(a), within sixty (60) days of the defendant's answer, a plaintiff in a medical malpractice action has to "serve upon the defendant a certificate of merit affidavit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care. The expert witness must meet the qualifying standards of section 147.139."

Iowa Code section 147.139 requires that the expert witness meet the following requirements:

> 1. The person is licensed to practice in the same or a substantially similar field as the defendant, is in good standing in each state of licensure, and in the five years preceding the act or omission alleged to be negligent, has not had a license in any state revoked or suspended.
>
> 2. In the five years preceding the act or omission alleged to be negligent, the person actively practiced in the same or a substantially similar field as the defendant or was a qualified instructor at an accredited university in the same field as the defendant.
>
> 3. If the defendant is board-certified in a specialty, the person is certified in the same or a substantially similar specialty

> by a board recognized by the American board of medical specialties, the American osteopathic association, or the council on podiatric medical education.
>
> 4. a. If the defendant is a licensed physician or osteopathic physician under chapter 148, the person is a physician or osteopathic physician licensed in this state or another state.
>
> b. If the defendant is a licensed podiatric physician under chapter 149, the person is a physician, osteopathic physician, or a podiatric physician licensed in this state or another state.

On October 2, 2020, Plaintiffs filed a certificate of merit from David H. Segal, M.D., J.D. App. 544–45. Dr. Segal was not qualified to certify the case because (i) he was not licensed to practice in the same or a substantially similar field as Dr. Monaster (Iowa Code § 147.139(1)), (ii) in the five years preceding the alleged acts did not actively practice in the same or a substantially similar filed as Dr. Monaster (Iowa Code § 147.139(2)), and (iii) was not board certified in the same or a substantially similar specialty as Dr. Monaster (Iowa Code § 147.139(3)). Dr. Monaster was a licensed and board-certified family physician, while Dr. Segal was a licensed and board-certified neurosurgeon and in the five years preceding the acts at issue practiced only in that field. App. 576–77, 578–582.

A certificate of merit was required in this case and Plaintiffs do not contend otherwise on this appeal. Plaintiffs also do not contend that their certificate did not substantially comply with the statutory requirements.

On December 22, 2020, Dr. Monaster filed a motion to dismiss with prejudice pursuant to Iowa Code section 147.140(6) for failure to substantially comply with the certificate of merit requirement. App. 553–575. Plaintiffs did not resist the motion. On December 28, 2020, Plaintiffs filed a voluntary dismissal of action without prejudice pursuant to Iowa R. Civil P. 1.943. App. 583. The court did not adjudicate either action.

On April 14, 2021, Plaintiffs filed another petition in the same court based on the same facts and allegations against Dr. Monaster. App. 7–10. On May 7, 2021, Defendant filed a pre-answer motion to dismiss and/or for summary judgment pursuant to Iowa Code § 147.140. App. 34–56. The court denied the motion, explaining that without parties' agreement the court could not take judicial notice of the prior proceeding. App. 127–130.

On October 15, 2021, Defendant filed a motion for summary judgment, noting that the court was allowed to take judicial notice of the prior proceeding on a motion for summary judgment. App. 148–67. On January 18, 2021, the court granted the motion. App. 288–294. The court found that Plaintiffs' certificate of merit did not substantially comply with the requirements of Iowa Code section 147.139. App. 292. The court also found that Defendant invoked his substantive right to have the case against him dismissed with prejudice. App. 292. Explaining that the statute's mandatory language

required dismissal with prejudice upon Defendant's meritorious motion, the court dismissed the case. App. 293.

On February 1, 2022, Plaintiffs filed a motion to reconsider. App. 295–304. Plaintiffs argued they had an absolute right to dismiss their previous case without prejudice and the court did not retain jurisdiction to rule otherwise. App. 296–303. Defendant resisted the motion. App. 312–318. On February 23, 2022, the court denied the motion to reconsider. App. 325–26.

ARGUMENT

I. Issue Preservation

Defendant agrees that Plaintiffs' arguments have been preserved.

II. Scope and Standard of Review

Defendant agrees with Plaintiffs' statement on the scope and standard of review.

An appellate court reviews a district court's ruling on a summary judgment motion for correction of errors at law. *Hedlund v. State*, 930 N.W.2d 707, 715 (Iowa 2019). An appellate court views the summary judgment record in a light most favorable to the nonmoving party. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). An appellate review is "limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Hedlund*, 930 N.W.2d at 715 (citing *Pillsbury Co. v. Wells Dairy, Inc*., 752 N.W.2d 430, 434 (Iowa 2008)).

At the district court level, summary judgment is appropriate only when the record shows no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The non-moving party may not rest upon the mere allegations or denials in the pleadings; the response must set forth specific facts showing that there is a genuine issue for trial. Iowa R. Civ. P. 1.981(5).

III. The district court's judgment should be affirmed because the court correctly decided that Plaintiffs could not voluntarily dismiss their case in order to avoid the consequences of failing to serve a certificate of merit pursuant to Iowa Code § 147.140.

Iowa Code section 147.140's express language requires dismissal with prejudice upon defendant's motion if the plaintiff does not serve a compliant certificate of merit. The statute was designed to allow for early dismissal of cases in order to save healthcare professionals' time and expense of defending meritless claims. A recent Iowa Supreme Court opinion in *Struck v. Mercy* upheld the same result and rationale. Therefore, Plaintiffs' procedural maneuver in voluntarily dismissing their case without prejudice and refiling it was ineffective. Holding otherwise would contradict both the statutory language and goals of the statute.

A. Iowa Code section 147.140 required dismissal with prejudice upon Defendant's motion and Plaintiffs could not circumvent the statute by dismissing and refiling their action.

Both the express statutory language of Iowa Code section 147.140 and Iowa case law prevent Plaintiffs from voluntarily dismissing their case and refiling it to avoid dismissal with prejudice. The statute was deliberately written to give a plaintiff sufficient time to serve a certificate of merit, and to require early dismissal when the plaintiff fails to prove that the action has merit.

Iowa Code section 147.140 requires a plaintiff in a medical malpractice action to provide a certificate of merit from an expert witness to prove a prima facie case:

> "To establish a prima facie case of medical malpractice, a plaintiff must produce evidence that (1) establishes the applicable standard of care, (2) demonstrates a violation of this standard, and (3) develops a causal relationship between the violation and the injury sustained. Ordinarily, evidence of the applicable standard of care—and its breach—must be furnished by an expert."

Struck v. Mercy Health Servs.-Iowa Corp., No. 20-1228, 2022 Iowa Sup. LEXIS 44, at *8 (Apr. 22, 2022) (*citing Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990)).

Failure to serve a certificate of merit within sixty days from the defendant's answer, upon defendant's motion, results in dismissal with prejudice. Iowa Code § 147.140(6) ("Failure to substantially comply with subsection 1 [requiring a certificate of merit] shall result, upon motion, in dismissal with prejudice"). The Iowa Supreme Court explained that "the legislature enacted section 147.140 to provide a mechanism for early dismissal with prejudice of professional liability claims against healthcare providers when supporting expert testimony is lacking." *Id*. at *9.

The statute has been consistently applied in other state and federal courts to require dismissal with prejudice. *See Morrow v. United States*, No.

21-cv-1003-MAR, 2021 U.S. Dist. LEXIS 185892, at *15-16 (N.D. Iowa July 28, 2021) ("A plaintiff's failure to comply with the requirements of Section 147.140(1) compels the court, upon defendant's motion, to dismiss the plaintiff's complaint with prejudice."); *McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021) (affirming dismissal when plaintiff failed to timely file a certificate of merit); *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291, at *24 (Iowa Ct. App. Apr. 13, 2022) (affirming dismissal when plaintiff filed a certificate of merit eighteen days after the statutory deadline and four days after the defendants moved to dismiss); *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560, at *6 (Iowa Ct. App. July 21, 2021) ("The district court correctly applied the law in concluding the [plaintiffs] failed to substantially comply with the requirements of section 147.140, and dismissal is appropriate."); *Schneider v. Jennie Edmundson Memorial Hosp.*, No. 19-1642, 2021 Iowa App. LEXIS 220, at *7-8 (Iowa App. Mar. 17, 2021) (affirming dismissal with prejudice of defendants for whom no certificate of merit was served). Accordingly, the Iowa law is well-established in that a failure to timely serve a certificate of merit, upon defendant's motion, results in dismissal with prejudice.

In *Morrow v. United States*, the plaintiff attempted the same maneuver to voluntarily dismiss their case and refile it after they had failed to timely

serve a certificate and the defendant requested dismissal with prejudice. No. 21-cv-1003-MAR, 2021 U.S. Dist. LEXIS 185892 (N.D. Iowa July 28, 2021). The U.S. District Court for the Northern District of Iowa, applying the Iowa state law, held that "[s]ection 147.140(6) compels the Court, in these circumstances, to dismiss Plaintiffs' complaint with prejudice." *Id*. at *16. The court also reached the same conclusion applying Federal Rule of Civil Procedure 41(a)(2) [voluntary dismissal without prejudice], noting that the rule "forbids a voluntary dismissal without prejudice where the moving party seeks only to avoid an adverse outcome." *Id.* at *16.

In this case, consistent with Iowa jurisprudence, Plaintiffs' action was dismissed with prejudice upon Defendant's motion. Although subsequent to Defendant's motion Plaintiffs filed a notice of voluntarily dismissal, their action was late and ineffective. Plaintiffs could not exercise their right to voluntary dismissal after Defendant first had exercised their right to have the case against them dismissed with prejudice. Therefore, the Court should reach the same conclusion as the federal court in *Morrow v. United States*.

Furthermore, Defendant's statutory right to dismissal with prejudice takes precedence over Plaintiffs' right to voluntary dismissal. Iowa Code section 147.140, as statutory substantive law, in case of conflict takes precedence over the court rules of civil procedure. *See Morrow v. United*

States, No. 21-cv-1003-MAR, at *10 (N.D. Iowa July 28, 2021) ("the requirements of Iowa Code Section 147.140 are substantive and enforceable [in a federal context]"). Accordingly, Defendant was entitled to and exercised their statutory right to fulfil the statute's objective in dismissing meritless actions early in the proceeding.

Although the district court did not immediately act upon either Defendant's or Plaintiffs' submissions, the court made the required findings in a subsequent proceeding. App. 289–93. The court analyzed Plaintiffs' petition and the course of proceeding and found that Plaintiffs did not substantially comply with the certificate of merit requirement. App. 292. Accordingly, Defendants were entitled to dismissal with prejudice and timely exercised their right before Plaintiffs' attempted dismissal. App. 292–93.

The Iowa legislature deliberately elected to require dismissal *with* prejudice as a consequence of plaintiff's failure to timely serve a certificate of merit. In contrast, some other states have expressly opted for dismissal *without* prejudice. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(1)(i)1. ("a claim or action . . . shall be dismissed, without prejudice, if the claimant or plaintiff fails to file a certificate"); Vt. Stat. Ann. tit. 12, § 1042(e) ("The failure to file the certificate of merit as required by this section shall be grounds for dismissal of the action without prejudice"); 735 Ill. Comp. Stat.

Ann. 5/2-622(g) ("The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619 [dismissal without prejudice]); *see also Owens v. Riverside Med. Ctr.*, 2020 IL App (3d) 180391, at *23 (Ill. App. Sep. 21, 2020) (interpreting the Illinois statute as allowing dismissal without prejudice). Other states, in turn, do not specify whether the dismissal should be with or without prejudice, and allow courts to decide this issue ad hoc. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e) ("A claimant's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice."); Wash. Rev. Code Ann. § 7.70.150 ("Failure to file a certificate of merit that complies with the requirements of this section is grounds for dismissal of the case.").

Unlike in other states, plaintiffs in Iowa are not at liberty to dismiss their case without prejudice. As much as such resolution would be in their interest, and they will readily make arguments to support their position, it is expressly against the statutory language. Furthermore, Iowa courts do not have discretion to choose whether the dismissal should be with or without prejudice. Therefore, notwithstanding Plaintiffs' attempt to change the course of proceeding through a voluntary dismissal and refiling the same case few

months later, the statute required dismissal with prejudice. The district court's decision correctly applied and reflected the statutory language.

B. The district court properly retained jurisdiction and granted Defendant's motion to dismiss.

The district court properly adjudicated Defendant's motion to dismiss and motion for summary judgment in Plaintiffs' second refiled case. Although Plaintiffs now argue the court did not have jurisdiction, their argument fails because Iowa Code section 147.140 provides an independent basis for the court to rule upon a defendant's motion to dismiss.

Iowa courts have exercised jurisdiction in similar circumstances when a plaintiff attempted to voluntarily dismiss the case to avoid an unfavorable result. Plaintiffs argue the district court's reliance on one such example in case *Darrah v. Des Moines General Hospital*, 436 N.W.2d 53 (Iowa 1989) was misplaced. However, *Darrah* constitutes good law and illustrates circumstances in which the court may and, in fact, should exercise jurisdiction to remedy prejudice to the defending party.

In *Darrah*, the defendant filed a motion for sanctions pursuant to Iowa Rule of Civil Procedure 80(a) (currently Rule 1.413, sanctions for filing pleadings not well-grounded in law or fact) after the plaintiff had voluntarily dismissed their case. *Id*. at 53-54. Although the district court decided they did not retain jurisdiction and refused to rule on the motion following the

voluntary dismissal, the Iowa Supreme Court reversed the judgment. The Supreme Court held that "[i]n light of the sanction nature of rule 80(a), we believe the trial court must necessarily retain jurisdiction to rule on motions made shortly after voluntarily dismissal which are based on filings made while the case was still pending." *Id*. at 55. The Court also explained that "if the plaintiff can terminate the ability of the court to impose sanctions by a voluntary dismissal, the rule's effectiveness would be significantly undermined." *Id*. at 54.

In the present case, Defendant filed a motion to dismiss *before* Plaintiffs attempted to voluntarily dismiss their action. *Darrah*, on the other hand, presents circumstances in which the court retained jurisdiction to rule upon motions filed even *after* a voluntary dismissal. It might be debatable whether under Iowa law the court could rule on a motion to dismiss pursuant to Iowa Code section 147.140 filed after the plaintiff initiated a voluntary dismissal. These cases will most likely appear in court. Pursuant to *Darrah*, the answer is likely yes. However, this is not the case presently before the Court. Here, Plaintiffs' notice of voluntary dismissal was subsequent to Defendant's motion to dismiss. If the court retains jurisdiction to rule on motions filed after a voluntary dismissal, *a fortiori* the court retains jurisdiction to rule on motions filed prior to such dismissal.

Furthermore, although *Darrah* case involved sanctions authorized under a different rule than in the present case, the same rationale applies. Iowa Code section 147.140's effectiveness would be significantly undermined, and in fact nullified, if the court did not have the ability to rule on and enforce a timely motion to dismiss. Motion to dismiss with prejudice, as provided by the statute, is precisely a sanction that should be enforced regardless of Plaintiffs' attempt to voluntarily dismiss the case in order to avoid adverse consequences of noncompliance with the statute.

The Iowa Supreme Court applied *Darrah* and its rationale in another recent case *Merrill v. Valley View Swine, LLC*, 941 N.W.2d 10 (Iowa 2020). In this case, the Court decided that Iowa Code section 657.11 (providing sanctions for filing a frivolous nuisance claim against an animal agricultural producer) allows the court to adjudicate a motion for sanctions even after the plaintiff voluntarily dismissed the case. The Court noted:

> The legislature's goal was "to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits." Id. § 657.11(1). That goal could be thwarted if the liability for costs and expenses for bringing a frivolous claim could be avoided simply by entering a voluntary dismissal, especially a second voluntary dismissal that operates as an adjudication on the merits. In Darrah v. Des Moines General Hospital, we held that a voluntary dismissal (even a first dismissal) should not deprive the court of jurisdiction to award sanctions under what is now rule 1.413(1), noting, "If the plaintiff can terminate the ability of the court to impose sanctions by a voluntary dismissal,

> the rule's effectiveness would be significantly undermined." 436 N.W.2d 53, 54 (Iowa 1989). The same logic applies here.

Id. at 16 (Iowa 2020).

Iowa Code section 147.140, alike Iowa Code section 657.11, constitutes an independent basis for imposing sanctions against plaintiffs who file meritless claims against a protected group of defendants. Iowa Code section 147.140 protects healthcare professionals and grants them a right to dismiss frivolous claims early in the proceeding. If plaintiffs had an unlimited right to voluntarily dismiss their claims and refile them before the court adjudicates upon defendant's motion, the statute would be meaningless.

Furthermore, courts retain jurisdiction notwithstanding plaintiff's voluntary dismissal in order to remedy prejudice to the defendant. In *Blair v. Werner Enters*., the court retained jurisdiction when a plaintiff voluntarily dismissed a case to pursue it in another forum, but as a result the defendant was deprived of the opportunity to claim contribution from a third party. 675 N.W.2d 533 (Iowa 2004). The Iowa Supreme Court explained:

> Where a plaintiff moves to discontinue an action, the vital question is whether the defendant will suffer prejudice by the discontinuance. A plaintiff ordinarily cannot take a voluntary discontinuance where the defendant has acquired some substantial right or advantage in the course of the proceeding which would be lost or rendered less efficient by such a termination, or where the defendant thereby would be deprived of a just defense. However, the injury which would thus be occasioned to the defendant must be of a character that deprives

> him or her of some substantive rights concerning defenses not available in a second suit or that may be endangered by the dismissal, and not the mere ordinary inconveniences of double litigation which in the eyes of the law would be compensated by costs.

Id. at 537 (*citing* 27 C.J.S. Dismissal & Nonsuit § 24, at 254 (1999)).

The same considerations apply in this case. Iowa Code section 147.140 protects healthcare professionals and allows them to arrest baseless actions early in the process. Defendant acquired a substantial right to have the case against him dismissed with prejudice. This right vested when Defendant filed a motion to dismiss as provided by the statute. Furthermore, Defendant suffered great prejudice when Plaintiffs again filed the same cause of action against him. In these circumstances, Plaintiffs' voluntary dismissal would abrogate Defendant's substantive rights.

C. Plaintiffs' subsequent action was barred by res judicata as their first case was dismissed with prejudice.

As a result of the mandatory dismissal with prejudice, Plaintiffs' second action was barred pursuant to the doctrine of res judicata and was properly dismissed by the court.

"The Iowa law of claim preclusion closely follows the Restatement (Second) of Judgments." *Villarreal v. United Fire & Cas. Co*., 873 N.W.2d 714, 719 (Iowa 2016). The restatement provides:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Id. at 720 (citing Restatement (Second) of Judgments § 24, at 196 (Am. Law Inst. 1982)).

Plaintiffs' subsequent petition was the same as their first one and included the same claims against the same Defendants. Therefore, both actions related to the same transaction. The only question is whether the first action concluded in a valid and final judgment. Iowa statutory and case law answer this question in the affirmative.

Pursuant to Iowa R. Civ. P. 1.946, "[a]ll dismissals not governed by rule 1.943 [voluntary dismissal] or not for want of jurisdiction or improper venue, shall operate as adjudications on the merits unless they specify otherwise." *See also Mensing v. Sturgeon*, 250 Iowa 918, 924 (Iowa 1959) ("The universal rule is that a dismissal with prejudice is ordinarily an adjudication on the merits."); *Phipps v. Winneshiek Cty*., 593 N.W.2d 143, 147 (Iowa 1999) ("under our rules of procedure every final adjudication of any of the rights of the parties in an action is a judgment."). Accordingly, the dismissal with prejudice pursuant to Iowa Code section 147.140 was a valid and final judgment against Plaintiffs.

Pursuant to the doctrine of res judicata, Plaintiffs were barred from filing another petition when their first action was dismissed with prejudice. The dismissal operated as an adjudication on the merits and prevented Plaintiffs from refiling the same petition in an attempt to circumvent the statute.

D. *Venard v. Winter* does not apply because Iowa Code section 147.140 is a substantive rule that mandates dismissal with prejudice.

Plaintiffs urge the Court to extend its holding in *Venard v. Winter*, 524 N.W.2d 163 (Iowa 1994) to the facts of this case. However, that case is distinguishable and not applicable to Iowa Code section 147.140.

In *Venard v. Winter*, the Iowa Supreme Court addressed Iowa Code section 668.11, a different statute than the one at issue here. Iowa Code section 668.11, enacted in 1987, requires a plaintiff in a medical malpractice case to designate expert witnesses within 180 days of the defendant's answer. Iowa Code § 668.11(1)(a). It also requires a defendant to certify its expert witnesses within 90 days of the plaintiff's certification. Iowa Code § 668.11(1)(b). If either party fails to certify a witness, that expert shall be prohibited from testifying. Iowa Code § 668.11(2).

The Court allowed a voluntary dismissal because Iowa Code section 668.11, unlike section 147.140, was a procedural rule. *Venard*, 524 at 164.

The Court specifically noted that noncompliance with Iowa Code section 668.11 did *not* require a dismissal:

> [W]e see nothing in the language of section 668.11 to suggest such a conflict with rule 215 [currently Iowa R. Civ. P. 1.943, voluntary dismissal]. Section 668.11 speaks only to the designation of experts, stating different deadlines for plaintiffs and defendants. The section allows a designation of experts beyond the deadlines for good cause. It does not suggest that a dismissal of a subsequent suit is the required outcome when (1) a plaintiff does not designate expert witnesses within 180 days of the defendant's answer in an original action, and then (2) voluntarily dismisses the original action. Section 668.11 says nothing about dismissal of any lawsuit. We have said that this section is "procedural or remedial rather than substantive." *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). In Hantsbarger, we recognized that the legislative intent behind section 668.11 was to "provide certainty about the identity of experts and prevent last minute dismissals when an expert cannot be found." *Id*. (citation omitted). Here, Venard found experts but did not say so until after the deadline had passed. If, as Winter suggests, the legislature intended a relationship between rule 215 and section 668.11, it could easily have said so. As Venard points out, nothing in section 668.11 requires a dismissal of any action for a party's failure to designate experts. The only penalty the section spells out is that the undesignated or late designated experts cannot testify.

Id. at 167-68. Although Iowa Code section 147.140 did not exist when *Venard* was decided, already at that time the Court noted that a statute requiring dismissal would be distinguishable.

Iowa Code section 147.140, enacted in 2017, furthers the same goals as section 668.11, but provides a more conclusive remedy that directly conflicts

with a voluntary dismissal without prejudice. The Iowa Supreme Court emphasized this distinction in a recent opinion:

> We have observed that [s]ection 668.11 is designed to require a plaintiff to have his or her proof prepared at an early stage in the litigation in order that the professional does not have to spend time, effort and expense in defending a frivolous action. Early disposition of potential nuisance[] cases, and those which must ultimately be dismissed for lack of expert testimony, would presumably have a positive impact on the cost and availability of medical services. Those goals are further served by section 147.140, which requires an expert's certification sixty days from the defendant's answer, even earlier than the one-hundred-eighty-day deadline in section 668.11. And while section 668.11 allows the exclusion of untimely expert testimony, section 147.140 provides an earlier and more complete remedy when the plaintiff lacks an expert: dismissal with prejudice. We agree with the court of appeals' observation that [s]ection 147.140 gives the defending health professional a chance to arrest a baseless action early in the process if a qualified expert does not certify that the defendant breached the standard of care.

Struck v. Mercy Health Servs.-Iowa Corp., No. 20-1228, 2022 Iowa Sup. LEXIS 44, at *13-14 (Iowa Ct. App. Apr. 22, 2022) (citations omitted). These distinctions between the two statutes make it clear that the holding in *Venard* cannot be extended to the new section 147.140.

In addition, the Iowa Court of Appeals has recently compared the two statutes and noted that Iowa Code section 668.11 was "procedural or remedial" as opposed to "substantive":

> Unlike the sixty-day deadline in the new legislation, the plaintiff has 180 days to comply with section 668.11(1)(a). Even under that longer timeline, our supreme court said section 668.11 was

> "designed to require a plaintiff to have his or her proof prepared at an early stage in the litigation" so that the defendant "does not have to spend time, effort and expense in defending a frivolous action." *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993). The remedy for the plaintiff's failure to comply was exclusion of the expert's testimony. *Id.* Thus, *Hantsbarger* decided that section 668.11 could be "properly classified as procedural or remedial rather than substantive" and should be "liberally interpreted to accomplish its purpose." *Id.*

McHugh v. Smith, 966 N.W.2d 285, 288 (Iowa Ct. App. 2021).

Following the court's reasoning, Iowa Code section 147.140, as opposed to section 668.11, is a substantive rule that required dismissal with prejudice upon Plaintiffs' noncompliance. The rule affected parties' substantive and not procedural rights. Thus, Defendant's substantive right to dismissal with prejudice, when timely exercised, took precedence over Plaintiffs' attempt to voluntarily dismiss the case. Unlike section 668.11, Iowa Code section 147.140 should be construed strictly rather than liberally to accomplish its purpose of dismissing meritless actions early in the proceeding.

CONCLUSION

The district court correctly held that Plaintiffs could not voluntarily dismiss their case and refile it after they had failed to comply with the requirements of Iowa Code section 147.140 and Defendant invoked his substantive right to dismiss the case against him with prejudice. Plaintiffs'

procedural maneuver contradicts both the express language and goals of the statute. Furthermore, the recent Iowa Supreme Court and Court of Appeals decisions confirm that Plaintiffs cannot avoid the consequences of noncompliance with the statute. Accordingly, the court properly exercised its jurisdiction and dismissed Plaintiffs' second action with prejudice.

Therefore, the district court's judgment should be affirmed.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellee Barclay A. Monaster, M.D. hereby requests oral argument on these issues.

Barclay A. Monaster, M.D.,
Defendant-Appellee,

BY: /s/ *Agnieszka Gaertner*

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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 Times New Roman in 14-point type and contains 5,356 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Agnieszka Gaertner* — June 9, 2022

Signature — Date

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

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