**IN THE SUPREME COURT OF IOWA**
**SUPREME COURT NO. 22-0365**
**Shelby County No. LACV020391**

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SUSAN RONNFELDT,

Plaintiff-Appellant,

vs.

SHELBY COUNTY CHRIS A. MYRTUE MEMORIAL HOSPITAL d/b/a MYRTUE MEDICAL CENTER and SHELBY COUNTY MEDICAL CORPORATION,

Defendants-Appellees.

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**APPEAL FROM THE IOWA DISTRICT COURT**
**FOR SHELBY COUNTY**
**HON. RICHARD H. DAVIDSON**

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# Final Brief for Defendants-Appellees

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**:

**Iowa Constitution**:



**Statutes**:

**Iowa Court Rules**:



**Secondary Sources**:

## STATEMENT OF ISSUES

**I. Whether the District Court Had Jurisdiction and Correctly Granted Defendants' Motion to Dismiss Pursuant to Iowa Code § 147.140 When Plaintiff Failed to Timely Serve a Certificate of Merit and Attempted to Voluntarily Dismiss the Petition to Avoid a Mandatory Dismissal with Prejudice.**

Cases:

*Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586 (Iowa 2004)

*Benskin, Inc. v. W. Bank*, 952 N.W.2d 292 (Iowa 2020)

*Blair v. Werner Enters*., 675 N.W.2d 533 (Iowa 2004)

*Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291 (Iowa Ct. App. Apr. 13, 2022)

*Darrah v. Des Moines General Hospital*, 436 N.W.2d 53 (Iowa 1989)

*Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013)

*Goche v. WMG, L.C.*, 970 N.W.2d 860 (Iowa 2022)

*Hantsbarger v. Coffin*, 501 N.W.2d 501 (Iowa 1993)

*In re Det. of Fowler*, 784 N.W.2d 184 (Iowa 2010)

*Karon v. Elliott Aviation*, 937 N.W.2d 334 (Iowa 2020)

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

*Merrill v. Valley View Swine, LLC*, 941 N.W.2d 10 (Iowa 2020)

*Midland Funding, L.L.C. v. Buhr*, 820 N.W.2d 160 (Iowa Ct. App. 2012)

*Morrow v. United States*, No. 21-cv-1003-MAR, 2021 U.S. Dist. LEXIS 185892 (N.D. Iowa July 28, 2021)

*Owens v. Riverside Med. Ctr.*, 2020 IL App (3d) 180391 (Ill. App. Sep. 21, 2020)

*Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560 (Iowa Ct. App. July 21, 2021)

*Schneider v. Jennie Edmundson Memorial Hosp.*, No. 19-1642, 2021 Iowa App. LEXIS 220 (Iowa Ct. App. Mar. 17, 2021)

*State v. Hoegh*, 632 N.W.2d 885 (Iowa 2001)

*Struck v. Mercy Health Servs.-Iowa Corp*., No. 20-1228, 2022 Iowa Sup. LEXIS 44 (Iowa Apr. 22, 2022)

*Venard v. Winter*, 524 N.W.2d 163 (Iowa 1994)

Statutes:

Iowa Code § 147.140 (2018)

Iowa Code § 657.11 (2014)

Iowa Code § 668.11 (1999)

735 Ill. Comp. Stat. Ann. 5/2-622(g)

Del. Code Ann. tit. 18, §6853

Ga. Code §9-11-9.1

Ill. Rev. Stat. ch. 735, §5/2-622

Ky. Rev. Stat. §411.167

Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(1)(i)1.

Mich. Comp. Laws §600.2912d

Minn. Stat. §145.682(6)

Nev. Rev. Stat. §41A.071

S.C. Code Ann. §15-36-100

Tenn. Code Ann. §29-26-122(c)

Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e)

Vt. Stat. Ann. tit. 12, § 1042(e)

W. Va. Code §55-7B-6

Wash. Rev. Code Ann. § 7.70.150

Iowa Court Rules:

Iowa R. Civ. P. 1.943

Secondary Sources:

John D. North, Tort reform-Certificate of Merit, 9 Bus. & Com. Litig. Fed. Cts. (5th ed. 2021)

27 C.J.S. Dismissal & Nonsuit § 24 (1999)

**II. Whether the Legislature Violated the Separation of Powers Doctrine in Enacting Iowa Code § 147.140.**

Cases:

*Drahaus v. State*, 584 N.W.2d 270 (Iowa 1998)

*In re Heitritter*, No. 04-2078, 2005 Iowa App. LEXIS 1339 (Ct. App. Nov. 9, 2005)

*Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs*., 642 N.W.2d 255 (Iowa 2002)

*Rathje v. Mercy Hosp.*, 745 N.W.2d 443 (Iowa 2008)

*Schultz v. Gosselink*, 260 Iowa 115, 118, 148 N.W.2d 434 (1967)

*State v. Angel*, 893 N.W.2d 904 (Iowa 2017)

*State v. Basquin*, 970 N.W.2d 643 (Iowa 2022)

*State v. Beckett*, 532 N.W.2d 751 (Iowa 1995)

*State v. Hoegh*, 632 N.W.2d 885 (Iowa 2001)

*State v. Thompson*, 954 N.W.2d 402 (Iowa 2021)

*State v. Tucker*, 959 N.W.2d 140 (Iowa 2021)

*Struck v. Mercy Health Servs.-Iowa Corp*., No. 20-1228, 2022 Iowa Sup. LEXIS 44 (Iowa Apr. 22, 2022)

*Webster Cnty. Bd. of Supervisors v. Flattery*, 268 N.W.2d 869 (Iowa 1978)

Iowa Constitution:

Iowa Const. art. V, §§ 4, 14

Statutes:

Iowa Code § 147.140 (2018)

Iowa Court Rules:

Iowa R. Civ. P. 1.101

Iowa R. Civ. P. 1.943

## 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 importance requiring ultimate determination by the Supreme Court.

## STATEMENT OF THE CASE

This is a medical malpractice case governed by Iowa Code section 147.140 and other provisions of Chapter 107. 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." Iowa Code section 147.140(6) provides that "[f]ailure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice."

The question presented is whether a plaintiff can voluntarily dismiss the petition and subsequently refile it in order to avoid the 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 defendant's motion when plaintiff fails to prove a prima facie case. Without the means to enforce it the statute would become a nullity.

Plaintiff filed a petition on June 2, 2021, and an amended petition on June 23, 2021. App. 4-7 (Pet.). On July 2, 2021, Defendants filed an answer. Pursuant to Iowa Code section 147.140(1)(a), Plaintiff had sixty days from Defendants' answer, until August 31, 2021, to serve a certificate from an expert witness to prove the case had colorable merit. App. 8-13 (Pet.). Plaintiff failed to do so.

On October 27, 2021, Defendants filed a motion to dismiss with prejudice pursuant to Iowa Code section 147.140(6). App. 14-17 (Mt. to Dis.). Plaintiff did not resist the motion. Subsequently, Plaintiff filed a notice of voluntary dismissal. App. 18 (Vol. Dism.). On November 1, 2021, the court issued an order considering Defendants' motion to dismiss moot. App. 19-20 (November 1, 2021, Order).

On November 11, 2021, Defendants filed a motion to reconsider. App. 21 (Mt. to Rec.). On November 22, 2021, Plaintiff resisted the motion. App. 47-52 (Resis. Mt. to Rec.). The same day, Defendants filed a reply. App. 53-55 (Reply Mt. to Rec.). After a hearing, the court granted Defendants' motion to dismiss with prejudice. App. 56-59 (February 1, 2022, Ruling). The court noted that "[t]o permit plaintiff to circumvent compliance with the statute and avoid the harsh penalty simply by dismissing and refiling is contrary to the

intent of the legislature in enacting the 2017 amendments." *Id*. at 3. Plaintiff filed this appeal.

On December 22, 2021, Plaintiff refiled the petition in the same court, case no. LACV020442. That case is currently pending.

## STATEMENT OF THE FACTS

In May 2016, Plaintiff did a CT scan of abdomen and underwent a hernia repair surgery at Myrtue Medical Center. App. 4-5 (Pet. p. 1-2). Plaintiff alleges that unnamed in the petition physicians and staff at Myrtue Medical Center incidentally noted a mass on her uterus but failed to inform the patient and schedule follow-up care. App. 6 (Pet. p. 3). In December 2020, Plaintiff was diagnosed with uterine cancer. App. 5 (Pet. p. 2). Plaintiff alleges this cancer was present in 2016 and she could have benefitted from advanced treatment. App. 6-7 (Pet. p. 3-4).

## ARGUMENT

### I. The District Court Had Jurisdiction and Properly Granted Defendants' Motion to Dismiss Because the Motion Was Filed Before Plaintiff's Attempted Voluntary Dismissal and in Exercise of Defendants' Substantive Right to Dismissal with Prejudice.

#### A. Issue Preservation

Defendant agrees that Plaintiff's argument has been preserved.

#### B. Scope and Standard of Review

This Court reviews the district court's decision granting Defendants' motion to dismiss with prejudice.

An appellate court reviews rulings on a motion to dismiss for correction of errors at law. *Karon v. Elliott Aviation*, 937 N.W.2d 334, 339 (Iowa 2020). The court accepts as true the petition's well-pleaded factual allegations, but not its legal conclusions. *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020). The court will affirm a dismissal only if the petition shows no right of recovery under any state of facts. *Id*. An appellate court reviews rulings on statutory interpretation for correction of errors at law. *Goche v. WMG, L.C.*, 970 N.W.2d 860, 863 (Iowa 2022).

### C. Iowa Statutory and Case Law Requires Dismissal with Prejudice for Failure to Comply with Iowa Code § 147.140.

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 drafted deliberately to ensure a plaintiff has sufficient time to serve a certificate of merit, and that defendant can obtain dismissal with prejudice if the plaintiff fails to timely prove the action has merit.

Pursuant to Iowa Code section 147.140(1), a plaintiff in a medical malpractice action must provide a certificate of merit from an expert witness that establishes the applicable standard of care, demonstrates a violation of

this standard, and develops a causal relationship between the violation and the injury sustained. *Struck v. Mercy Health Servs.-Iowa Corp*., No. 20-1228, 2022 Iowa Sup. LEXIS 44, at *8 (Apr. 22, 2022). A plaintiff must serve the certificate upon defendant within sixty days from the defendant's answer. Iowa Code § 147.140(1). Failure to substantially comply with this requirement "shall result, upon motion, in dismissal with prejudice" Iowa Code § 147.140(6). *See In re Det. of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) ("In a statute, the word 'shall' generally connotes a mandatory duty.").

State and federal courts in Iowa have consistently held that failure to comply with the statute requires 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); *Struck v. Mercy Health Servs.-Iowa Corp*., No. 20-1228, 2022 Iowa Sup. LEXIS 44, at *8 (Apr. 22, 2022); *McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021); *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291, at *24 (Iowa Ct. App. Apr. 13, 2022); *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560, at *6 (Iowa Ct. App. July 21, 2021); *Schneider v. Jennie Edmundson Memorial Hosp.*, No. 19-1642, 2021 Iowa App. LEXIS 220, at *7-8 (Iowa App. Mar. 17, 2021).

More than half of the states have enacted similar statutes.[1] As a consequence for noncompliance, these statutes differ whether they require dismissal with prejudice, dismissal without prejudice, or leave it to the court's discretion.

Similarly as Iowa, Minnesota and Tennessee require the case be dismissed with prejudice. *See* Minn. Stat. §145.682(6) ("Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case."); Tenn. Code Ann. §29-26-122(c) ("The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice.").

Other states have 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

[1] https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx.

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).

In some states, the statute does not specify whether the dismissal should be with or without prejudice and allows the court 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 some other states, plaintiffs in Iowa are not at liberty to dismiss their case without prejudice. Although such resolution would be in their interest and they will readily make arguments to support their position, it is expressly against the statutory language. The goal of statutory construction is to determine legislative intent:

> We determine legislative intent from the words chosen by the legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the

> guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.

*Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 348 (Iowa 2013) (citing *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 590 (Iowa 2004)). Both the express language and goals of the statute indicate the legislature allows defendants to dispose of meritless actions early in the proceeding.

Furthermore, Iowa courts do not have discretion to choose whether the dismissal should be with or without prejudice. Therefore, notwithstanding Plaintiff's attempt to change the course of proceeding through a voluntary dismissal and refiling the same case two months later, the statute required dismissal with prejudice. The district court's decision correctly applied and reflected the statutory language.

Iowa Code section 147.140 balances the rights of plaintiffs and defendants. In a recent case *Struck v. Mercy*, 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." *Struck v. Mercy Health Servs.-Iowa Corp.*, No. 20-1228, 2022 Iowa Sup. LEXIS 44, at *9 (Apr. 22, 2022). The statute ensures that a medical professional "does not have to spend time, effort and expenses in defending a frivolous action." *Id*. at *14 (citing *Hantsbarger v. Coffin*, 501 N.W.2d 501,

504 (Iowa 1993)). Limiting frivolous litigation, in turn, supports affordability and availability of medical services. *Id*.

Furthermore, the Iowa statute provides sufficient time to obtain and serve a certificate of merit. Plaintiff has sixty days to serve the certificate, although in practice such certificate should be obtained before the case is even filed in court. *See Struck v. Mercy Health Servs.-Iowa Corp*., No. 20-1228, at *15 ("[t]he common denominator is that all of the statutes, to one degree or another, require the plaintiff's attorney to do what good practice and economics dictate: perform the due diligence necessary to determine the claim is meritorious before instituting litigation." (citing John D. North, Tort reform-Certificate of Merit, 9 Bus. & Com. Litig. Fed. Cts. § 103:31 (5th ed. 2021)). In many states, including Delaware, Georgia, Illinois, Kansas, Michigan, Nevada, South Carolina, and West Virginia, a certificate of merit must be filed contemporaneously with the complaint. *See* Del. Code Ann. tit. 18, §6853, Ga. Code §9-11-9.1, Ill. Rev. Stat. ch. 735, §5/2-622, Ky. Rev. Stat. §411.167, Mich. Comp. Laws §600.2912d, Nev. Rev. Stat. §41A.071, S.C. Code Ann. §15-36-100, W. Va. Code §55-7B-6. Accordingly, the 60-day deadline established by the Iowa legislature provides a vast amount of time to serve the defendant. In addition, the statute allows a plaintiff to extend

this deadline to serve a certificate of merit for good cause and upon a request filed prior to the expiration of the deadline. *See* Iowa Code § 147.140(4).

### D. Iowa Code § 147.140 Takes Precedence over Plaintiff's Right to Voluntary Dismissal Because Defendants Exercised Their Right First in Time and Because Plaintiff Could Not Voluntarily Dismiss only to Avoid Adverse Consequences.

Plaintiff argues that Iowa R. Civ. P. 1.943 provides for an absolute right of voluntary dismissal up to 10 days before trial and upon its exercise deprives the court of jurisdiction. However, as discussed above, Plaintiff did not exercise their right to dismiss until after Defendants invoked their right to dismissal with prejudice. *See Midland Funding, L.L.C. v. Buhr*, 820 N.W.2d 160 (Iowa Ct. App. 2012) (finding that the plaintiff could not voluntarily dismiss their case pursuant to Iowa R. Civ. P. 1.943 after the court had granted defendant's motion to dismiss plaintiff's petition).

In this case, the district court correctly held that Plaintiff's action was dismissed with prejudice when Plaintiff failed to serve a certificate of merit and Defendants filed a motion to dismiss. Plaintiff did not resist Defendants' motion to dismiss. Instead, Plaintiff attempted to voluntarily dismiss the petition but only after Defendants' motion had been filed. On these facts, the district court agreed with Defendants that the court did not have discretion to allow for voluntary dismissal. The court noted "[t]he defendants filed such a motion prior to plaintiff's counter move to voluntarily dismiss her action. The

timing of defendants' motion is significant." App. __-__ (February 1, 2022, Ruling, p. 3). The court stated that "[t]o find otherwise would allow defendants no avenue for relief and plaintiff the right to sidestep the 'harsh consequence' of the statute." *Id*. Accordingly, Plaintiff's attempt to exercise their right to voluntary dismissal without prejudice pursuant to Iowa R. Civ. P. 1.943 was late and ineffective, and intended solely to avoid adverse consequences of noncompliance with the statute.

Furthermore, even if Plaintiff had exercised their right to voluntary dismissal prior to Defendants' motion to dismiss, that right is not without limitations. Iowa case law provides examples of circumstances when courts retained jurisdiction notwithstanding plaintiff's attempt to voluntarily dismiss without prejudice to avoid an unfavorable result.

The U.S. District Court for the Northern District of Iowa addressed this issue in *Morrow v. United States*. In that case, the plaintiffs also failed to timely serve a certificate of merit, and when the defendant filed a motion to dismiss with prejudice, the plaintiffs tried to voluntarily dismiss the case and refile it. 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 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*. In this case and consistently with prior jurisprudence, the Court should reach the same result.

Moreover, Plaintiff's voluntary dismissal, even if exercised first in time, does not always terminate court's jurisdiction. Iowa courts have retained jurisdiction after voluntary dismissal when a plaintiff tried to escape adverse consequences or when a defendant invoked his substantive rights.

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 refused to rule on the motion following the voluntary dismissal, the Iowa Supreme Court reversed the decision. 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, unlike in *Darrah*, Defendant filed a motion to dismiss even *before* Plaintiffs attempted to voluntarily dismiss their action. 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 had voluntarily dismissed. 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 a plaintiff who files a meritless claim 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 a plaintiff had an

unlimited right to voluntarily dismiss their claim and refile it 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 lost 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)).

In this case, alike in *Blair*, Defendants acquired a substantial right that would become a nullity if plaintiff could trump it with a voluntary dismissal at any time. This result contradicts the rationale behind Iowa Code section 147.140. The statute 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 and already suffered prejudice when Plaintiff refiled the same complaint against him.

The statute was enacted specifically to avoid double litigation and to force plaintiffs to obtain a certificate of merit and prepare their cases in advance of filing a complaint. As a consequence of failing to timely certify their case, the statute requires dismissal with prejudice, and thus prevents plaintiffs from trying to remedy their failure in a subsequent case. Litigants are assumed to know the law and are not excused for failure to comply with the statutory requirements. A different outcome would contradict the statute's express language.

### E. *Venard V. Winter* Does Not Apply to the Facts of this Case Because Iowa Code § 147.140 Provides for a Substantive Right to Dismiss with Prejudice and Takes Precedence over Iowa R. Civ. P. 1.943.

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 cannot be curtailed by a subsequent 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); *see also 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]"). 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).

Pursuant to this case law, Iowa Code section 147.140, as opposed to section 668.11, is a substantive rule that required dismissal with prejudice upon Plaintiff's noncompliance with the statute. 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. Accordingly, *Venard v. Winter* does not apply to the facts of this case and does not allow for voluntary dismissal contrary to Defendants' right to dismiss the case with prejudice.

## II. Iowa Code § 147.140 Is a Constitutional Exercise of Legislative Powers and Does Not Violate Courts' Constitutional Duties or Separation of Powers.

### A. Issue Preservation

Plaintiff's argument has not been preserved. Plaintiff raised the argument based on the unconstitutionality of Iowa Code section 147.140 for the first on this appeal and the district court did not have the opportunity to address it.

### B. Scope and Standard of Review

The same scope and standard of review applies as to the first argument.

### C. Iowa Code § 147.140 Does Not Inhibit Courts' Inherent Powers or Violate Separation of Powers.

Iowa Code section 147.140 requires dismissal with prejudice when a plaintiff fails to timely serve a certificate of merit. This rule creates a substantive right that cannot be abridged by a court rule of procedure. Contrary to Plaintiff's contention, the statute does not violate courts' powers

to enact rules of procedure. In addition, the statute does not conflict with a plaintiff's right to voluntary dismissal when defendant exercises their right to dismissal first in time. Furthermore, plaintiff's right to voluntary dismissal is not constitutional in nature and therefore a statute can impose limitations on its exercise.

First, Iowa Code section 147.140 does not inhibit courts' inherent powers. Iowa courts have recognized that even courts' inherent powers may be controlled or restricted or overridden by statute. *State v. Hoegh*, 632 N.W.2d 885, 889 (Iowa 2001). However, statutory restrictions cannot curtail court inherent powers that are "so fundamental to the operation of a court that any attempt by the legislature to restrict or divest the court of the power could violate the separation of powers doctrine." *Id.* The requirement that plaintiff's action be dismissed with prejudice restricts plaintiff's right to voluntarily dismiss when plaintiff negligently prosecutes his action. The statute does not restrict courts' fundamental powers to operate.

Furthermore, the statute does not violate the separation of powers doctrine. This doctrine prohibits a department of the government from exercising "powers that are clearly forbidden to it," "granted by the constitution to another branch," and from "impairing another in the performance of its constitutional duties." *State v. Basquin*, 970 N.W.2d 643,

657 (Iowa 2022) (*citing State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021)). The legislature's role is to enact statutes that reflect public policy. Statutes often create substantive or procedural rights of litigants. The judiciary is empowered with the task of interpreting statutes when they are ambiguous and enforcing them. Iowa Code section 147.140 is an ordinary statute in the exercise of legislative powers, intended to reflect the policy of protecting healthcare professionals from meritless lawsuits, and indirectly limiting the costs of medical insurance to the public. Similarly, nothing in the statute inhibits courts' constitutional duties.

Iowa courts have specifically held that legislature can enact substantive laws, procedural laws, or both. *In re Heitritter*, No. 04-2078, 2005 Iowa App. LEXIS 1339, at *5 (Ct. App. Nov. 9, 2005). Substantive law is "that part of the law which creates, defines, and regulates rights." Procedural law is "that which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on a suit." *Id*. (*citing Schultz v. Gosselink*, 260 Iowa 115, 118, 148 N.W.2d 434, 436 (1967)). Accordingly, the legislature can enact both substantive and procedural laws, and Iowa Code section 147.140 is a standard exercise of the legislative power.

Moreover, the Iowa Rules of Civil Procedure expressly provide that a statute can modify procedures in a certain category of cases. Pursuant to Iowa

R. Civ. P. 1.101, the Iowa Rules of Civil Procedure "shall govern the practice and procedure in all courts of the state, *except where* they expressly provide otherwise or *statutes not affected hereby provide different procedure in particular courts or cases*." (emphasis added). Iowa Code section 147.140 modifies plaintiff's right to voluntary dismissal by providing defendants in medical malpractice cases a right to dismissal with prejudice. Such statutory modification of the Rules is explicitly authorized by the Rules.

Iowa courts have been cognizant that for the reasons of public policy the legislature modifies rules in medical malpractice cases. One such example is a statute of limitations. In *Rathje*, the Iowa Supreme Court noted that the outcome in some cases may be at odds with perceived fairness, nevertheless the courts cannot overturn the legislative intent and goals:

> This case requires us once again to visit the medical malpractice statute of limitations and apply it to the facts of a particular case. We have done this on a number of occasions since the special statute was enacted in 1975, and have developed a body of interpretative law in the process. Yet, this law has raised some questions about the fairness of the outcome of a number of these cases. This perception has not gone unnoticed by us, for we have freely acknowledged the statute can "severely restrict[] the rights of unsuspecting patients." *Schlote v. Dawson*, 676 N.W.2d 187, 194 (Iowa 2004). Nevertheless, we have declined to change course, recognizing it is the role of the legislature to "address this problem." *Id.*

*Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 447 (Iowa 2008). *See also id*. ("It is, of course, the role of the legislature to write statutes, and it is our role to

interpret them based on their application in the course of litigation."). In this case, it is also the role of the legislature to modify rules of procedure in order to balance the rights of plaintiffs and defendants in medical malpractice cases. Such exercise of legislative power does not in any way violate separation of powers. Regardless of perceived fairness, courts are tasked with enforcing statutes such as this one.

Furthermore, the meaning of Iowa Code section 147.140 is clear and requires dismissal with prejudice upon defendant's motion. This statute does not require courts' interpretation but only enforcement. *See Drahaus v. State*, 584 N.W.2d 270, 274 (Iowa 1998) ("when the text of a statute or rule is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction. In such cases, we simply give effect to the statute as written." (citations omitted)).

Iowa courts have also recognized that allowing exceptions might effectively deprive a statute of its intended effect and "be tantamount to judicial repeal of the statute." *State v. Angel*, 893 N.W.2d 904, 925 (Iowa 2017); *see also id*. at 917 ("In *Beckett*, we stated that '[a]dopting a good faith exception to the statutory requirement would effectively defeat the purpose of the statute because failure to comply with the statute would be of no consequence.') (*citing State v. Beckett*, 532 N.W.2d 751, 755 (Iowa 1995)).

If the statute and rules were construed the way the plaintiff advocates for it, Iowa Code section 147.140 would become a nullity. Each time a plaintiff would fail to serve a certificate of merit and a defendant would file a motion to dismiss with prejudice, the plaintiff would voluntarily dismiss their case without prejudice. The intended consequences of not complying with the statute would never take effect.

### D. The Iowa Supreme Court's Opinion in *State V. Tucker* Does Not Support Plaintiff's Argument that Iowa Code § 147.140 Is Unconstitutional.

The Iowa Supreme Court's majority opinion in *State v. Tucker* further shows that Iowa Code section 147.140 is a constitutional exercise of legislative powers. Although Plaintiff invites this Court to hold that any legislative act that overrides a court procedural rule should be considered unconstitutional, s

uch proposition is meritless and contrary to Iowa law. In addition, Plaintiff did not satisfy the high burden of proof necessary to declare a statute unconstitutional.

In *State v. Tucker*, plaintiff argued that a statute limiting his right to appeal after he pled guilty was unconstitutional because it violated the separation of powers doctrine. The Iowa Supreme Court rejected his claim. The Court noted that "[f]or the judiciary to play an undiminished role as an

independent and equal coordinate branch of government nothing must impede the immediate, necessary, efficient and basic functioning of the courts." 959 N.W.2d 140, 150 (Iowa 2021) (citing *Webster Cnty. Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 873 (Iowa 1978)). The statute at issue did not implicate these basic and inherent courts functions. The Court also noted that "[t]he Iowa Constitution explicitly provides the legislature with authority to provide for a general system of practice in all the courts of this state." *Id*. at 151 (referring to Iowa Const. art. V, §§ 4, 14). The Court held the statute was enacted pursuant to the legislative powers and did not divest the courts of judicial powers. *Id*. at 151-52.

Iowa Code section 147.140 also does not impede "the immediate, necessary, efficient and basic functioning of the courts." The statute does nothing more than restricts plaintiff's ability to dismiss their claim and refile it in order to protect healthcare defendants. It does not implicate basic functioning of the courts. It also does not inhibit powers that are immediate or necessary. Lastly, the statute does not divest the courts of judicial powers. Accordingly, Iowa Code section 147.140 cannot be held to violate the separation of powers.

Furthermore, Plaintiff did not satisfy a high burden of proof required to successfully challenge constitutionality of the statute. In *State v. Tucker*, the

Iowa Supreme Court emphasized that "[b]ecause statutes are cloaked with a strong presumption of constitutionality, a party challenging a statute carries a heavy burden of rebutting this presumption. . . . [T]he party must show beyond a reasonable doubt that a statute violates the constitution." 959 N.W.2d at 147 (citing *Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs*., 642 N.W.2d 255, 260 (Iowa 2002)).

Plaintiff did no more than cited Justice Appel's concurrent opinion and suggested that "[t]he general guidance of these cases from other states and general proposition of law to be extracted from the above discussion is that, where a legislative act overrides a court procedural rule, it should be considered an unconstitutional infringement on the judiciary's authority to promulgate procedural rules." *See* Plaintiff's Brief, at 15. Plaintiff did not cite Iowa precedent to support his argument. Further, as discussed above, Iowa courts have consistently held that the legislature has power to enact substantive and procedural laws that do not inhibit courts' basic functions or divest courts' judicial powers. Thus, Plaintiff's proposition is neither grounded in law nor supported by facts. Plaintiff's argument also does not prove beyond a reasonable doubt that Iowa Code section 147.140 is unconstitutional.

Lastly, Justice Appel's concurrence does not support Plaintiff's argument because Iowa Code section 147.140, unlike the statute limiting plaintiff's right to appeal in *State v. Tucker*, does not implicate a constitutional right. Justice Appel explained that "[i]f the Iowa constitutional structure is to be preserved, the legislature cannot have the power to prevent the Iowa courts from performing their essential constitutional role . . . for instance, to enact legislation preventing the Iowa courts from considering constitutional matters . . ." *State v. Tucker*, 959 N.W.2d 140, 158 (Iowa 2021). Unlike a criminal defendant's right to appeal his conviction, plaintiff's right to voluntarily dismiss his petition does not implicate a constitutional right. Iowa Code section 147.140 also does not prevent Iowa courts from performing their constitutional role. Therefore, Plaintiff's cite to Justice Appel's concurrence is out of context and does not extend to the facts of this case.

## CONCLUSION

The district court correctly held that Plaintiff could not voluntarily dismiss their case after they had failed to comply with the requirements of Iowa Code section 147.140 and Defendants invoked their right to dismiss the case with prejudice. Plaintiff's procedural maneuver contradicts both the express language and goals of the statute. Recent Iowa Supreme Court and Court of Appeals decisions confirm that Plaintiff cannot avoid the

consequences of noncompliance with the statute. Furthermore, the statute is constitutional and contrary to Plaintiff's contention, does not violate separation of powers.

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

## REQUEST FOR ORAL ARGUMENT

Defendants-Appellees Shelby County Chris A. Myrtue Memorial Hospital d/b/a Myrtue Medical Center and Shelby County Medical Corporation hereby request oral argument on these issues.

Shelby County Chris A. Myrtue Memorial Hospital d/b/a Myrtue Medical Center and Shelby County Medical Corporation, Defendants-Appellees,

BY: /s/ *Frederick T. Harris*

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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 6,640 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Frederick T. Harris* — July 14, 2022
Signature — Date

## CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this brief was electronically filed and served on the 14th day of July, 2022, 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):

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## ATTORNEY COST CERTIFICATE

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

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