

IN THE SUPREME COURT OF IOWA

No. 22-1574

Polk County No. LACL 151799

DARRIN P. MILLER, Individually, as Executor of the Estate of MEREDITH R. MILLER, and as Parent, Guardian, and Next of Friend of S.M.M., a minor,
Plaintiff-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, STATE OF IOWA, SNYDER & ASSOCIATES, INC., COMPANY, INC. (an unidentified corporation),
Defendants,

and

CATHOLIC HEALTH INITIATIVES – IOWA, CORP. d/b/a MERCYONE DES MOINES MEDICAL CENTER, DR. WILLIAM NOWYSZ, DO,
DR. JOSEPH LOSH, DO, DR. HIJINIO CARREON, DO, DR. NOAH PIROZZI, DO, DR. DANIELLE CHAMBERLAIN, and DARON E. DARMENING, RT.
Defendants-Appellants

Appeal from the Iowa District Court for Polk County
The Honorable Joseph Seidlin, Judge

**BRIEF OF DEFENDANTS-APPELLANTS
WILLIAM NOWYSZ, DO, AND HIJINIO CARREON, DO**

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ROUTING STATEMENT

This case should be retained by the Supreme Court. It presents substantial questions of first impression and fundamental issues of broad public importance, namely: 1) establishing a definition for the qualifying standard set forth in Iowa Code section 147.139 as it is to be applied by district courts assessing compliance with the certificate of merit requirement in Iowa Code section 147.140; and 2) determining whether defendant physicians in medical malpractice cases are entitled to a certificate of merit under section 147.140 that is signed under oath. These issues are unresolved in Iowa and, therefore, present a substantial question of enunciating changing legal standards which must be decided by the Supreme Court. *See*, Iowa R. App.P. 6.1101(2)(c), (d), and (f).

STATEMENT OF THE CASE

Plaintiff Darrin Miller, acting in his individual capacity as well as in his capacities as Executor of the Estate of Meredith Miller, and as Parent, Guardian, and Next of Friend of A.M.M., a minor, filed his petition on October 28, 2021. App. p.8. Dr. Nowysz and Dr. Carreon filed their answer to the petition on December 23, 2021. App. p.19.

On December 28, 2021, plaintiff filed a motion for leave to amend the petition, which was granted by order filed February 7, 2022. App. p.30(Order filed 2/7/22). The amended petition did not change the allegations plaintiff asserted against Dr.

Nowysz and Dr. Carreon. App. p.30. Dr. Nowysz and Dr. Carreon filed their answer to the amended petition on February 21, 2022. App. p.50.

The same day, which was 60 days after the filing of defendants' initial answer, plaintiff's counsel served the Expert Witness Report of Findings and Opinions signed by Dr. Lynette Mark, App. pp.100-01; 207-08, and filed a document entitled "Plaintiff's Service of Certificate of Merit and Notice of Same." App. p.61.

On May 12, 2022, Dr. Nowysz and Dr. Carreon filed a motion for summary judgment asserting plaintiff had failed to comply with Iowa Code § 147.140. App. p.86. Plaintiff filed a resistance on May 27, 2022, App. p.210. In response to the motion to dismiss filed by the medical co-defendants and the defendants' motion for summary judgment, plaintiff also filed the "Affidavit of Lynette Mark, M.D., in Support of Plaintiffs' Resistance to Defendants, Dr. Nowysz and Dr. Carreon's Motion for Summary Judgment" on June 2, 2022, in which Dr. Mark attested under penalty of perjury that her expert opinion letter dated February 20, 2022, was true and correct. App. p.242. The district court scheduled a hearing on the pending motions for June 30, 2022. (Order filed 6/3/2022).¹

¹ Two days before the hearing, plaintiff filed a Motion for Leave to File Second Amended Petition at Law and Jury Demand. (Motion filed 6/28/22). The district court granted the motion over objection of the medical co-defendants by order filed the same day as its ruling on defendants' motion for summary judgment on August 24, 2022. (Order Granting Motion to Amend). The Second Amended Petition did not introduce any new claims against Dr. Nowysz and Dr. Carreon, and they accordingly have not filed another answer.

On August 24, 2022, the district court entered its Ruling on Defendants William Nowysz, DO, and Hijinio Carreon, DO's, Motion for Summary Judgment denying the motion in its entirety. App. p.258. On September 23, 2022, Dr. Nowysz and Dr. Carreon filed their Joinder in Application for Permission to Appeal, App. p.307, joining in the filing made on behalf of the medical co-defendants.² Justice May entered an order on behalf of the Supreme Court on November 3, 2022, granting the application and the joinder and staying further proceedings in the district court. App. p.334.

STATEMENT OF FACTS

For purposes of the instant summary judgment motion, defendants have assumed the accuracy of the allegations of plaintiff's amended petition concerning how plaintiff's decedent came to be presented for medical treatment. First, decedent Meredith R. Miller sustained injuries on December 15, 2019, while a passenger in a vehicle being driven by her minor daughter, S.M.M., when the vehicle "slid off the snow-covered road and collided with a tree. App. p.11. Second, Ankeny Fire Department medics responded and transported plaintiff's decedent to MercyOne Des Moines Medical Center. App. p.11. Third, plaintiff's decedent was treated in the

² For convenience, this brief refers to Catholic Health Initiatives – Iowa Corp. d/b/a MercyOne Des Moines Medical Center, Dr. Joseph Losh, Dr. Noah Pirozzi, Dr. Danielle Chamberlain and Daron Darmening, RT as "the medical co-defendants."

emergency department but ultimately died as a consequence of her injuries. App. pp.11-12.

Plaintiff's petition, as amended, alleges Dr. Nowysz and Dr. Carreon, along with the medical co-defendants, collectively, were negligent in their care of Meredith Miller, breaching the applicable standard of care and causing her death by: (1) negligently performing an esophageal intubation; (2) negligently failing to identify that the esophageal intubation was performed instead of a tracheal intubation; (3) negligently failing to correct the esophageal intubation; (4) knowingly being aware of the esophageal intubation after Meredith R. Miller's death and not being forthcoming about the cause of death; (5) knowingly performing other attempts at tracheal intubation after Meredith R. Miller was pronounced dead in an effort to cover up the esophageal intubation. App. p.16.

Plaintiff alleged Dr. Nowysz was a consulting emergency room physician. App. p.9. The defendants' answer admitted Dr. Nowysz is a physician licensed in the State of Iowa who provides professional services in the emergency department of MercyOne Des Moines Medical Center. App. p.20. Plaintiff alleged Dr. Carreon was the chief medical officer of MercyOne Central Iowa, which Dr. Nowysz and Dr. Carreon admitted. App. pp.10; 21. In their Statement of Undisputed Facts in Support of Motion for Summary Judgment, defendants asserted Dr. Carreon is a physician with board certification in emergency medicine and provided his affidavit

in support. He has limited his medical practice to seeing and treating patients in an emergency medicine practice. App. pp.92-3; 95.

Dr. Lynnette Mark states in her expert witness report that she is a board-certified, practicing anesthesiologist, maintaining a full-time practice in anesthesiology. App. pp.100-101; 207-08. Dr. Mark is not board-certified in the field of emergency medicine and her report does not represent that she is licensed to practice as an emergency medicine physician. Further, her report was not in the form of an affidavit or otherwise subscribed and sworn to upon oath.

ARGUMENT

ERROR PRESERVATION

The defendants preserved error on both of the following arguments. The motion for summary judgment attacked the plaintiff's certificate of merit for failure to comply with the requirements of section 147.140 and 147.139, Code of Iowa (2021) on both grounds. The district court identified the issues before it, and ruled upon, whether Dr. Mark's report substantially complied with section 147.140.

SCOPE AND STANDARD OF REVIEW

Reviews of rulings on statutory interpretation are for correction of errors at law. *Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022) (citing *Goche v. WMG, L.C.*, 970 N.W.2d 860, 863 (Iowa 2022)). The court

also reviews rulings on summary judgment for correction of errors at law. *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 76 (Iowa 2022). In summary judgment matters, the trial court's findings are not findings of fact, but are decisions on questions of law. *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989).

I. THE DISTRICT COURT ERRED IN RULING IT WAS THE DEFENDANTS' BURDEN TO SHOW PLAINTIFF'S EXPERT WAS NOT IN A SUBSTANTIALLY SIMILAR FIELD

To date, *Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533 (Iowa 2022) is the lone opinion issued by the Iowa Supreme Court expressly construing Iowa Code §147.140.³ That statute, made effective to all cases filed on or after July 1, 2017, provides in full:

147.140. Expert witness--certificate of merit affidavit

1. a. In any action for personal injury or wrongful death against a health care provider based upon the alleged negligence in the practice of that profession or occupation or in patient care, which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the plaintiff shall, prior to the commencement of

³ The court recently decided two more cases implicating section 147.140, but neither focused on construing its substantive provisions. *See, Ronnfeldt v. Shelby County Chris A. Myrtue Memorial Hospital*, No. 22-0365, 2023 WL 115161, at *1 (Jan. 6, 2023)(plaintiff has right to voluntarily dismiss medical malpractice case without prejudice, even in the face of a pending motion seeking dismissal under section 147.140(6)) and *Kirlin v. Monaster*, No. 22-0405, 2023 WL 115160, at *3 (Jan. 6, 2023)(court cannot rule on the validity of a section 147.140 motion after a voluntary dismissal of prior case if plaintiff chooses to refile).

discovery in the case and within sixty days of the defendant's answer, 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.

b. A certificate of merit affidavit must be signed by the expert witness and certify the purpose for calling the expert witness by providing under the oath of the expert witness all of the following:

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

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

c. A plaintiff shall serve a separate certificate of merit affidavit on each defendant named in the petition.

2. An expert witness's certificate of merit affidavit does not preclude additional discovery and supplementation of the expert witness's opinions in accordance with the rules of civil procedure.

3. The parties shall comply with the requirements of section 668.11 and all other applicable law governing certification and disclosure of expert witnesses.

4. The parties by agreement or the court for good cause shown and in response to a motion filed prior to the expiration of the time limits specified in subsection 1 may provide for extensions of the time limits. Good cause shall include but not be limited to the inability to timely obtain the plaintiff's medical records from health care providers when requested prior to filing the petition.

5. If the plaintiff is acting pro se, the plaintiff shall have the expert witness sign the certificate of merit affidavit or answers to interrogatories referred to in this section and the plaintiff shall be bound by those provisions as if represented by an attorney.

6. Failure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case.

7. For purposes of this section, "health care provider" means the same as defined in section 147.136A.

Section 147.140, Code of Iowa (2021).

In *Struck*, the district court dismissed the plaintiff's claims after she failed to file a certificate of merit. Plaintiff appealed, contending her petition encompassed "possible acts of general negligence," such as premises liability and lack of supervision by nonprofessional staff, that would not require expert testimony and therefore fall outside the scope of section 147.140. *Struck*, 973 N.W.2d at 539. The Court of Appeals, in affirming in part and reversing part, agreed with the plaintiff. On further review, the Supreme Court held the Court of Appeals had failed to address plaintiff's failure to preserve error on the issue and affirmed the district court's dismissal of the case. *Id.*, at 540-41("Struck is bound by the allegations actually pleaded within the four corners of her petition. By alleging only 'professional negligence' claims and not filing a certificate of merit, she effectively pleaded herself out of court.") Because the issue was fully briefed on appeal and decided by the Court of Appeals, however, the Supreme Court exercised its discretion "to clarify the scope of the new statute" despite its holding error was not preserved. *Id.*, at 540.

The court began its discussion by outlining the requirements found in section 147.140(1)(a). *Struck*, 973 N.W.2d at 540. Relevant to the instant case, the court made clear that the legislative goal underlying the statute is "to enable healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite expert testimony," *id.*, and observed that section 147.140 is to work in tandem with Iowa Code section 668.11. The court observed that "section 147.140

provides an earlier and more complete remedy when the plaintiff lacks an expert: dismissal with prejudice.” *Id.*, at 541.

In its analysis, the court in *Struck*, cited approvingly to *McHugh v. Smith*, 966 N.W.2d 285 (Iowa App. 2021), where the Court of Appeals also analyzed sections 147.140 and 668.11 and pronounced: “The new legislation imposes two extra burdens: (1) provide verified information about the medical malpractice allegations to the defendants *and* (2) do so earlier in the litigation.” *McHugh*, 966 N.W.2d at 290. Perhaps most pertinent to the issue presented here, the court in *McHugh* construed section 147.140(1)(a) to require that “the expert who signed the certificate had to ‘meet the qualifying standards of section 147.139,’ including licensure, *practice field*, board certification in a specialty, and other criteria.” *Id.*(emphasis added).

By its express terms, then, the last sentence of section 147.140(1)(a) incorporates the requirements of Iowa Code section 147.139, entitled “Expert Witness Standards.” See Iowa Code § 147.140(1)(a) (“The expert witness must meet the qualifying standards of section 147.139”). Under section 147.139, plaintiff’s designated standard of care expert must meet all of the following criteria: (1) licensure to practice in the same or a substantially similar field as the defendant; (2) good standing in each state of licensure; (3) no license revocation or suspension in the five years preceding the act or omission alleged to be negligent. Section

147.139(1), Code of Iowa (2021). In addition, there must be evidence the proffered expert has “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.” *Id.*, at 147.139(2). And if the defendant physician is board certified in a specialty, the expert must be certified in the same or a substantially similar specialty by a board recognized by the American board of medical specialties. *Id.*, at 147.139(3). The failure to meet any of the listed requirements renders the proffered expert unqualified. Therefore, if an expert who has tendered a certificate of merit affidavit pursuant to Iowa Code section 147.140 does not satisfy the criteria of § 147.139, the certificate of merit affidavit is deficient.

In interpreting a statute, the court first considers the plain meaning of the relevant language, read in the context of the entire statute, to determine whether there is ambiguity. *Butler v. Iyer*, No. 21-0796, WL 1100275, at *5 (Apr. 13, 2022)(citing *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017)). In the absence of ambiguity, interpretation stops with the plain meaning. *Id.*, (citing *State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017)). The specific requirements set forth in § 147.139 have been strictly construed to effectuate their purpose. *See Borjas v. State*, No.18-0185, 2018 WL 6700229 at *5 (Dec. 17, 2018)(“[Expert] is not a licensed physician and does not work in the medical field; therefore, he is not

qualified as an expert capable of testifying about the standard of care or the violation”) (citing Iowa Code § 147.139).

In its analysis of the defendants’ motion for summary judgment, the trial court determined the “field” referenced in section 140.139 . . . is that which establishes the standard of care.” Without citation to any authority, the trial court then concluded:

At issue here is airway management. This is what Miller alleges Drs. Nowysz and Carreon were engaged in with Ms. Miller. Presumably, Drs. Nowysz and Carreons’ respective licensures, board certifications and practices permit them to perform the procedures that they were engaged in with Ms. Miller, including esophageal intubation as alleged. As Dr. Mark’s c.v. shows, she is also a board certified physician who practices, specializes and teaches in the field of airway management. Dr. Mark has opined that Drs. Nowysz and Carreon breached the applicable standard of care in performing esophageal intubation of Ms. Miller. No information provided by Dr. Mark or by Drs. Nowysz and Carreon at this point in the proceedings indicates any different standard of care, for airway management in general or esophageal intubation in particular, for board certified anesthesiologists or emergency medicine physicians performing the same procedure. In other words, the court has no information that in their care of this patient, Drs. Nowysz and Carreons’ [sic] were not licensed practicing or board certified in the same or substantially similar filed as Miller’s designated expert. Dr. Mark is qualified under § 147.140.

App. p.265.

The foregoing conclusions are erroneous for several reasons. First, the premise that the “field” referred to in the expert qualification statute “is that which establishes the standard of care” borders on the tautological. The “same or substantially similar standard of care” does not identify a “field.” The phrase

“substantially similar” is used to describe the specialty. Therefore, it is the specialty which must be substantially similar. *See, McHugh*, 966 N.W.2d at 290 (the qualifying standards of section 147.139 include the “practice field”).⁴

Second, “the issue here is airway management” is an incorrect statement. The issue here is whether an anesthesiologist can be said to be in the same or substantially similar field as emergency room physicians. In this connection, the district court overlooked section (c) of 147.140 which specifies, “A plaintiff shall serve a separate certificate of merit affidavit on each defendant named in the petition.” This language implies a separate certificate of merit is required for each defendant because expert qualifications must be analyzed in light of individual fields of expertise. *See, Wolfe v. Shenandoah Medical Center.*, No. 21-1269, 2022 WL 2160449, at *1 (June 15, 2022). Having misidentified the issue, the trial court then compounded its error when it identified “airway management” as the applicable field for purposes of applying section 140.139.

Finally, the district court erred in looking to Dr. Nowysz and Dr. Carreon to how they “were not licensed, practicing or board certified in the same or substantially similar field as Miller’s designated expert.” This final determination

⁴ Dr. Nowysz and Dr. Carreon by this reference also adopt the reasoning and authorities cited by the medical co-defendants in regard to the legislative history of section 147.140 and construction of the qualification requirements found in section 147.139.

upended the burden of proof applicable to a motion for summary judgment. The defendants demonstrated in support of their motion that it was undisputed Dr. Mark's report did not contain a statement that her licensure, board certification and anesthesiology practice are *in the same or substantially similar field to emergency medicine*. Dr. Mark is not an emergency medicine physician. Therefore, the certificate of merit fell short of the requirements for qualification of expert witnesses set forth in Iowa Code § 147.139(1), (2) and (3). In stating it had "no information," the trial court placed the burden upon the defendants under the statute to, in effect, rebut a statement of qualification that had not been made. Under summary judgment standards, it was incumbent upon plaintiff, as the resisting party, to set forth specific facts creating a factual dispute. See *Buboltz v. Birusingh*, 962 N.W.2d 747, 754 (Iowa 2021), *reh'g denied* (Aug. 25, 2021)(the resisting party may not rest on mere allegations in its pleadings but rather must set forth specific material facts showing that a genuine disputed issue exists). Here, plaintiff's counsel argued there was a genuine issue of fact precluding summary judgment on this issue, but never set forth specific facts supporting the notion that the practice of anesthesiology is the same or substantially similar to the practice of emergency medicine.⁵ Tr. p.20, ln.s 5-11. Certainly, Dr. Mark's expert report and her subsequent affidavit did not say so.

⁵ This argument is undercut by the argument plaintiff intended to produce an expert opinion from Dr. Mustapha Saheed, who apparently is an emergency trauma

II. THE DISTRICT COURT ERRED IN DETERMINING A CERTIFICATE OF MERIT NEED NOT BE IN AFFIDAVIT FORM.

Finally, there is no factual dispute Dr. Mark's report plaintiff submitted on February 21, 2022, was not signed under oath as required by 147.140(1)(b) ("certificate of merit affidavit must be signed by the expert witness and certify the purpose for calling the expert witness by providing under the oath of the expert witness all of the following ...").⁶ On this issue, the trial court determined plaintiff had shown substantial compliance because the element of the oath was the only substantive omission from the requirements of section 47.140. See App. p.263 ("Every reasonable objective of the statute is covered by Dr. Mark's report.") The court also noted Dr.s Nowysz and Carreon had not shown prejudice "or anything

physician at Johns Hopkins, but could not obtain the doctor's timely response. Tr. p.13, ln.s7-22.

⁶ Plaintiffs also served an affidavit signed by Dr. Mark on June 2, 2022, attesting that the opinion she expressed more than three months earlier were true and correct. These measures cannot be allowed to save plaintiffs' case from dismissal, as they are clearly beyond the plain terms of § 147.140.

The fact that a plaintiff can belatedly show the litigation was not frivolous is not an exception in the statute. The legislature decided plaintiffs should make that showing within sixty days of a defendant's answer. We have no basis to determine that this timeframe is "too early" compared to the overall duration of litigation.

Butler v. Iyer, No. 21-0796, WL 1100275, at *6.

they would do differently” because the signature was not under oath. In short, the trial court declined to enforce the express terms of the statute.

By its plain language, section 147.140 imposes the burden upon plaintiff to “provide *verified information* about the medical malpractice allegations to the defendants.” *McHugh*, 966 N.W.2d at 290(*emphasis supplied*). In other contexts, the submission of unsworn expert reports has evidentiary consequences. *Provident Life and Accident Ins. Co. v. Goel*, 274 F.3d 984, 1000 (5th Cir. 2001)(“Unsworn expert reports ... do not qualify as affidavits or otherwise admissible evidence for [the] purpose of [summary judgment], and may be disregarded by the court when ruling on a motion for summary judgment.”) *See also, Maytag Corp. v. Electrolux Home Products, Inc.*, 448 F. Supp. 2d 1034, 1064 (N.D. Iowa 2006) (collecting cases)(while an unsworn expert report, standing alone, does not constitute admissible evidence that can be considered at the summary judgment stage of the proceedings, an unsworn expert report may be considered where the opinions therein are otherwise adopted or reaffirmed in an admissible affidavit or deposition testimony by the expert); *McCoy v. State*, No. No. 17-1919, 2020 WL 3263924 at *3 (June 17, 2020)(“Because the statement is neither notarized nor certified under penalty of perjury, we do not treat it as part of the record.”) The statute does not include a requirement the defendant physician suffer prejudice as a result of a plaintiff’s failure to comply. The district court both ignored an express

term in the statute⁷ and read in a requirement that is not there. The Court of Appeals in *McHugh* specifically rejected a request to read language into the statute beyond the plain text. “We cannot read a grace period into the new statute that the legislature did not communicate through its drafting.” *McHugh*, 966 N.W.2d at 291(citing *Homan v. Branstad*, 887 N.W.2d 153, 170 (Iowa 2016)(“What the general assembly actually said guides our interpretation.”)) It also bears noting that the court in *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 WL 3077022 at *5 (July 21, 2021) quoted with approval the district court’s observation that noncompliance with §147.140 included the failure to offer a certificate of merit “in affidavit form or otherwise submitted under oath.”

CONCLUSION

The district court erred in ruling plaintiff substantially complied with the requirements of Iowa Code § 147.140. The report of Dr. Mark, an anesthesiologist, did not contain proof plaintiff’s expert practices in the same or substantially similar field or specialty as Dr. Nowysz or Dr. Carreon, both emergency medicine physicians, and was unverified. As a consequence, the certificate of merit did not substantially comply with the requirements of Iowa Code § 147.140. The district


⁷ In all, section 147.140 contains the term “certificate of merit affidavit” five times in addition to its title.

court should have granted the defendants' motion for summary judgment in this case.

REQUEST FOR ORAL ARGUMENT

Dr. Nowysz and Dr. Carreon respectfully request that the Court grant oral argument.

Respectfully submitted,
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I certify that on March 16, 2023, the foregoing document was electronically filed with the Court using the CM/ECF system and served to the parties listed by electronic means through the ECF system.

/s/ Thomas F. Ochs

March 16, 2023

Date