IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 22-1574
Polk County No. LACL151799

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

Plaintiff-Appellee,

vs.

THE STATE OF IOWA; SNYDER & ASSOCIATES, INC.; C.J. MOYNA & SONS, LLC; J. PETTICORD, INC.

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, CO; DR. NOAH PIROZZI, DO; DR. DANIELLE CHAMBERLAIN; and DARON DARMENING, RT

Defendants-Appellant.

Defendants/Appellants 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's Final Brief

---

BY:/s/ *Theodore T. Appel*
Rick Harris AT0003198
Theodore T. Appel AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: 515-513-5003

rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR CHI DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Acts, and Administrative Rules:

Iowa Court Rules:

Other Secondary Sources:

STATEMENT OF ISSUES

I. Dr. Mark Does Not Meet the Expert Qualification Requirements in Iowa Code section 147.139 as Required for a Substantially Compliant Certificate of Merit.

Cases:

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

Borger v. Eighth Judicial Dist. Court, 102 P.3d 600 (Nev. 2004)

Bray v. Hill, 517 N.W.2d 223 (Iowa Ct. App. 1994)

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

Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996)

Carreras v. Iowa Dep't of Transp., 977 N.W.2d 438 (Iowa 2022)

Chesnut v. Montgomery, 307 F.3d 698 (8th Cir. 2002)

Cox v. Iowa Dep't of Rev., 920 N.W.2d 545 (Iowa 2018)

Ganrud v. Smith, 206 N.W.2d 311 (Iowa 1973)

Giltner v. Stark, 252 N.W.2d 743 (Iowa 1977)

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

Hass v. Zafar, No. LACL 145009, 2022 Iowa Dist. LEXIS 1 (Iowa Dist. Ct. March 9, 2022)

Hutchison v. American Family Mut. Ins. Co., 514 N.W.2d 882 (Iowa 1994)

Iowa Coal Mining Co. v. Monroe Cty., 555 N.W.2d 418 (Iowa 1996)

Iowa Supreme Court Atty. Disciplinary Bd. v. Doe, 888 N.W.2d 248 (Iowa 2016)

Jones v. Bagalkotakar, 750 F.Supp.2d 574 (D. Md. 2010)

Kirlin v. Monaster, LACV 121621, UNPUBLISHED, Pg. 5 (Iowa Dist. Ct. Jan. 18, 2022)

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)

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

Medina v. Pitta, 120 A.3d 944 (N.J. Super. Ct. App. Div. 2015)

Midwest Auto. III, L.L.C., v. Iowa D.O.T., 646 N.W.2d 417 (Iowa 2002)

Oyens Feed & Supply, Inc. v. Primebank, 808 N.W.2d 186 (Iowa 2011)

Postell v. Am. Family Mut. Ins. Co., 823 N.W.2d 35 (Iowa 2012)

Shover v. Iowa Lutheran Hospital, 107 N.W.2d 85 (Iowa 1961)

Star Equip., Ltd. v. State, 843 N.W.2d 446 (Iowa 2014)

State v. Boston, 278 N.W. 291 (Iowa 1939)

State v. Hensley, 911 N.W.2d 678 (Iowa 2018)

State v. Kamber, No. 05-1868, 2007 Iowa App. LEXIS 43 (Iowa Ct. App. Jan. 18, 2007)

State v. Kamber, 737 N.W.2d 297 (Iowa 2007)

State v. Mathias, 936 N.W.2d 222 (Iowa 2019)

State v. Middlekauff, 974 N.W.2d 781 (Iowa 2022)

State v. Shorter, 945 N.W.2d 1 (Iowa 2020)

State v. Zacarias, 958 N.W.2d 573 (Iowa 2021)

Struck v. Mercy Health Servs., 973 N.W.2d 533 (Iowa 2022)

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd., 484 U.S. 365 (1988)

United Suppliers, Inc. v. Hanson, 876 N.W.2d 765 (Iowa 2016)

Vezeau-Crouch v. Abraham, No. 17-1213, 2019 Iowa App. LEXIS 24 (Iowa Ct. App. Jan. 9, 2019)

Ward v. Unity Healthcare, No. 20-1516, 2021 Iowa App. LEXIS 1039 (Iowa Ct. App. Dec. 15, 2021)

Statutes:

Introduced House File 487, 87th Gen. Assemb., Reg. Sess. (Iowa 2017)

Introduced Senate File 465, 87th Gen. Assemb., Reg. Sess. (Iowa 2017)

2017 Iowa Acts ch. 107

Iowa Admin. Code r. 653-20.11(12)

Iowa Admin. Code r. 653-23.1(17)(b)

Iowa Code § 4.1 (2019)

Iowa Code § 147.136A (2019)

Iowa Code § 147.139 (2017)

Iowa Code § 147.139 (2019)

Iowa Code § 147.140 (2019)

Iowa Code § 152B.2 (2019)

Nev. Rev. Stat. § 41A.071

N.J.S.A. § 2A:53A-38

40 Pa. Cons. Stat. § 1303.512

W.Va. Code § 55-7B-6

Iowa Court Rules:

Iowa R. Evid. 5.702

Other Secondary Sources:

American Board of Medical Specialties, *American Board of Anesthesiology*,

https://www.abms.org/board/american-board-of-anesthesiology/

American Board of Medical Specialties, *American Board of Emergency Medicine*,

https://www.abms.org/board/american-board-of-emergency-medicine/#abem-accm

American Board of Medical Specialties, *American Board of Pathology*,

https://www.abms.org/board/american-board-of-pathology/

American Board of Medical Specialties, *American Board of Radiology*,

https://www.abms.org/board/american-board-of-radiology/

American Board of Medical Specialties, *American Board of Surgery*,

https://www.abms.org/board/american-board-of-surgery/

American Board of Specialties, *Specialty and Subspecialty Certificates* https://www.abms.org/member-boards/specialty-subspecialty-certificates/

American Osteopathic Association, *About AOA Board Certification*, https://certification.osteopathic.org/about/

Field, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/field

Field, Merriam-Webster, https://www.merriam-webster.com/dictionary/field

Fronlineer, *Urgent Care vs. Critical Care v. Emergency Care*, Frontline ER, (Jan. 21, 2018) https://frontlineer.com/urgent-care-vs-critical-care-vs-emergency-care/

Johns Hopkins Anesthesiology and Critical Care Medicine: Adult Critical Care https://anesthesiology.hopkinsmedicine.org/adult-critical-care/

Johns Hopkins Anesthesiology and Critical Care Medicine: Neurosciences Critical Care https://anesthesiology.hopkinsmedicine.org/nccu/

Johns Hopkins Anesthesiology and Critical Care Medicine: Pediatric Critical Care https://anesthesiology.hopkinsmedicine.org/pediatric-critical-care/

Johns Hopkins School of Medicine: Academic Departments & Institutes https://www.hopkinsmedicine.org/som/education-programs/academic-departments.html

Lane Medical Litigation Guide (1995)

Lawyer's Medical Cyclopedia (2014)

Lynette J. Mark, M.D. et. al., *Difficult Airway Response Team: A Novel Quality Improvement Program for Managing Hospital-Wide Airway Emergencies*

Multidisciplinary, Merriam-Webster https://www.merriam-webster.com/dictionary/multidisciplinary

Must, Merriam-Webster, https://www.merriam-webster.com/dictionary/must

Webster's Third New International Dictionary (unabr. ed. 1993)

Webster's Third New International Dictionary (2002)

II. Dr. Mark's Report was Not Under Oath As Required Under Iowa Code section 147.140(1)(*b*).

Cases:

Iowa Supreme Court Atty. Disciplinary Bd. v. Doe, 888 N.W.2d 248 (Iowa 2016)

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)

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

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

State v. Carter, 618 N.W.2d 374 (Iowa 2000) (en banc)

Struck v. Mercy Health Servs., 973 N.W.2d 533 (Iowa 2022)

Tunia v. St. Francis Hosp., 832 A.2d 936 (N.J. Super. Ct. App. Div. 2013)

Statutes:

Iowa Code § 147.140 (2019)

Iowa Code § 622.1 (2019)

N.J.S.A. § 2A:53A-38

Other Secondary Sources:

Must, Merriam-Webster https://www.merriam-webster.com/dictionary/must

III. CHI Defendants Incorporate Any Applicable Arguments Made by Defendants Noweyz and Carreon's Appellate Brief as their Own.

ROUTING STATEMENT

Catholic Health Initiatives-Iowa, Corp. d/b/a/ MercyOne Des Moines Medical Center, Dr. Joseph Losh, Dr. Noah Pirozzi, Dr. Danielle Chamberlain, and RT Daron Darmening [hereinafter CHI Defendants] argue that this case should be retained by the Iowa Supreme Court. The scope of the recently revised expert qualifying standards in Iowa Code 147.139, as required for a certificate of merit in Iowa Code 147.140 and permissible expert testimony in medical malpractice cases, involves a substantial issue of first impression, a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the Supreme Court, and/or a substantial question of enunciating or changing legal principles. Iowa R. App. P. 6.1101(2)(*c-d*, *f*).

STATEMENT OF THE CASE

This appeal involves a medical malpractice claim which is governed by Iowa Code Chapter 147. Plaintiff filed a petition on October 28, 2021 alleging several specifications of medical malpractice against several medical professionals for the treatment of Meredith Miller. App. 8-18. CHI Defendants filed an Answer on January 3, 2022. App. 40-49.

On February 21, Plaintiff served CHI Defendants with an Expert Report of Findings and Opinions by Dr. Lynette Mark, [hereinafter Report] claiming it to be a certificate of merit. *See generally* App. 61-63, 100-101. In her Report, Dr. Mark

stated that she is a "board-certified anesthesiologist . . . [who] maintained a full-time practice in anesthesiology . . . [and] ha[s] been licensed to practice medicine as an anesthesiologist." App. 100. Her Report explained she was "familiar with the standard of care applicable to anesthesiologists caring for adult patients in the United States." App. 100. Additionally, Dr. Mark also held out her expertise in "difficult airway management" by being a founding member of the Society of Airway Management, Director of the Difficult Airway Response Team Program, and an Executive Medical Director of JMH Multidisciplinary Airway Program. App. 100. Despite her Report stating she was only familiar with the standard of care for anesthesiologists, she stated that "Mercy Medical Center *emergency department members* breached the standard of care." *Compare* App. 100 *with* App. 101 (emphasis added). Her Report concludes that Doctors Johnson, Nowsysz, Losh, Carreon, Pirozzi, and Chamberlain and other Mercy Medical Center emergency department members fell below the standard of care required for Meredith Miller. App. 100. Plaintiff did not provide any other timely certificate of merit. App. 250-51, 256.

CHI Defendants filed a Motion to Dismiss with accompanying briefing on May 12, 2022. *See generally* App. 64-85. Specifically, Dr. Mark, as an anesthesiologist, was not licensed in the same or substantially similar field and not actively practicing in the same or substantially similar field as the CHI Defendants

who include a trauma surgeon, general surgeons, and respiratory therapists. Iowa Code § 147.139(1, 2); *see* App. 67-68, 80-81. CHI Defendants also noted that Dr. Mark's Report contained no affirmation or oath as required by Iowa Code section 147.140(1)(*b*). App 82.

Defendants Johnson[1], Nowysz, and Carreon also filed a motion for summary judgment related to similar certificate of merit issues the same day. App. 86-155. On May 23, Plaintiff filed a resistance to CHI Defendants Motion to Dismiss. App. 156-62. Plaintiff filed a separate resistance to Defendants Nowysz and Carreron's motion for summary judgment on May 27. App. 210-36. CHI Defendants filed a reply on May 31 and Defendants Nowsyz and Carreron filed their reply on June 6. App. 237-41, 244-48. A joint hearing on both motions was held on June 30.

Plaintiff stated at the hearing that the "Defendants correctly assert, *and we agree*, that Dr. Lynette Mark is not a trauma surgeon, general surgeon, or respiratory therapist. I think it's fair to agree that *she's not in the same field as the defendants*." Tr. Pg. 14:10-15 (emphasis added); *see also id.* at Pg. 15:14-17 ("If we look at Iowa Code section 147.139 and read it only that the expert must be licensed in the same field, which is what the defendants are arguing here, then I [Plaintiff's counsel] would agree."). However, Plaintiff then argued that the "substantially similar" language kept the "material provisions of [a previous

[1]Dr. Johnson was voluntarily dismissed from the case.

version of] Iowa Code 147.139." *Id.* at Pg. 15:9-10. Subsequently, Plaintiff argued that Dr. Mark was in a "substantially similar field" because she was an "airway expert" who could testify as to the standard of care regarding the appropriate treatment of Meredith Miller. App. 211; *see also* Tr. Pg. 17:5-8, 20:5-11. Plaintiff also argued that they substantially complied with the oath requirement because Dr. Mark's signature was provided in her Report. Tr. Pg. 18:19-24.

The District Court denied both respective appealing Defendant's motions. *See generally* App. 249-66. The District Court first determined that the oath requirement had been substantially complied with due to it being timely signed under Dr. Mark's letterhead. App. 252-54. In turning to the expert qualification requirement, the District Court explained that "[t]he focus of proof and expert testimony in medical malpractice cases is the standard of care" which requires expert testimony. App. 255. After reciting the elements of medical malpractice and explaining that expert testimony is required for medical malpractice actions, the District Court defined "[t]he 'field' referenced in § 147.139, . . . [as] which establishes the standard of care." App. 255. Subsequently, the District Court used "airway management" as the field that needed to be compared. App. 255.

The District Court also found that it had "no information provided by Dr. Mark or by the Defendants at this point in the proceedings [that] indicates any different standard of care, for airway management in general or esophageal

intubation in particular, for board certified anesthesiologists or trauma surgeons, or respiratory therapists performing the same procedure." App. 255 (emphasis added). Since the District Court had no information from Dr. Mark, it "presumed" that Dr. Mark had similar licensures, board certifications, and actively practiced in the same and substantially similar field as the Defendants. App. 255–56.

A timely application for interlocutory appeal was submitted by CHI Defendants. App. 281-306. A joinder in the application for interlocutory appeal was filed by Defendants Nowysz and Carreon. App. 307-314. Plaintiff filed duplicative resistances to the applications for interlocutory appeal and alternative motions for expediated briefing. App. 315-26. CHI Defendants filed a reply and resistance to the alternative motion for expediated briefing. App. 327-33. The Supreme Court granted the appealing Defendant's applications for interlocutory appeal and denied the Plaintiff's request for expediated briefing. App. 334-37.

STATEMENT OF THE FACTS

This appeal involves a medical malpractice claim stemming from the treatment of Meredith Miller. *See generally* App. 8-18. Plaintiff, Darrin Miller, filed a petition as individual and executor for his spouse Meredith Miller and as parent, guardian, and next of friend for his daughter A.M.M. *See generally* App. 8-18. A.M.M. was driving with Meredith when she lost control of her vehicle and

collided into a tree.[2] App. 11. Meredith was transported to MercyOne Des Moines Medical Center. App. 11. She received treatment from several physicians and nurses including trauma surgeon Dr. Joseph Losh, general surgeons Dr. Noah Piozzi (resident at the time of the incident) and Dr. Danielle Chamberlin, and respiratory therapist Daron Darmening. App. 11. Plaintiff alleges that the CHI Defendants improperly performed an esophageal intubation instead of a tracheal intubation, failed to identify that an esophageal intubation was performed, failed to correct the esophageal intubation, not being forthcoming about the cause of death despite knowing they performed an esophageal intubation, and performed tracheal intubation after Meredith was pronounced dead. App. 11-12, 15-16.

ARGUMENT

I. Dr. Mark Does Not Meet the Expert Qualification Requirements in Section 147.139 as Required for a Substantially Compliant Certificate of Merit.

A. Standard of Review.

A district court's ruling on a motion to dismiss and statutory interpretation is reviewed for correction of errors at law. *Struck*, 973 N.W.2d at 538.

B. Error Preservation.

[2]On a motion to dismiss, "we accept as true the petition's well-pleaded factual allegations." *Struck v. Mercy Health Servs.*, 973 N.W.2d 533, 538 (Iowa 2022) (quoting *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020)).

An issue is preserved if the "court's ruling indicates that the court considered the issue and necessarily ruled on it." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). Error has been preserved on whether the Plaintiff adequately filed a substantially complaint certificate of merit on the expert qualification grounds. *See generally* App. 64-85; *see also* App. 254-56.

C. The 2017 Tort Reform Legislation Significantly Changed the Expert Qualification Requirements in Medical Malpractice Cases.

In 2017, the Iowa legislature enacted additional safeguards for healthcare providers in defending medical malpractice suits. *See generally* 2017 Iowa Acts ch. 107. These revisions included a non-economic damages cap, strengthened expert testimony requirements, and a new certificate of merit statute. *Id.* (codified at Iowa Code § 147.136A, .139, .140). This legislation applies to "all causes of action accruing on or after the effective date of July 1, 2017." *Id.* § 5; *see Iowa Coal Mining Co. v. Monroe Cty.*, 555 N.W.2d 418, 429 (Iowa 1996) ("A cause of action . . . is defined by our court as the act on the part of the defendant which gives the plaintiff his 'cause of complaint.' " (quoting *Giltner v. Stark*, 252 N.W.2d 743, 745 (Iowa 1977)). These changes are applicable to these proceedings because Plaintiff's cause of action arises out of the care and treatment of Meredith on December 15, 2019.

The new certificate of merit statute requires a plaintiff to file an affidavit by a medical expert within sixty days of the Defendant's answer. Iowa Code § 147.139. The affidavit and expert must meet several conditions enumerated under Iowa Code sections 147.139 and 147.140 to ensure that the medical malpractice lawsuit is sufficiently viable in the early stages of litigation. *Id.* §§ .139, .140; *see Struck*, 973 N.W.2d at 539. Failure to substantially comply with the statute's requirements requires dismissal of "each cause of action as to which expert witness testimony is necessary to establish a prima facie case" with prejudice. Iowa Code § 147.140(6). The Iowa Supreme Court recently 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*, 973 N.W.2d at 539; *see also McHugh v. Smith*, 966 N.W.2d 285, 289 (Iowa Ct. App. 2021) ("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 litigation.").

Iowa Code section 147.140(1)(a) states the following:

> In any action for personal injury or wrongful death against a healthcare provider based upon the alleged negligence in the practice of that profession or occupation or in patient care, which includes a cause of action for which expert testimony is necessary to establish a prima facie case, the plaintiff shall, prior to the commencement of discovery in the case and within sixty days of the defendant's answer, serve upon the defendant a certificate of merit 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*.

Id. § 147.140(1)(a) (emphasis added).

Prior to the 2017 revisions, Iowa Code section 147.139 stated the following:

> If the standard of care given by a physician and surgeon . . . is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical or dental qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in this case.

Id. § 147.139 (2016); *see also* Iowa R. Evid. 5.702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.").

Under this previous standard, Iowa courts adhered to a liberal admissibility policy for experts in medical malpractice cases. Our courts did not require "that a physician be a specialist in the particular field in order to express" standard of care opinions. *Shover v. Iowa Lutheran Hosp.*, 107 N.W.2d 85, 89 (Iowa 1961); *see also Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994) ("Although licensing carries a presumption of qualification to testify in the given field, 'learning and experience may provide the essential elements of qualification.' " (quoting *Ganrud v. Smith*, 206 N.W.2d 311, 315 (Iowa 1973)). For

example in *Hutchison*, the court rejected that an expert needed to have board certification in neuropsychology to testify in the specific field of neuropsychology under Rule 702 and Iowa Code section 147.139. 514 N.W.2d at 886–89. *Hutchison* noted that "the criteria for qualifications under 702 – knowledge, skill, experience, training, or education – are too broad to allow distinctions based on whether or not a proposed expert belongs to a particular profession or has a particular degree." *Id.* at 887–88. Similarly, in *Carolan v. Hill*, the Court explained that the plaintiff's nurse expert was qualified to testify against a defendant doctor because they had performed similar work. 553 N.W.2d 882, 888 (Iowa 1996). Specifically, the Court noted that although the defendant doctor was a physician, he was not "an anesthesiologist because he did not specialize solely in that field." *Id.* at 889. *Carolan* made note of the failed "[e]fforts . . . to impose licensure as a requirement for admission of expert testimony." *Id.* at 888. Yet, these efforts eventually became successful when the expert witness standards under section 147.139 were significantly revised as part of the aforementioned 2017 Tort Reform legislation.

A plaintiff's expert witness providing a certificate of merit "*must* meet the qualifying standards of section 147.139." Iowa Code § 147.140(1)(a) (2019) (emphasis added); *see Must*, Merriam-Webster https://www.merriam-webster.com/dictionary/must ("be required by law"); *see also Iowa Supreme Court Atty. Disciplinary Bd. v. Doe*, 888 N.W.2d 248, 252 (Iowa 2016) (explaining the

emphasis of using " 'must' or 'will' or other language that clearly expresses the mandatory nature of the rule"). Thus, to ensure that a plaintiff's expert is sufficiently familiar with the standard of care at issue, they must meet *all* of the following requirements that are applicable.[3] *See* Iowa Code § 147.140(1)(a), .139.

- "[L]icensed 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." *Id.* § 147.139(1).
- "In the five years preceding the act or omission alleged to be negligent, the person actively practiced in the same or a substantial similarly field as the defendant or was a qualified instructor at an accredited university in the same field as the defendant." *Id.* § 147.139(2).
- "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." *Id.* § 147.139(3).
- "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." *Id.* § 147.139(4).

[3]In *Ward v. Unity Healthcare*, the Court of Appeals incorrectly stated that the Plaintiff's expert witness "must satisfy *one* of the following standards" listed in subsections 1 through 4 of section 147.139. No. 20-1516, 2021 Iowa App. LEXIS 1039, at *13 (Iowa Ct. App. Dec. 15, 2021) (emphasis added). The plain language of 147.139 requires "*all* of the following [subsections] to be established." Iowa Code § 147.139 (emphasis added). Similarly, the plain language of 147.140 requires that the plaintiff's expert must meet the plural "qualifying standards." *Id.* § 147.140(1)(*a*) (emphasis added). This is a situation where the plural does not mean the singular due to the specific context of sections 147.139 and 147.140. *Cf. id.* § 4.1(16).

The substantial revisions to the expert testimony requirements for medical malpractice cases set the framework for the first argument on appeal.

D. The "Same or Substantially Similar Field" Requirement Refers to the Defendant's Professional Practice or Branch of Medicine and Not the Procedure or Negligent Act at Issue.

Defendant argued that a "field" referred to the healthcare provider's professional practice or branch of medicine. App. 67-68, 80-81. Plaintiff admitted that Dr. Mark, as an anesthesiologist, was not in the same field as the CHI Defendants trauma surgeon, general surgeon, and respiratory therapist, but that their expert was in a "substantially similar field" because she had experience with the procedure at issue in this case. Tr. Pg. 14:10-15, 15:14-17. The District Court concluded that the term "field" referred to the standard of care or the procedure involved in the case. App. 255-56.

"The first step in our statutory interpretation analysis is to determine whether the statute is ambiguous." *State v. Middlekauff*, 974 N.W.2d 781, 793 (Iowa 2022) (quoting *State v. Zacarias*, 958 N.W.2d 573, 581 (Iowa 2021)). "Our inquiry ends with the plain language if the statute is unambiguous." *Id.* (quoting *Zacarias*, 958 N.W.23d at 581)); *see also State v. Shorter*, 945 N.W.2d 1, 7 (Iowa 2020) ("If the legislature does not provide a definition, 'we look to the context in which the term appears and give it its ordinary and common meaning." (quoting *State v. Mathias*,

936 N.W.2d 222, 227 (Iowa 2019)). "If the statute is ambiguous, we 'rely on principles of statutory construction to resolve the ambiguity.' " *Carreras v. Iowa Dep't of Transp.*, 977 N.W.2d 438, 446 (Iowa 2022). The legislature did not define "field" in Chapter 147. So, we must first review the term's plain meaning under the context of the Iowa Code section 147.139.

1. The Plain Meaning of "Field" Supports CHI Defendant's Interpretation.

The defendant healthcare provider's "field" under Iowa Code section 147.139 should be associated with the defendant's area of professional practice rather than the standard of care for the specific procedure cause of action is based on. To begin, the subsection 1 and 2 clearly state that "field" is modified by "as the defendant." *Id.* Essentially, the statute directs the court to determine whether the plaintiff has a license to practice and is actively practicing within the defendant's field. *Id.* In support of this notion, the most contextually relevant dictionary definitions provide that a "field" is "an area or division of an activity, subject, or profession." *Field*, Merriam-Webster, https://www.merriam-webster.com/dictionary/field; *see Field*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/field ("[A]n area of activity or interest.").

"Field" is, very clearly, not modified by a medical problem or the specific treatment involved in the underlying cause of action. "Field" is not referencing, as

the District Court put it, "that which establishes the standard of care." App. 256. Rather, the "field" requirement is intended to ensure that the Plaintiff's expert is qualified to the testify about the standard of care against someone in their own or substantially similar field.

"[W]e presume the legislature was aware if our decisions when it craft[s] new statutes." *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 774 (Iowa 2016). Presumably, the legislature was aware of how Iowa appellate courts utilized the term "field" in cases such as *Shover*, *Carolan*, and *Hutchinson* in crafting the scope of the term "field." In the medical context, our caselaw and state administrative regulations typically reflect that the ordinary and common meaning of healthcare provider's "field" is associated to their specific area of practice or branch of the profession. *See, e.g, Carolan*, 553 N.W.2d at 889 (explaining that anesthesiology is a distinct field)*; Hutchison*, 514 N.W.2d at 886 (determining whether a clinical phycologist could testify in the field of neuropsychology); *Ganrud*, 206 N.W.2d at 315 (explaining that expert "work[ing] on his Ph.D. degree in physical chemistry but changed *fields to physiology* and obtained a Ph.D. in that field in 1952." (emphasis added)); *State v. Boston*, 278 N.W. 291, 294 (Iowa 1939) ("We approve the decree as restraining from professing to and treating human ailments in modes and manners outside the *field of chiropractic*." (emphasis added)); *see, e.g.*, Iowa Admin. Code r. 653-20.11(12) ("If an applicant for

reinstatement has not engaged in the *field of generic counseling or precision medicine* . . .” (emphasis added); *id.* r. 653-23.1(17)(b) (holding that as a ground for discipline “self-laudatory claims that imply that the licensee is skilled in a *field or specialty of practice* for which the licensee is not qualified” (emphasis added)). A couple of Iowa courts have already began properly comparing the plaintiff’s expert’s profession with the defendant healthcare providers under Iowa Code section 147.139’s mandate. *Ward v. Unity Healthcare*, No. 20-1516, 2021 Iowa App. LEXIS 1039, at *10-17 (Iowa Ct. App. Dec. 15, 2021) (comparing the plaintiff’s expert’s field, as an emergency medicine physician, with the fields of hospital administration, nurs[ing], radiolog[y], surge[ry], or hospitalists); *Hass v. Zafar*, No. LACL 145009, 2022 Iowa Dist. LEXIS 1, at *1 (Iowa Dist. Ct. March 9, 2022) (concluding that “a family practice physician is not in a ‘substantially similar field’ as urology”); *see Kirlin v. Monaster*, LACV 121621, UNPUBLISHED, Pg. 5 (Iowa Dist. Ct. Jan. 18, 2022) (comparing the fields of a family medicine to a neurosurgery).

The American Board of Specialties and the American Osteopathic Association also use the term “field” in relation to a specific practice area rather than the specific procedure at issue. *See* American Osteopathic Association, *About AOA Board Certification*, https://certification.osteopathic.org/about/ (“Physicians earn primary board certification by meeting requirements in a specified *field of*

medical practice under the jurisdiction of the certifying board." (emphasis added)); *see, e.g.*, American Board of Medical Specialties, *American Board of Pathology*, https://www.abms.org/board/american-board-of-pathology/ ("To acknowledge the diverse activities in the practice of Pathology and to accommodate the interests of individuals wanting the enter the *field*, the American Board of Pathology offers primary certification through the following three routes:" (emphasis added)); American Board of Medical Specialties, *American Board of Radiology*, https://www.abms.org/board/american-board-of-radiology/ ("Physician practicing in the *field* of Radiology specialize in Diagnostic Radiology, Interventional Radiology, or Radiation Oncology." (emphasis added)). "While membership in these groups does not necessarily measure a doctor's competency, it is a sign of recognition by other members in the *same field*." Lawyer's Medical Cyclopedia, Medical Education and Regulation: § 1.13 *Specialty Organization*, 1-42 (2014) (emphasis added)); *see also* Lane Medical Litigation Guide, Medical Specialists and Other Health Care Personnel: § 2.5 Board Certification, 7 (1995) ("There are a wide variety of medical specialists trained in particular fields to handle specific types of medical problems."); Lawyer's Medical Cyclopedia, Medical Education and Regulation: § 1.5B *Certification* at 1-10 ("Undoubtedly, the certifying boards have decidedly elevated the quality of work in the specialty *fields of medicine*." (emphasis added)). These certifying board's use of the word "field" is consistent

with how our courts have explained specialization within a field. *See, e.g., Shover*, 107 N.W.2d at 89.[4]

In light of this plain language interpretation, it is unsurprising Plaintiff readily acknowledged at the hearing that the "field" requirement compares the Defendant's professional practice or branch of medicine to the Plaintiff's expert. Tr. Pg. 14:10-15, 15:14-17. And Dr. Mark's own Report states that her field is anesthesiology; not airway management. Specifically, Dr. Mark's Report stated she is "licensed to practice medicine as an *anesthesiologist*." *Compare* App. 207 (emphasis added) *with* Iowa Code section 147.139(1) (providing the licensing requirement). She has a "full-time practice in *anesthesiology*." *Compare* App. 207 (emphasis added) *with* Iowa Code section 147.139(2) (providing the active practice or teaching requirement). Understandably, Dr. Mark then stated she was familiar "*applicable to anesthesiologists* caring for adult patient[s] in the United States." App. 207 (emphasis added). A Defendant should be entitled to rely on the "field" that the Plaintiff's expert declares that they are in and familiar with in their own certificate of merit.

2. The Surrounding Context of Iowa Code Section 147.139 Supports CHI Defendant's Interpretation.

[4]Notably absent from the American Board of Specialties is any field or specialty certification narrowly identified as "airway management." *Compare* App. 255 *with* American Board of Specialties, *Specialty and Subspecialty Certificates*, https://www.abms.org/member-boards/specialty-subspecialty-certificates/.

Iowa Code section 147.139, as a whole, also presents compelling evidence that the legislature intended "field" to be in reference to the defendant healthcare providers practice rather than the specific act at issue. *State v. Hensley*, 911 N.W.2d 678, 682 (Iowa 2018) ("We glean [legislative] intent by 'assess[ing] the statute as a whole, not just isolated words or phrases.' " (quoting *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011)); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). Other than the licensure to practice in a field and actively practice in a field requirements, a court must determine whether the plaintiff has the same or substantially similar board-certified specialties as the defendant and has a similar M.D. or D.O. licensure. Iowa Code § 147.139. Under the plain language, the board certification could be in a different field/specialty than the negligent act at issue in the case. *Id.* These other qualifications help clarify that subsection one and two must be read to compare the plaintiff's expert field to the defendant's field rather than looking at the procedure at issue.

Moreover, Iowa Code section 147.139's first two subsections require that "in the five years preceding the act or omission alleged to be negligent" the plaintiff's expert has not had a license suspension or revocation and actively practiced or was a qualified instructor at an accredited university. *Id.* § 147.139(1–

2). This shows that the legislature understood how to modify a word or phrase, such as field, based on facts of the underlying action *e.g.* the negligent act or omission. *Cf. Cox v. Iowa Dep't of Rev.*, 920 N.W.2d 545, 553 (Iowa 2018) ("Where Congress includes particular language in one section of statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Chesnut v. Montgomery*, 307 F.3d 698, 701-02 (8th Cir. 2002)). So, if the legislature wanted the plaintiff's experts license, active practice, or teaching to be in the "same or substantially similar field" as the standard of care at issue, it could have simply stated that the plaintiff's expert must be "licensed to practice in the same or a substantially similar field as the act or omission alleged to be negligent" or is "actively practicing in the same or substantially similar field as the act or omission alleged to be negligent." Yet, the legislature decided not to.

In a similar vein, the Iowa legislature could have modified the word "field" by "cause of action." The 2017 Tort Reform Legislation enacted the new expert qualification requirements along with the certificate of merit requirement for any cause of action for which a *prima facie* case requires expert testimony. *See generally* 2017 Iowa Acts ch. 107; *cf. Cox*, 920 N.W.2d at 553. "Cause of action" is well defined in our case law "as the act on the part of the defendant which gives the plaintiff his 'cause of complaint.' *Iowa Coal Mining Co.*, 555 N.W.2d at 429.

The legislature could have stated that the plaintiff's expert must be "licensed to practice in the same or a substantially similar field as the cause of action" or is "actively practicing in the same or substantially similar field as the cause of action." Yet again, the legislature decided not to.

Similarly, the statutory development of section 147.139 supports CHI Defendants' position. *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 455 (Iowa 2014) ("When the legislature amends a statute, it raises a presumption that the legislature intended a change in the law." (quoting *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 49 (Iowa 2012)); *see also Carreras*, 977 N.W.2d at 449 (reviewing the textual development of the statute at issue). The previous version of Iowa Code section 147.139 only required that the "expert's qualifications related directly to the medical problem or problems at issue and the type of treatment administered in this case." *Vezeau-Crouch v. Abraham*, No. 17-1213, 2019 Iowa App. LEXIS 24, at *12 (Iowa Ct. App. Jan. 9, 2019) (quoting Iowa Code § 147.139 (2015)). If the legislature wanted to require that plaintiff's expert's "field" was related to the standard of care or procedure at issue, it could have kept the language of the previous version *i.e.* plaintiff's expert must be "licensed to practice or is actively practicing in the same or a substantially similar field as the medical problem and type of treatment administered in this case." Clearly, the material provisions of Iowa Code section 147.139 have been changed with the most recent revision.

Contra Tr. Pg. 15:5-10 (Plaintiff claiming that the material provisions of section 147.139 had not been changed).

Other state statutes on expert qualifications provide ample examples of how the Iowa legislature could have tied a "field" to the underlying facts in this case. For example, West Virginia's certificate of merit statute requires that the plaintiff's expert have been "engaged or qualified in a medical *field* in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions *similar to those of the patient*." W.Va. Code § 55-7B-6(b)(2) (emphasis added). Similarly, Nevada's medical expert affidavit statute requires that an affidavit be "submitted by a medical expert who practices or has practiced in an area that is *substantially similar to the type of practice engaged in at the time of the alleged professional negligence*." Nev. Rev. Stat. § 41A.071 (emphasis added); *see Borger v. Eighth Judicial Dist. Court*, 102 P.3d 600, 605 (Nev. 2004) ("First, the statute does not require that the affiant practice in the same area of medicine as the defendant; rather it requires that the affiant practice in an area 'substantially similar' to that in which the defendant engaged, giving rise to the malpractice action."). Likewise, Pennsylvania's expert qualification statute requires that the plaintiff's expert practices in the "same subspecialty as the defendant physician or in a subspecialty which as a *substantially similar standard of care for the specific care at issue*." 40 Pa. Cons. Stat. § 1303.512 (emphasis added). Therefore, the

surrounding context of section 147.139 strongly indicates that "field as the defendant" refers to their professional practice or branch of medicine rather than the procedure at issue.

3. Legislative History Supports CHI Defendant's Interpretation.

The legislature originally contemplated keeping an expert qualification requirement that focused on the care performed in the case. The introduced House and Senate Files contained a qualification requirement that the expert "has specialty expertise in the disease process or procedure performed *in this case*." Introduced House File 487, 87th Gen. Assemb., Reg. Sess. (Iowa 2017); Introduced Senate File 465, 87th Gen. Assemb., Reg. Sess. (Iowa 2017); *see State v. Allen*, 708 N.W.2d 361, 366-38 (Iowa 2006) (examining the changes made to the introduced bill). Notably, both introduced bills already contained a "same field" requirement. Introduced House File 487, 87th Gen. Assemb., Reg. Sess. (Iowa 2017); Introduced Senate File 465, 87th Gen. Assemb., Reg. Sess. (Iowa 2017). However, the enacted version removed the "specialty expertise in the disease process or performed in this case" requirement. *Compare* Introduced House File 487, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) *and* Introduced Senate File 465, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) *with* 2017 Iowa Acts ch. 107. The legislative history, again, proves that the legislature contemplated that the "same or substantially similar field" qualifying requirement is in reference to the Plaintiff's

expert's similarity to the Defendant's professional practice or branch of medicine rather than Plaintiff expert's familiarity with the procedure at issue.

4. Significant Policy Reasons Support CHI Defendant's Interpretation.

The notion that "field" refers to the healthcare provider's area of practice makes common sense. "Doctors are held to such a reasonable care and skill as is exercised by the ordinary physician of good standing under *like* circumstances." *Bray v. Hill*, 517 N.W.2d 223, 226 (Iowa Ct. App. 1994) (emphasis added). This means that a trauma surgeon, general surgeon, or respiratory therapist will be held to the reasonable care of ordinary members of their profession; not to an anesthesiologist. *Cf. id.* The legislature, by requiring a plaintiff's expert to be in the same or substantially similar field as the defendant healthcare provider, sought to ensure that more "professional negligence claims . . . [were] supported by requisite expert testimony." *Struck*, 973 N.W.2d at 541. Presumably, the same or substantially similar field requirement "prevent[s] hired gun experts from freely roaming outside of their chosen fields." *Jones v. Bagalkotakar*, 750 F.Supp.2d 574, 581 (D. Md. 2010).

The District Court could be correct that the standard of care for the medical problem or treatment at issue is the same across medical fields. App. 255. But the Legislature determined that the best way to ensure valid medical malpractice claims was to have an expert from the same field as the defendants corroborate that

statement. In other words, if the plaintiff's expert's license to practice is, and is actively practicing in the same or substantially similar field as the defendant healthcare provider, the more likely the plaintiff's expert would be able to explain efficiently, effectively and authoritatively why the defendant healthcare provider breached the standard of care in their certificate of merit. Having this simple matching of expert qualifications is particularly important considering the quick turnaround of sixty days to file the certificate of merit after defendant's answer is served. As succinctly explained by Chief District Court Judge Huppert in *Hass*, "the fact that the issue at hand may cross over different specialties (*i.e.* the reading of x-rays) does not create an exception to the clear language in Iowa Code § 147.139." 2022 Iowa Dist. LEXIS 1, at *1.

To conclude, the District Court made legal error when it determined that "field" referred to the specific procedure at issue rather than the Defendant's practice area or branch. This holding was inconsistent with the plain language, statutory context, legislative history, and policy goals of the recently enacted Iowa Code section 147.139. It was also inconsistent with the Plaintiffs' concession at the hearing and their own Report identifying that Dr. Mark's licensure to practice and active practice was in the field of anesthesiology, rather than "airway management," which was not in the same field as the CHI Defendants. *Compare* Tr. Pg. 14:10-15, 15:14-17 *and* App. 100 *with* App. 255.

E. Dr. Mark, as an Anesthesiologist, Fails to Meet Iowa Code section 147.139's "Substantially Similar Field" Requirement as Applied to the CHI Defendants.

After correcting the legal error made by the District Court, the outcome of this appeal rests on whether Dr. Mark, who is licensed to practice and actively practicing in the field of anesthesiology, is in the "same or substantially similar field" as the CHI Defendants (a trauma surgeon, general surgeons, and a respiratory therapist). As Plaintiff conceded at the hearing, they are not in the same field. Tr. Pg. 14:10-15, 15:14:17. So, the Court must turn to whether they are in a "substantially similar field." Once again, the legislature did not define "substantially similar" in Chapter 147. Thus, we must interpret "substantially similar" based on its plain language in context of the statute.

"The dictionary defines 'substantially' as: 'in a substantial manner: so as to be substantial.' The word 'substantial' is defined as 'material,' 'important,' or 'essential.' " *Midwest Auto. III, L.L.C., v. Iowa D.O.T.*, 646 N.W.2d 417, 426 (Iowa 2002) (quoting *Webster's Third New International Dictionary* 2280 (unabr. ed. 1993)). "The word 'similar' is defined as 'having characteristics in common: very much alike' or 'alike in substance or essentials.' " *State v. Kamber*, No. 05-1868, 2007 Iowa App. LEXIS 43, at *7 (Iowa Ct. App. Jan. 18, 2007) (quoting *Webster's Third New International Dictionary* 2120 (2002)) *vacated by State v. Kamber*, 737 N.W.2d 297 (Iowa 2007). Thus, the Plaintiff has the burden to show

how their expert anesthesiologist has the "material characteristics" or is "essentially like" a trauma surgeon, general surgeon, and respiratory therapist. Iowa Code § 147.139, .140(1)(a); *McHugh*, 966 N.W.2d at 291 ("By enacting section 147.140, layered over the existing mandates of section 668.11, the legislature *placed higher demands on medical malpractice plaintiffs*." (emphasis added)).[5]

The American Board of Specialties and Iowa Code help distinguish between the different fields in this case. An anesthesiologist "is a physician who provides anesthesia for patients undergoing surgical, obstetric, diagnostic, or therapeutic procedures while monitoring the patient's condition and supporting vital organ functions." American Board of Medical Specialties, *American Board of Anesthesiology*, https://www.abms.org/board/american-board-of-anesthesiology/. On the other hand, an emergency room physician is someone who "focuses on the immediate decision making and action necessary to prevent death or any further disability both in the pre-hospital setting by directing emergency medical technicians and in the emergency department." American Board of Medical

[5]The words "substantially similar" do not somehow transform the "field as the Defendant" requirement to be satisfied if the plaintiff's expert has experience with the nature of the underlying "negligent" procedure, or as the Plaintiff puts it, the "medicine the doctors were practicing at the time th[e incident] happened" rather than assessing whether the branches of medicine the Plaintiff's expert and practice in are the same. Tr. Pg. 17:6-8. "Substantially similar" only serve as adverbs or adjectives that modify the phrase "field as the Defendant" and nothing more.

Specialties, *American Board of Emergency Medicine*, https://www.abms.org/board/american-board-of-emergency-medicine/#abem-accm. Furthermore, a surgeon is "responsible for the diagnosis and preoperative, operative, and postoperative management of patient care . . . [and] [d]uring the course of the operation, the surgeon makes important decisions about the patient's health, safety, and welfare, working in cooperation with other members of the surgical team." American Board of Medical Specialties, *American Board of Surgery*, https://www.abms.org/board/american-board-of-surgery/. A respiratory therapist or respiratory care practitioner under Iowa Code is defined as "a health care professional, under medical direction, employed in the therapy, management, rehabilitation, diagnostic evaluation, and care of patients with deficiencies and abnormalities which affect the pulmonary system and associated aspects of cardiopulmonary and other systems' functions." Iowa Code § 152B.2(1)(*a*). By their medical and legal definitions, these fields have minimal overlap with each other.

The Plaintiff alleged that Dr. Mark was in the "substantially similar field" because she is an associate professor and on the core faculty of Johns Hopkins School of Medicine's Anesthesiology and Critical Care Medicine Department. Tr. Pg. 17:9-18. Plaintiff also separately emphasized that Dr. Mark is in the substantially similar field because her appointment involves the "Critical Care"

portion of Anesthesiology and Critical Care Medicine Department. Tr. Pg. 17:10-13. But she is not listed on the Johns Hopkins division faculty for adult critical care, neurosciences critical care, or pediatric critical care. *See, e.g.*, Johns Hopkins Anesthesiology and Critical Care Medicine: Adult Critical Care https://anesthesiology.hopkinsmedicine.org/adult-critical-care/; Johns Hopkins Anesthesiology and Critical Care Medicine: Neurosciences Critical Care https://anesthesiology.hopkinsmedicine.org/nccu/; Johns Hopkins Anesthesiology and Critical Care Medicine: Pediatric Critical Care https://anesthesiology.hopkinsmedicine.org/pediatric-critical-care/. Her Report and her C.V. do not indicate she is licensed to practice critical care medicine, actively practices critical care medicine, or even teaches any course in critical care medicine. *See* App. 100; *see also* App. 124. Her C.V. states that her current clinical responsibilities, *i.e.* what she actively practices, since 2012 have solely been as a "general adult anesthesiologist." App. 124.

In any event, critical care medicine and emergency medicine, surgery or respiratory therapy are not substantially similar fields. Emergency medicine focuses on the immediate diagnosis and stabilization of a patient to be transferred to an intensive care unit while critical care focuses on the long-term treatment of a patient after they have been admitted into an intensive care unit. Fronlineer, *Urgent Care vs. Critical Care v. Emergency Care*, Frontline ER, (Jan. 21, 2018)

https://frontlineer.com/urgent-care-vs-critical-care-vs-emergency-care/; *Compare* American Board of Medical Specialties, *American Board of Emergency Medicine*, https://www.abms.org/board/american-board-of-emergency-medicine/#abem-accm *with* American Board of Medical Specialties, *American Board of Anesthesiology* (explaining that the critical care anesthesiologists "coordinate patient care among the primary physician, critical care staff, and other specialists and their primary base of operation is the intensive care unit (ICU) of a hospital"). Similarly, a surgeon does the actual procedure as compared to coordinating the patient care. And respiratory therapy focuses on pulmonary system rather than long-term treatment of a patient.

Furthermore, Dr. Mark's teaching experience as an assistant professor or on the core faculty at Johns Hopkins School of Medicine only satisfies the expert qualification requirement if they are "a qualified instructor at an accredited university in the *same field as the Defendant*." Iowa Code § 147.139(2) (emphasis added). Notably absent to this qualification is a "substantially similar" exception. *Id.* And Plaintiff has readily admitted that Dr. Mark is not in the same field as the CHI Defendants. Tr. Pg. 14:10-15; 15:14-17. To buttress this conclusion, the Johns Hopkins School of Medicine itself has different departments for emergency medicine, surgery, and anesthesiology & critical care medicine. *See generally Johns Hopkins School of Medicine: Academic Departments & Institutes*

https://www.hopkinsmedicine.org/som/education-programs/academic-departments.html. Johns Hopkin's own decision to create separate departments for emergency medicine, surgery, and anesthesiology & critical care medicine indicates that these are indeed distinct fields. Therefore, Plaintiff cannot use Dr. Mark's teaching credentials/clinical experience at the Johns Hopkins School of Medicine to satisfy the expert qualification requirement under Iowa Code section 147.139(2).

Plaintiff also argued that Dr. Mark is in the "substantial similar field" as the Defendants because she has experience as the Director of the Difficult Airway Response Team (DART) at Johns Hopkins. Tr. Pg. 17:17-18. But Dr. Mark lists the DART program under her "system innovation and quality improvement activities" rather than her "clinical activities" section in her C.V. *Compare* App. 122-24 *with* App. 129. Iowa Code section 147.139 does not recognize "quality improvement activities," "research experience," or "leadership" as an acceptable expert qualification requirement. *See generally* Iowa Code § 147.139.[6] Thus, the DART program should not be construed as Dr. Mark "actively practicing" in any applicable field as required by Iowa Code section 147.139(2). And again, to the extent the DART program involves a teaching component, Plaintiff admitted that

[6]Nor is being an executive director of a program or a founding member of a medical society an acceptable expert qualification either. *Compare* Iowa Code § 147.139 *with* App. 100.

Dr. Mark is not in the same field as the CHI Defendants which means the teaching component of Iowa Code section 147.139(2) is not satisfied. Tr. Pg. 14:10-15; 15:14-17. Therefore, Dr. Mark's experience as the director of the DART program does not satisfy the expert qualification requirements.[7]

Regardless, the DART program provides a good example of how an anesthesiologist and the CHI Defendants are not in a substantial similar field. As explained by Dr. Mark, "the DART program is *multidisciplinary*, and draws on the collective expertise of different specialties in airway management." Lynette J. Mark, M.D. et. al., *Difficult Airway Response Team: A Novel Quality Improvement Program for Managing Hospital-Wide Airway Emergencies*, HHS Public Access, Pg. 11 (emphasis added) [hereinafter, *Novel Quality Improvement*]; *see* App. 131, 135, 143 (identifying the multidisciplinary nature of DART); *see also Multidisciplinary*, Merriam-Webster https://www.merriam-webster.com/dictionary/multidisciplinary ("Combining or involving more than one discipline or field of study."). These different fields of study include trauma surgeons, emergency physicians, anesthesiologists, and respiratory therapists. Mark et. al., *Novel Quality Improvement* at 3 (explaining that DART "involved the

[7]Consequently, the District Court erroneously concluded that Dr. Mark "practices, specializes and teaches in the field of airway management" through the DART program. App. 255. There was no substantial evidence to support this conclusion.

disciplines of anesthesiology, otolaryngology, trauma surgery, and emergency medicine" to come together), and 8 (explaining that respiratory therapists were later added to the DART program). Dr. Mark had specifically noted the need for the DART program because various health care providers from the different fields had trouble understanding their roles during a difficult airway situation. *Id.* at 3. Again, simply because a plaintiff's expert is involved in a similar procedure that may cross fields or specialties does necessarily not mean that they are licensed to practice or actively practice in a substantially similar field as the defendant. *Hass*, 2022 Iowa Dist. LEXIS 1, at *1.

Plaintiff lastly argued that even if their expert is not licensed to practice or does not actively practice in the substantially similar field, they substantially complied with the certificate of merit statute. *See generally* Tr. Pg. 18:14-20:15. "Substantial compliance means 'compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.' " *McHugh*, 966 N.W.2d at 288–89 (quoting *Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993)). The reasonable objectives of the statute are to "(1) provide verified information about the medical malpractice allegations to the defendants" and (2) to provide it at an earlier point in litigation. *Id.* at 290. This objective of "verified information" includes that the "expert who signed the certificate had to 'meet the qualification standards of section 147.139,' including *licensure, practice field,*

board certification in a specialty, and other criteria." *Id.* (quoting Iowa Code § 147.140(1)) (emphasis added).

The word "must" in section 147.140(1) provides a mandatory requirement for the certificate of merit to be substantially compliant. *Doe*, 888 N.W.2d at 252 (Iowa 2016). These qualification requirements in 147.139 for the expert signing the certificate of merit are essential for a district court to perform a gatekeeping function to ensure that the Plaintiff's expert is indeed familiar with the standard of care involved in this case. As explained previously, the substantially similar field requirement helps ensure that a Plaintiff's expert has knowledge of the "like circumstances" when alleging a medical professional breached the standard of care. *Bray*, 517 N.W.2d at 226. Thus, a party cannot substantially comply with the certificate of merit statute if their expert does not have the appropriate qualifications. *Medina v. Pitta*, 120 A.3d 944, 958 (N.J. Super. Ct. App. Div. 2015) (explaining that allowing substantial compliance for expert qualification requirements for an affidavit of merit would "eviscerate the remedial purpose of the PFA to established enhanced qualification requirements as part of 'a comprehensive set of reforms affecting the State's tort liability system, health care system and medical malpractice liability insurance carriers.' (quoting N.J.S.A. § 2A:53A-38(f))).

Ultimately, the differences between Dr. Mark and each of the CHI Defendants are profound. Anesthesiologists (or critical care providers) do not make immediate decisions to stabilize a patient like emergency doctors, do not operate on individuals like trauma surgeons or general surgeons, and do not exclusively focus on pulmonary care like a respiratory therapist. These are material differences that prevent Dr. Mark from being licensed to practice or actively practicing in a substantially similar field as the CHI Defendants. Dr. Mark was not qualified to determine that "Mercy Medical Center emergency department members breached the standard of care" when she said she was only "familiar with the standard of care for anesthesiologists." *Compare* App. 100 *with* App. 101. Plaintiff has not substantially complied with the certificate of merit statute by failing to meet one of its mandatory requirements. *McHugh*, 966 N.W.2d at 288–89; *accord Medina*, 120 A.3d at 958. Dismissal with prejudice as applied to the CHI Defendants is required under Iowa Code section 147.140(6).[8]

Even if the CHI Defendants are incorrect that "field" refers to the standard of care or procedure at issue, the District Court did not properly assign the burden of proof on the Plaintiff in its Order. App. 255–56. The District Court made a factual finding that "it had no information provided by Dr. Mark" to determine

[8]To the extent each of the CHI Defendant employees are dismissed, the court should dismiss CHI as well as a hospital can only act negligently through its employees. *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291, at *23 (Iowa Ct. App. Apr. 13, 2022).

whether Dr. Mark had a similar license to practice or was actively practicing or board certified in the same or substantially similar field as the CHI Defendants. App. 255. By "presuming" that the standard of care was the same across fields, the District Court's holding allows Plaintiffs to escape their burden of providing "verified information" regarding that the Defendant breached their standard of care and deprives "the defending health professional a chance to arrest a baseless action early in the process." *Compare* App. 255 *with McHugh*, 966 N.W.2d at 289-90. Further, the District Court's holding places the burden on the Defendants "to ferret out details of plaintiffs' malpractice claims." *McHugh*, 966 N.W.2d at 291. These ramifications from the District Court's holding are directly against the purpose of a certificate of merit statute. Therefore, the District Court should have held that that Plaintiff's certificate of merit failed to establish evidence that its expert was qualified when it determined that "it had no information provided by Dr. Mark" to be able to decide whether the standard of care was different or the same for the CHI Defendants. App. 255–56.

II. Dr. Mark's Report was Not Under Oath As Required Under Iowa Code section 147.140(1)(*b*).

A. Standard of Review.

A district court's ruling on a motion to dismiss and statutory interpretation is reviewed for correction of errors at law. *Struck*, 973 N.W.2d at 538.

B. Error Preservation.

An issue is preserved if the "court's ruling indicates that the court considered the issue and necessarily ruled on it." *Lamasters*, 821 N.W.2d at 864. Error has been preserved on whether the Plaintiff adequately filed a substantially complaint certificate of merit in relation to the oath requirement in Iowa Code section 147.140(1)(*b*). App. 82; *see also* App. 252-54.

C. Dr. Mark's Report is not Signed Under Oath.

Dr. Mark's opinions came in the form of an "expert report and finding and opinions." App. 252-54. The Report contains an electronic signature from Dr. Mark. App. 101. However, the Report "is not in affidavit form or notarized, nor does it otherwise state the information provided by Dr. Mark is certified under penalty of perjury to be true and correct." App. 252-53. The District Court held that the Plaintiff had substantially complied with the statute by providing a timely signed electronic report with Dr. Mark's letterhead and Dr. Mark's statements regarding the standard of care. App. 254.

"[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* all of the following: . . . ." Iowa Code § 147.140(1)(*b*) (emphasis added). "[I]t is essential that a person appear before a designated officer to satisfy the oath of affirmation requirement." *State v. Carter*, 618 N.W.2d 374, 377 (Iowa 2000) (en

banc). Here, Plaintiff provided no evidence, and the District Court did not find, that Dr. Mark appeared before a designated officer who could administer an oath attesting to the content requirements of the certificate of merit affidavit within the sixty days of CHI Defendant's answer.

D. Dr. Mark's Report is not Signed Under Penalty of Perjury or Other Similar Language.

"[T]he only [Iowa] statute which eliminates the presence of another requirement for an oath of affirmation is found in section 622.1." *Id.* "When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by a sworn statement written by the person attesting to the matter, the person may attest the matter by an unsworn statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement's execution and is subscribed by that person." Iowa Code § 622.1. "Although our legislature permits a written attestation to be accomplished alone, it requires the certification to expressly impress upon the person that it is made under penalty of perjury." *Carter*, 618 N.W.2d at 378. "This is an important requirement because the under penalty of perjury language, like the administration of an oath by an official, acts to bind the conscience of the person and emphasizes the obligation to be truthful." *Id.* As the District Court found, the Report does not "otherwise state that the information

provided by Dr. Mark is certified under penalty of perjury to be true and correct." App. 251.

Plaintiff argued that Dr. Mark's Report substantially complied with the oath requirement. Tr. Pg. 18:19-23. Defendant contends that substantial compliance should not apply because the failure to provide an oath on the certificate of merit affidavit is not a "mere 'technical' deficiency" but "goes to the very nature of what an affidavit is." *Tunia v. St. Francis Hosp.*, 832 A.2d 936, 939 (N.J. Super. Ct. App. Div. 2013); *see also* N.J.S.A. § 2A:53A-27. As explained in previously, the word "must" provides a mandatory requirement. *Must*, Merriam-Webster https://www.merriam-webster.com/dictionary/must; *see also Doe*, 888 N.W.2d at 252. Failure to sign under oath prevents the Defendant from having "verified information" of the alleged malpractice. *McHugh*, 966 N.W.2d at 290–91.

But even if substantial compliance applies due to Iowa Code section 662.1, "[a] certification which does not contain language which substantially complies with this phrase [under penalty of perjury] is outside the statute." *Carter*, 618 N.W.2d at 378. Neither the Plaintiff nor the District Court pointed to any other language in Dr. Mark's Report that substantially complies with the phrase "under penalty of perjury." The facts that Dr. Mark's Report was timely signed with her letterhead do not plausibly "act to bind the conscience of the person" nor "emphasize[] the obligation to be truthful." *Compare* App. 253 *with Carter*, 618

N.W.2d at 378. Plaintiff has failed to substantially comply with oath requirement under Iowa Code section 147.140(1)(*b*). *Schmitt v. Floyd Valley Healthcare*, No. 20-0985, 2021 Iowa App. LEXIS 560, at *5 (Iowa Ct. App. July 21, 2021) (approving of the district court's rationale that the failure to provide an "affidavit form or otherwise submitted under oath" did not rise to the level of substantial compliance). Therefore, the District Court incorrectly held that Dr. Mark's Report, which was not made under oath or made under penalty of perjury, met the substantial compliance standard. Dismissal with prejudice is also required under this ground. Iowa Code § 147.140(6).

III. CHI Defendants Incorporate Any Applicable Arguments Made by Defendants Noweyz and Carreon's Appellate Brief as their Own.

CONCLUSION

The District Court made legal error when it concluded that the "field" at issue was airway management. The District Court's holding was inconsistent with the Plaintiff's strategic concession that her expert's field of anesthesiology was not in the same field as the CHI Defendants and Dr. Mark's own Report which identified her license to practice, and her active practice was in the field of anesthesiology. The District Court's holding that field refers to the procedure at issue is also inconsistent with the plain language of the section 147.139, the context of the section 147.139 as a whole, legislative history, and purpose of the

statute. Plaintiff has not shown that her field of anesthesiology is in the substantially similar field as a trauma surgeon, general surgeons, and a respiratory therapist. Failure to meet the expert qualification requirements requires dismissal with prejudice.

The District Court made further legal error by not dismissing the case after making the factual holding that it had no information from Plaintiff's expert to determine whether the CHI Defendants were in the same or substantially similar field as the Plaintiff's expert. Such a holding inappropriately placed the burden on the CHI Defendants, when the proper burden was on the Plaintiff to provide verified information. Failure to provide sufficient information requires dismissal with prejudice.

The District Court also made legal error when it determined that Dr. Mark's Report substantially complied with the under-oath requirement. There was no evidence that Dr. Mark appeared before a designated officer to attest to the certificate of merit requirements. Further, Dr. Mark's Report shows that she did not sign it under penalty of perjury and no other substantially compliant language is identified. Failure to substantially comply with the oath requirement requires dismissal with prejudice.

Based on any one or all of these errors, CHI Defendants request to be dismissed with prejudice from this case.

REQUEST FOR ORAL ARGUMENT

Undersigned counsel respectively requests oral argument.

BY:/s/ *Theodore T. Appel*
Rick Harris AT0003198
Theodore T. Appel AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: 515-513-5003
rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR CHI DEFENDANTS

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this final brief was electronically filed and served on the 20th day of March, 2023 upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

BY:/s/ *Theodore T. Appel*
Rick Harris AT003198
Theodore T. Appel AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: 515-513-5003
rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR CHI DEFENDANTS

Jenna L. Cruise
Joshua L. Dewald
6600 Westtown Parkway, Suite 270
West Des Moines, IA 50266
515-984-0091

Marc S. Harding
1217 Army Post Road
Des Moines, Iowa 50315
515-287-1454
ATTORNEYS FOR PLAINTIFF

Richard Anthony Stefani
Thomas Ochs
425 Second Street SE Suite 700
P.O. Box 456
Cedar Rapids, IA 52406
319-364-1535

ATTORNEYS FOR DEFENDANTS DR. WILLIAM NOWYSZ, DO AND DR. HIJINIO CARREON

CERTIFICATE OF COMPLIANCE

This final 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 9,443words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Theodore T. Appel* March 20th, 2023

Signature Date

ATTORNEY COST CERTIFICATE

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

/s/ *Theodore T. Appel* — March 20th, 2023

Signature — Date