ELECTRONICALLY FILED MAR 16, 2023 CLERK OF SUPREME COURT

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

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

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TABLE OF CONTENTS

TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 3
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 4
ARGUMENT 5
I. THE DISTRICT COURT ERRED IN RULING IT WAS THE DEFENDANTS' BURDEN TO SHOW PLAINTIFF'S EXPERT WAS NOT IN A SUBSTANTIALLY SIMILAR FIELD **5**
II. THE DISTRICT COURT ERRED IN DETERMINING A CERTIFICATE OF MERIT NEED NOT BE IN AFFIDAVIT FORM 10
III. THE PROPOSED BRIEF OF AMICUS CURIAE IOWA ASSOCIATION OF JUSTICE DOES NOT ASSIST THE COURT 12
IV. DR. NOWYSZ AND DR. CARREON BY THIS REFERENCE ADOPT AND INCORPORATE THE APPLICABLE AUTHORITIES AND ARGUMENT CITED IN THEIR CO-DEFENDANTS' REPLY BRIEF. 12
CONCLUSION 13
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS 14
CERTIFICATE OF SERVICE AND FILING 14

TABLE OF AUTHORITIES

Cases

33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co., 939 N.W.2d 69 (Iowa 2020) 12
Beverage v. Alcoa, 975 N.W.2d 670 (Iowa 2022) 8
Buboltz v. Birusingh, 962 N.W.2d 747 (Iowa 2021) 6
Butler v. Iyer, No. 21-0796, 2022 WL 1100275 (April 13, 2022) 11
Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996) 8, 11
Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016) 11
Marcus v. Young, 538 N.W.2d 285 (Iowa 1995) 8
McHugh v. Smith, 966 N.W.2d 285 (Iowa App. 2021) 7-8, 11
Rieder v. Segal, 959 N.W.2d 423 (Iowa 2021) 12
State v. Carter, 618 N.W.2d 374 (Iowa 2000) 12
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999) 12
Struck v. Mercy Health Services – Iowa Corp., 973 N.W.2d 533 (Iowa 2022) 12
Susie v. Family Health Care of Siouxland, P.L.C., 942 N.W.2d 333 (Iowa 2020) 6
Vezeau-Crouch v. Abraham, No. 17-1213, 2019 WL 141362 (January 9, 2019) 9

Statutes

147.140(1)(a) 7, 10
147.140(1)(b) 10
147.140(1)(c) 10
147.140(2) 10
147.140(5) 10
Section 147.139(1), Code of Iowa (2021) 7
Section 147.139(3), Code of Iowa (2021) 7
Section 622.85, Code of Iowa (2021) 11

Rules

Iowa R.App. P. 6.906 12
Iowa R.App.P. 14(f)(13) 8

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

Iowa Code § 147.139
Buboltz v. Birusingh, 962 N.W.2d 747 (Iowa 2021)
Susie v. Family Health Care of Siouxland, P.L.C., 942 N.W.2d 333 (Iowa 2020)
Iowa R. Civ. P. 1.981(3)
McHugh v. Smith, 966 N.W.2d 285 (Iowa App. 2021)
Beverage v. Alcoa, 975 N.W.2d 670 (Iowa 2022)
Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996)
Iowa R.App.P. 14(f)(13)
Marcus v. Young, 538 N.W.2d 285 (Iowa 1995)).
Vezeau-Crouch v. Abraham, No. 17-1213, 2019 WL 141362 (January 9, 2019)

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

147.140
Section 622.85, Code of Iowa (2021)
Carolan v. Hill, 553 N.W.2d 882 (Iowa 1996)
McHugh v. Smith, 966 N.W.2d 285 (Iowa App. 2021)
Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016)
Butler v. Iyer, No. 21-0796, 2022 WL 1100275 (April 13, 2022)

WHETHER THE PROPOSED BRIEF OF AMICUS CURIAE WILL ASSIST THE COURT

Struck v. Mercy Health Services-Iowa Corp., 973 N.W.2d 533 (Iowa 2022)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999))
Iowa R.App. P. 6.906
Rieder v. Segal, 959 N.W.2d 423 (Iowa 2021)
33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co., 939 N.W.2d 69 (Iowa 2020).
State v. Carter, 618 N.W.2d 374, 377-78 (Iowa 2000)
Iowa Code section 622.1

ARGUMENT

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

Plaintiff asserts defendants failed to preserve error on their argument the district court misapplied the burden of proof. This assertion misapprehends defendants' argument and, therefore, the nature of the district court's error. Defendants stated the district court "upended the burden of proof applicable to a motion for summary judgment." Defendants' Proof Brief, at p.17. This contention centers upon the defendants having met their burden of showing there is no dispute as to two case-determinative facts: (1) Dr. Mark is not licensed to, and does not, practice emergency medicine; and (2) Dr. Mark's report is not evidence that her licensure, board certification, and anesthesiology practice are in the same or substantially similar field to emergency medicine.

In their brief replying to plaintiff's resistance in the district court, the defendants stated:

> Plaintiffs seek to avoid dismissal by claiming Dr. Mark is licensed to practice and board certified in "a substantially similar field" as the defendant emergency medicine specialists. See, Iowa Code § 147.139. They offer no evidence, however, upon which the court can make the judgment that the practice of anesthesiology is substantially similar to the practice of emergency medicine. Nor do they offer case authority supporting their assertion. They simply argue there are "minor professional differences" between the two specialties and that their failure to provide a sworn affidavit from a physician who specializes in

> emergency medicine is an "immaterial deviation." Dr. Mark's expert opinion letter certainly does not make such claims.

Defendants Reply Brief, at pp.3-4. In its ruling, the district court did not acknowledge plaintiff failed to set forth *specific facts* demonstrating the existence of a factual dispute. Rather, the court determined the defendants were required to rebut *the argument* Dr. Mark was qualified "in the same or substantially similar field." The "burden" defendants' argument refers to is the burden to show a genuine issue of material fact existed sufficient to preclude summary judgment in their favor. See *Buboltz v. Birusingh*, 962 N.W.2d 747, 754 (Iowa 2021), *reh'g denied* (Aug. 25, 2021). Error was preserved on this issue. Even when viewed in a light most favorable to the plaintiff, there is no evidence in the record from which the district court could infer a fact issue exists with respect to compliance with section 147.140. See *Susie v. Family Health Care of Siouxland, P.L.C.,* 942 N.W.2d 333, 336-37 (Iowa 2020); Iowa R. Civ. P. 1.981(3). The plaintiff's attempt to parse Iowa's error preservation rule is based upon a misreading of defendants' argument and is without merit.

The defendants' argument regarding Dr. Mark's lack of appropriate qualifications centers upon the current language in Iowa Code section 147.139. Plaintiff attempts to show that the current version of the statute "does not include a requirement that the expert practice in the same 'branch of medicine'" because of the use of the undefined phrase "substantially similar field." Plaintiff's Proof Brief,

at p.18. Yet, plaintiff's analysis and interpretation does not mention that the legislature chose in 2017 to strike "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 the case" from the statue and replace it with a new set of criteria, which begin with the requirement "[t]he person is *licensed to practice* in the same or a substantially similar field as the defendant." Section 147.139(1), Code of Iowa (2021)(emphasis added). Qualifications related "directly to the medical problem" were, therefore, rendered insufficient and the expert's area of licensure became critical in order to show compliance.

Similarly, the revised statute includes a requirement focusing on the expert's practice specialty where applicable.

> 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.

Section 147.139(3), Code of Iowa (2021). The focus upon the specialty is an obvious refinement of the prior "relate directly to the medical problem or problems at issue and the type of treatment" standard.

The Iowa Court of Appeals recognized these heightened standards when it 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." *McHugh v.*

Smith, 966 N.W.2d 285, 290 (Iowa App. 2021)(emphasis added). Plaintiff's citation to *Beverage v. Alcoa*, 975 N.W.2d 670, 685 (Iowa 2022), for the proposition courts should interpret statutes so as to avoid rendering portions of them superfluous, while a correct statement, is contrary to plaintiff's argument, which makes no mention of the statute's reference to licensure, thus rendering that portion of the statute meaningless. See Plaintiff's Proof Brief, at pp.19-20.

In short, plaintiff's argument blatantly ignores the language the legislature actually used. The court is "to be guided by what the legislature actually said, rather than what it should or might have said." *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996)(citing Iowa R.App.P. 14(f)(13); *Marcus v. Young,* 538 N.W.2d 285, 289 (Iowa 1995)).

Curiously, after offering an interpretation of the statutory language that omits reference to the explicit requirement of licensure, plaintiff asserts "Dr. Mark is trained, board certified and licensed in such," referring to the "subject" of airway management/intubation. Plaintiff's Proof Brief, at pp.24-25. Dr. Mark's CV reflects she is a board-certified anesthesiologist. That is her undisputed practice field and specialty. No evidence was presented to establish "airway management" or "intubation" as specialties subject to independent licensure or board certification.[1]

[1] Plaintiff also states Dr. Mark's opinion letter and CV "demonstrated Dr. Mark's license to practice, active practice and board certification in airway management." Plaintiff's Proof Brief, at p.28

The issue is whether anesthesiology and emergency medicine are "the same or substantially similar" fields of medicine. Plaintiff has failed, in the Certificate of Merit or otherwise, to set forth specific facts from which the question may be answered in the affirmative. The arguments advanced on appeal relying upon various statutory definitions from Iowa Code chapters 147A, 148, 148A, 148F, 149.1, 152, 152B, 153, 154B and Administrative Code section 645-265.5 do not constitute facts and, in any case, were not raised before the district court.[2]

Next, plaintiff cites to authorities from Nevada and Missouri to support the argument that defendants' interpretation of section 147.149's qualification requirements is an overly-literal approach. Plaintiff's Proof Brief, at pp.25-26. Neither of the cases cited by plaintiff involves language mirroring the criteria expressly set forth in section 147.139, however, making them distinguishable here. More critically, plaintiff's attempt to create an expansive definition for the term field does not give meaning to the entire statute.

Likewise, plaintiff's reliance upon *Vezeau-Crouch v. Abraham,* No. 17-1213, 2019 WL 141362 at *5 (January 9, 2019), is misplaced. That case was filed in the district court in 2015, meaning the version of section 147.139 governing the

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[2] These references arise from plaintiff's argument the district court properly interpreted the term "field" as used in section 147.139. Defendants' Proof Brief details why the district court erred in not interpreting the term to refer to a care provider's practice field or medical specialty. Defendants' Proof Brief, at pp.15-18.

plaintiff's action was the 2015 version. *Id.,* at fn. 2. Plaintiff's argument that in revising section 147.139 in 2017, "the Legislature refused to expressly change the focus from medical problems and methods of treatment" is baffling. The foregoing discussion of the substantive changes wrought by the 2017 revisions demonstrates the focus of the statute changed rather markedly, as the new language expressly specified—and narrowed—the criteria for determining the qualifications of a proffered expert witness in a medical malpractice case.

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

Plaintiff defends the district's decision to ignore the use of the word "affidavit" in section 147.140 by discussing cases establishing a definition for "substantial compliance," contending the trial court's determination the reasonable objectives of the statute were met by Dr. Mark's unverified report is correct. Plaintiff's Proof Brief, at pp.32-33. Plaintiff has not otherwise responded to defendants' argument the plain language of section 147.140 (1)(a) requires service of "a certificate of merit affidavit," and section 147.140(1)(b) imposes requires a plaintiff to provide a certificate signed "under the oath of the expert witness." Sections 147.140(1)(c), 147.140(2), and 147.140(5) also refer to an "affidavit." Plaintiff responds without a justification for not complying with the language of the statute because the plain language found in the statute cannot be contradicted.

Iowa law defines an "affidavit" as follows: "An affidavit is a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state." Section 622.85, Code of Iowa (2021). The repeated use of the word "affidavit" in section 147.140 obviously was intentional and, in any event, must be given meaning in interpreting the statute. To hold otherwise would violate the principle that the court is to be guided by what the legislature actually said. *Carolan v. Hill*, 553 N.W.2d at 888. The district court's interpretation, which permitted a report not signed under oath to constitute substantial compliance with the requirement of an affidavit, ignored the term explicitly employed by the legislature.

Plaintiff attempted to cure the failure to comply with the statute by also serving an affidavit signed by Dr. Mark more than 90 days later, attesting that the opinions expressed in her report were true and correct. This, too, was not authorized by the plain terms of § 147.140. "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.")) See also, *Butler v. Iyer,* No. 21-0796, 2022 WL 1100275 at *6 (April 13, 2022)(belated compliance is not an exception in the statute).

III. THE PROPOSED BRIEF OF AMICUS CURIAE IOWA ASSOCIATION OF JUSTICE DOES NOT ASSIST THE COURT.

In the event the court should grant the Motion for Leave to File Amicus Curiae Brief filed by The Iowa Association of Justice on behalf of the plaintiff, defendants' response to its substance is two-fold: first, the issue of whether Iowa Code section 147.140 is unconstitutional on the grounds of vagueness was not raised in the district court. See *Struck v. Mercy Health Services – Iowa Corp.,* 973 N.W.2d 533, 539–40 (Iowa 2022)(quoting *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999)). Error has not been preserved on the issue, therefore, as required by Iowa R.App. P. 6.906. See, *Rieder v. Segal*, 959 N.W.2d 423, 428 (Iowa 2021); *33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.*, 939 N.W.2d 69, 76 (Iowa 2020).

Second, the rather vitriolic tenor of the brief in attacking the language used by the legislature[3] is utterly misplaced. Together, *State v. Carter*, 618 N.W.2d 374, 377-78 (Iowa 2000) and Iowa Code section 622.1 provide clear guidance for what is required to subscribe to a writing under oath or penalty of perjury. The proposed brief offers no pertinent, contrary authority that is of assistance to the court in the task of interpreting the plain language of the statute.

IV. DR. NOWYSZ AND DR. CARREON BY THIS REFERENCE ADOPT AND INCORPORATE THE APPLICABLE AUTHORITIES AND ARGUMENT CITED IN THEIR CO-DEFENDANTS' REPLY BRIEF.

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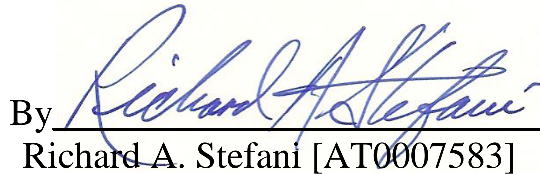
[3] The first sentence of the argument states: "The 'oath' requirement of Iowa Code section 147.140 . . . is a hot mess." Proposed Brief of Amicus Curiae, at p.7.

CONCLUSION

The district court erred in ruling plaintiff substantially complied with the requirements of Iowa Code §147.140 because plaintiff did not show by affidavit that Dr. Mark is licensed to and actively practices in the same or substantially similar field or specialty as Dr. Nowysz or Dr. Carreon. The district court should have granted the defendants' motion for summary judgment in this case. This court should reverse the district court's ruling and remand this case for the entry of an order of dismissal.

Respectfully submitted,
WILLIAM NOWYSZ, DO AND
HIJINIO CARREON, DO



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [X] this brief contains 2,036 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

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CERTIFICATE OF SERVICE AND FILING

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