

MEDICAL MALPRACTICE UPDATE

**Jeff W. Wright
Heidman Law Firm, P.L.L.C.
Sioux City, Iowa**

Iowa Code § 147.140 Certificates of Merit

I. Iowa Code §§ 147.139 and 147.140 create new obligation for plaintiffs and defendants

- A. Traps for the unwary adopted for stated purpose of protecting healthcare providers from frivolous claims by requiring plaintiffs to show early on that they have a colorable claim.
- B. Does not replace § 668.11; adds to it.
- C. Applicable in all cases where the cause of action arose after July 1, 2017, which obviously translates to all new cases filed in the State of Iowa.

II. Elements required by § 147.140(1)(a)

- A. Required in any action:
 - 1. For personal injury or wrongful death;
 - 2. Against a health care provider;
 - 3. Based upon alleged negligence in the practice of their profession, occupation, or patient care;
 - 4. Where expert testimony is required to establish a prima facie case.
 - Applies even to cases where expert testimony would not be required to establish breach, as expert testimony would still be needed as to causation. *Schmitt v. Floyd Valley Health Care*, Plymouth County, Case No. LACV039727 (p. 9)
- B. The certificate must be signed under oath and contain the following:
 - 1. A statement of familiarity with the standard of care.
 - 2. A statement that standard of care was breached by the defendant. §147.140(1)(b)

- C. The certificate of merit must be served within 60 days of defendant's answer and must be in the form of a signed affidavit by an expert witness, alleging a breach of the standard of care.
- D. The expert must meet standards set forth in § 147.139 which include:
 - 1. Holding a license to practice in the same or substantially similar field as the defendant, being in good standing with their state(s) of licensure, and not having had their license revoked or suspended within the five years preceding the act or omission of the defendant alleged to be negligent.
 - 2. Actively practiced in the same or substantially similar field as the defendant or was a qualified instructor at an accredited university in the same field as the defendant for the five years preceding the act or omission alleged to be negligent.
 - 3. Where the defendant is board-certified in a specialty, the expert must be certified by the same or a substantially similar recognized board.
 - 4. The expert must be licensed as a physician, osteopathic physician, or podiatric physician if the defendant is so licensed.
 - 5. Surgery and radiology are not "substantially similar" specialties such that a board-certified surgeon does not meet the expert standards of § 147.139 when filing a certificate of merit alleging a board-certified radiologist breached the standard of care. *Wood v. Montgomery County Memorial Hospital et al.*, Montgomery County, Case No. LACV022000 (p. 7).
- E. A separate certificate shall be served regarding each defendant named in plaintiff's petition. § 147.140(1)(c); *Struck v. Mercy Medical Center et al.*, Woodbury County, Case No. LACV190500 (p. 26)
- F. The plaintiff must also comply with the requirements of § 668.11, governing the certification and disclosure of experts. § 147.140(3)
 - 1. The Certificate of Merit pursuant to § 147.140 must be filed within 60 days of defendant's answer, unlike the disclosure and certification of experts under § 668.11, for which a plaintiff has 180 days from the defendant's answer to comply.
 - 2. The purpose for the affidavit is merely to show plaintiff has a colorable claim. The certificate of merit serves to weed out frivolous cases early in the proceedings. *McHugh v. Tri-State Specialists, LLP et al.*, Woodbury County, Case No. LACV187705 (p. 5)

- G. The 60-day period may be extended either by party agreement or by the court for good cause *and* in response to a motion filed by the plaintiff *prior* to expiration of the 60 days. § 147.140(4).
 - 1. The “and” is important. In the absence of party agreement, the court must find good cause to extend the period, and the motion to extend the period must be filed before the expiration of the 60-day period. *Struck* (p. 28); *McHugh* (p. 3)
- H. Plaintiff acting pro se “shall be bound by those provisions as if represented by an attorney.” § 147.140(5).
 - 1. Courts enforce this section of the statute, providing no leeway to pro se plaintiffs who fail to follow § 147.140 requirements. *See Schmitt*.

III. Interplay between § 147.140 and § 668.11

- A. Iowa Code § 668.11 governs expert designations in professional liability cases
 - 1. Iowa legislature has recognized its continued application – Iowa Code § 147.140(2).
 - 2. It establishes the statutory guidelines by which parties in a professional malpractice claim must designate experts.
 - (a) Plaintiffs – 180 after defendant’s answer
 - (b) Defendants – 90 days after plaintiff’s designation
- B. Timeline Difference.
 - 1. Certificate of Merit – 60 days after each defendant’s answer.
 - 2. Designation – 180 days after defendant’s answer (set in the Discovery Plan).
- C. Good Cause.
 - 1. § 147.140.
 - (a) The parties by agreement or the Court for good cause shown and in response to a motion filed prior to the expiration of [60 days post-answer] may provide for extensions of the time limits.
 - (b) Statutory example given is the inability to timely obtain the plaintiff’s medical records.

2. § 668.11.

- (a) The 180-day deadline applies unless the Court for good cause not *ex parte* extends the time for disclosure.
- (b) Substantial compliance contemplated here, but far less so under Certificate of Merit statutes.
- (c) Substantial compliance contemplates “compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998).

(1) Objectives:

- (i) Providing certainty about the identity of experts.
- (ii) Preventing last minute dismissals when an expert cannot be found.
- (iii) Requiring plaintiffs to have their proof prepared at an early stage in the litigation in order to protect professionals from having to defend against frivolous lawsuits.

Nedved, 585 N.W.2d at 240.

(d) Good cause for § 668.11 is drawn from that used for default judgments.

- (1) “sound, effective, truthful reason, something more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect. The movant must show his failure to defend was not due to his negligence or want of ordinary care or attention, or to his carelessness or inattention. He must show affirmatively he did intend to defend and took steps to do so, but because of some misunderstanding, accident, mistake or excusable neglect failed to do so. Defaults will not be vacated where the movant has ignored plain mandates in the rules with ample opportunity to abide by them.” *Donavon v. State*, 445 N.W.2d 763, 765-66 (Iowa 1989).

(e) Good cause factors for § 668.11 include:

- (1) The seriousness of the deviation from the statutory deadline
 - (i) Even three days has been found to be too long.
- (2) Prejudice to defendant
 - (i) Example = having to designate before plaintiff designates
 - (ii) Prejudice to defendant is not essential.
- (3) Defense counsel’s actions.
 - (i) Did defendant send discovery?
 - (ii) Did defendant simply lay in weeds?

See Tamayo v. Debrah, 924 N.W.2d 873 (Table), 2018 WL 4922993 at *2 (Iowa Ct. App.).

- (4) Plaintiff must show “more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect, and simple oversight by plaintiff’s counsel is insufficient. *Donovan*, 445 N.W.2d at 765-66; *Tamayo*, 2018 WL 4922993, at *2.
- D. §147.140 and § 668.11 have distinct purposes and requirements:
1. §147.140 does not require disclosure of all of the same information that must be disclosed to comply with § 668.11 – a party’s § 147.140 certificate of merit affidavit need not necessarily be completed by the expert whom the party eventually designates as its expert.
 2. However, the certificate should indicate whether the plaintiff intends to eventually designate its certificate of merit affiant as an expert witness.

IV. **“Shall” taken literally by courts - § 147.140(6)**

- A. Failing to substantially comply with the certificate of merit requirements **shall** result, upon motion by defendant, in dismissal with prejudice.
- B. “Shall” means **SHALL**
1. Though courts have recognized that dismissal with prejudice is a harsh result, the language of § 147.140 compels the remedy. *Sobolik* (p. 3); *McHugh* (p. 6).
 2. “Shall” imposes a duty on the court, pursuant to § 4.1(30), leaving the court no discretion. *McHugh* (p. 6).
 3. Even where plaintiff is proceeding pro se, the mandatory dismissal language of § 147.140 denies the court discretion and it must dismiss claims for which expert testimony is needed to establish a prima facie case. *Schmitt* (p. 17).
- C. Substantial compliance
1. Need not be literal compliance but must include the essential matter necessary to achieve the objective of the statute. *Schmitt* (p. 13)
 2. At the very least, courts have found this requires the statement of the expert to be (a) in affidavit form; (b) contain the pertinent standard of care; (c) allege breach of the standard of care; and (d) certify that the expert is familiar with the standard of care. *Schmitt* (p. 16).
 3. Some courts, perhaps more forgivingly, have found that discovery responses within the 60-day window could lead to a “reasonable argument” that substantial compliance has occurred, as the defendant would be

presented with sufficient substance showing the claim is not frivolous. *McHugh* (p. 5).

4. Some courts have trended the other way, hinting at requiring strict compliance, as is the rule in other states with similar certificate of merit statutes, as opposed to mere substantial compliance. *Sobolik v. Mercy Health Services et al.*, Chickasaw County, Case No. LACV004052 (p. 3).
5. A plaintiff fails to substantially comply with § 147.140 when they meet the procedural requirement of submitting a timely certificate of merit but fail substantively because their expert failed to meet the qualification standards of the Code.