IN THE SUPREME COURT OF IOWA

MARLENE BANWART AND RICHARD BANWART,	)	
Plaintiffs-Appellants/Cross-Appellees,	)	S.C. NO. 24-0027
vs.	)	CERRO GORDO CASE NO. LACV072328
NEUROSURGERY OF NORTH IOWA, P.C., DAVID BECK, M.D., AND THOMAS GETTA, M.D.	)	
Defendants-Appellees/Cross-Appellants.	)	

APPEAL FROM THE
IOWA DISTRICT COURT FOR CERRO GORDO COUNTY
THE HONORABLE COLLEEN WEILAND, JUDGE

REPLY BRIEF FOR APPELLANT/CROSS-APPELLEES AND REQUEST FOR ORAL ARGUMENT

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3. CROSS APPEAL: The Banwarts substantially complied with the certificate of merit affidavit filing as required by Iowa Code section 147.140.

Argument

1. The Iowa Supreme Court's Supervisory Orders do not violate the Iowa Constitution's doctrine of separation-of-powers, so the tolling of the statutes of limitations was proper, the Banwarts' petition was timely, and the district court erred by granting summary judgment in defendants' favor on the basis that plaintiffs' petition was time-barred

A. If *Basquin* does not apply to this case, the Supervisory Orders do not violate the separation-of-powers doctrine.

The Appellees (cumulatively referred to as "NNI") misunderstand the Banwarts' argument that the supreme court's May 22 Order is constitutional because the Iowa Legislature abdicated its responsibility to act including but not limited to tolling statutes of limitations. (*See* Beck's Br. at 31-32; Getta's Br. at 38.) The Iowa Supreme Court acted because the Iowa Legislature adjourned and went home instead of addressing the global pandemic affecting every facet our Iowan's daily lives. The Iowa Supreme Court filled the gap left by the legislature's choice to do nothing. The authority to fill that gap – tolling statutes of limitations – by May 22 Order is granted by Iowa Constitution article V, section 4.

B. If this court holds the Supervisory Orders are invalid, this court should consider the Banwarts' petition timely filed based upon the equitable tolling of the statute of limitations.

The Banwarts preserved this issue for appellate review. They raised the doctrine of equitable tolling to preserve their claim in their arguments to the district court. The district court dismissed all of the claims on the separation-of-powers doctrine, which was fully dispositive. "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (citations omitted). Here, the district court expressly mentioned:

> The parties in this case have briefed the tension between these two positions thoroughly and well. *Both raise points of merit, and repeating their arguments here would only be repetitive.* This court is more convinced by the arguments against the extension order's constitutionality than it is by those in favor. Ultimately, the Court's rulemaking, supervisory, and

> administrative authority is limited by statutory pronouncements. The order extending the statute of limitations went past those limits. And if constitutionally invalid, it cannot save Plaintiffs' otherwise tardy petition.

(D0078, Dismissal w Prejudice at 5 (12-08-2023).) The parties raised the issue of equitable tolling, the court rejected it, and the issue is preserved for appellate review. *See Meier*, 641 N.W.2d at 540.

Beck's argument that the Banwarts failed to prove the basis for equitable tolling defies common sense. (*See* Beck's Br. p33.) It is undisputed that the Banwarts relied on the Supervisory Order's tolling of the statute of limitations. "Of course, we recognize that we and the district court are bound by our supreme court's orders, including the May 22, 2020 order." *See Cecena v. Billick*, No. 21-0184, 2022 WL 1658698, at *2 (Iowa Ct. App. May 25, 2022).

2. CROSS-APPEAL: The Defendants' claim that the Banwarts' petition is untimely irrespective of the supervisory order's extension is based on the discovery rule. When the Banwarts discovered their injury, thus starting the time when statute of limitations began to run, is a genuine issue of material fact which justifies denying summary judgment in the Defendants' favor.

The district court considered the defendants' argument that the Banwarts' should have discovered the malpractice as of late-July 2018 or soon thereafter. (D0078 at 3.) The district court then ruled:

> Here, the Banwarts' claims arise from the July 24, 2018 surgery. This marks the earliest point at which she could have known of her injury. She had continuous pain and symptoms through diagnosis of the epidural hematoma on August 15. And the latest possible "discovery" would have been Banwart's September 18, 2018 follow-up appointment with Beck. *The parties dispute the discovery date, and there exists a genuine issue of fact as to that issue.* But it is not material, because none of the possible discovery dates occur within the two years before the filing date of October 19, 2020.

(*Id.* (emphasis added).)

NNI claims that the district court erred by finding a genuine issue of material fact, e.g., "the Banwarts had sufficient information of the injury and its cause to begin investigating their potential claim against the Neurosurgery Defendants in late July of 2018." (Beck's Br. at 36-37; *see* Getta's Br. at 48.) NNI is wrong; the district court did not err.

A. Legal principles governing court determinations at the summary judgment stage as to when a plaintiff's claim accrues to start the clock ticking on the statute of limitations.

> Under Iowa Code section 614.1(9), medical malpractice claims must be brought "within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known … of the existence of, the injury … for which damages are sought." "Injury" within the context of the statute is the physical or mental harm incurred by the plaintiff.

Rock v. Warhank, 757 N.W.2d 670, 673 (Iowa 2008) (citing *Langner v. Simpson*, 533 N.W.2d 511, 517 (Iowa 1995)). "[T]he plaintiff must have known, or should have known through reasonable diligence, the medical care caused or may have caused the injury. However, it is not necessary for the plaintiff to discover the medical professional

was negligent in order to trigger the statute of limitations." *Id.* at 673 (citing *Rathje v. Mercy Hospital*, 745 N.W.2d 443, 461-63 (Iowa 2008)). So, in the context of a summary judgment, as we have here, the court determines "whether a reasonable fact finder could conclude [the Banwarts] filed [their] claim within two years of when [the Banwarts] first knew or should have known of [the] injury and its cause." *Id.* (citations omitted).

Based on the foregoing standard, the *Rock* Court held that "two questions must be answered to determine when the statute of limitations begins to run under section 614.1(9) in a" medical negligence case. *Id.* at 674.

> *First*, one must determine at what stage a plaintiff's condition became an "injury," i.e., when did the problem worsen so that it posed a greater danger to the plaintiff or required more extensive treatment. *Second*, one must determine when the plaintiff knew, or should have known through reasonable diligence, of the injury and its cause in fact.

Id. (emphasis added). "[B]oth of these inquiries are 'highly fact-specific.' … [T]hey cannot be resolved as a matter of law unless no

reasonable fact finder could conclude the lawsuit was filed within two years of when the plaintiff knew or should have known of the injury and its cause." *Id.* (citing *Murtha v. Cahalan*, 745 N.W.2d 711, 718 (Iowa 2008)).

Under Iowa Code section 614.1(9),

> the clock begins ticking when the claimant has actual knowledge of her injury and its cause or "*through* the use of reasonable diligence should have known" of the injury and its cause. The latter provision simply prevents the tolling of the statute of limitations if a claimant *fails* to use reasonable diligence. In other words, the "reasonable diligence" component adds an objective standard of knowledge to the statute to prevent a plaintiff from benefiting from willful or reckless ignorance.

Rock, 757 N.W.2d at 675–76 (note omitted & emphasis in original).

> [I]t is not until the conclusion of an investigation that a plaintiff "should have known" of her injury and cause. It is inconsistent with the plain language of the statute to charge … a layperson … with knowledge of facts before [the physician] – an expert – knows these facts or conveys them to her. … Thus, the clause "through the use of reasonable diligence should have known" does not charge a patient with knowledge that could not have been reasonably discovered at the time.

Id. at 676 (note omitted). Finally, whether the Banwarts' claims are time-barred by the statute of limitations is a question to be determined by the factfinder. *Shams v. Hassan*, 905 N.W.2d 158, 163 (Iowa 2017). The trial record shows that the issue is not "so clear it can be resolved as a matter of law." *See id.* As such, the district court did not err by denying NNI's summary judgment motion.

B. Genuine issues of material fact exist justifying a denial of summary judgment on when the Banwarts discovered their injuries.

This case is about a failure to timely diagnose a spinal epidural hematoma resulting from the lumbar laminectomy surgery performed by Dr. Beck on July 24, 2018. (D0059 Other Def Beck-Neuro Stmt Undisputed Facts ¶6 (07-07-2023).) An epidural hematoma is a rare but known complication of spine surgery where blood accumulates in the epidural space in the spine and can press against the spinal cord or nerves causing pain. (*See id.* ¶¶40-45.) It

is an evolving condition that, if not diagnosed in a timely fashion, can result in permanent nerve damage.

Until her MRI on August 15, 2018, Marlene Banwart did not know and could not have known she had an epidural hematoma developing in her spine. (*See id.* ¶6.) The pain she experienced following the July 24, 2018, surgery, while greater than she had experienced with prior back surgeries, was not sufficient to be considered an "injury" under the standard recited by the court in *Rock*. In fact, when considered in the light most favorable to the Banwarts, a reasonable jury will very likely conclude that Marlene's post-surgery pain and more arduous recovery than she had with prior different back surgeries thirty years previously did not rise to the level of "injury" such that it "posed a greater danger to the plaintiff or required more extensive treatment" until she was diagnosed on August 15, 2018, and had emergent surgery. *See Rock*, 757 N.W.2d at 673. As a lay person with no medical training, Marlene's experiences with back surgery thirty years before (when

she was in her thirties) could not have tipped her off that an epidural hematoma had developed in her spine and was causing her pain versus the pain and difficulty that can occur from a major back surgery at age sixty-six.

Post-surgery, she was under the continuous care of medical professionals and, other than complaining of pain and symptoms as she did (all while on significant pain medications), she was left with no option but to rely upon her physicians and providers to investigate and make a diagnosis. Her complaints of pain were the only way for her to communicate that something was amiss and prompt her physicians to investigate. She most certainly was not "willful or reckless" in her cries for help to get her providers' attention. *See Rock*, 757 N.W.2d at 675–76.

Under these facts, when considered in the light most favorable to the Banwarts, a reasonable jury could only find that it was not until the conclusion of the "investigation" – when the epidural hematoma was diagnosed on August 15, 2018 – that

Marlene should have known of her injury and its cause. Significantly, Getta, in his separate motion, advocates that Marlene's cause of action accrued on July 31, 2018, the date of diagnosis of the epidural hematoma. (Getta's Br. at 43 n.5, 48-49.) Defendants Beck and NNI argue that the Banwarts's cause of action accrued on July 27, 2018. (Beck's Br. at 36-39.) With the defendants arguing different dates, that inconsistency alone shows competing interpretations of the statute of limitations and confirms a fact question exists.

The court "must adhere to the bedrock principle [used] when interpreting statutes of limitations: 'When two interpretations of a limitations statute are possible, the one giving the longer period to a litigant seeking relief is to be preferred and applied.'" *See Rock*, 757 N.W.2d at 676. Courts "rely on this principle because statutes of limitations are disfavored." *Id.* A genuine issue of material fact exists, the district court did not err denying the defendants' motion for summary judgment on the issue of when the Banwarts

discovered their injury, which started the "clock ticking" on their cause of action. (*See* D0078 at 3.) Then, summary judgment must be denied. This court should affirm.

3. CROSS APPEAL: The Banwarts substantially complied with the certificate of merit affidavit filing as required by Iowa Code section 147.140.

The Banwarts timely served certificates of merit from qualified experts regarding the standard of care and the defendants' breach thereof, as required by section 147.140. (D0010, Cert. of Merit Aff. re Getta (11-20-2020); (D0011, Cert. of Merit Aff. re Beck (12-01-2020).) NNI does not challenge the substance of the Banwarts' experts' certificates.

Any failure by the Banwarts did not frustrate "the reasonable objectives of the statute." *See McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021). The Banwarts' diligence in retaining qualified experts and producing the signed and affirmed statements complying with the substantive requirements of section 147.140 met the objective of the statute by demonstrating early expert

support for the merit of the Banwarts' claims and a justification for moving forward with discovery and more specific and detailed expert opinions required under Iowa Code section 668.11. The Banwarts' failure to use the magic words "under the oath of the expert witness" in their certificates does not justify the draconian result of dismissal with prejudice. *See McHugh*, 966 N.W. 2d at 289. Rather, the Banwarts substantially complied with section 147.140, and the district court properly denied NNI's motion for summary judgment on that point.

A. Standard of review and preservation of error.

NNI moved for summary judgment claiming that the Banwarts did not comply with the obligation to file a certificate of merit as required by Iowa Code section 147.140. The district court denied their motion. (D0078 at 6-7.) The Banwarts agree with NNI that this court reviews the lower court's ruling for correction of errors at law. (Getta's Br. at 50; Beck's Br. at 40.) The Banwarts

also agree that the error is preserved for appellate review. (Getta's Br. at 49-50; Beck's Br. at 40.)

B. The Banwarts substantially complied with section 147.140.

A plaintiff's "[f]ailure to substantially comply" with the requirements of section 147.140(1) "shall result" in a "dismissal with prejudice" to that claim. Iowa Code § 147.140(6). Substantial compliance of section 147.140(1) generally considers three conditions:

1) the plaintiff timely filed a certificate of merit affidavit, section 147.140(1)(a);

2) the expert witness be "meet the qualifying standards of section 147.139", section 147.140(1)(a); and

3) the certificate of merit affidavit is signed by the expert witness "under the oath" stating the expert witness's familiarity with the applicable standard of care, and the standard of care was breached by the defendant health care provider, section 147.140(1)(b);

Iowa Code § 147.140(1).

In this case, the parties do not dispute that the Banwarts timely filed their certificates of affidavits against the named defendants. (Getta Br. at 49-58 (never raising the issue of timeliness); Beck's Br. at 39-59 (same).) The parties also do not dispute that the Banwarts' expert witnesses were qualified. (Getta Br. at 49-58 (never raising the issue of whether the Banwarts' experts were qualified); Beck's Br. at 39-59 (same).) So, the sole issue raised by the defendants is whether was the certificate of merit affidavit substantially complied as an affidavit under oath. (*See* Getta's Br. at 58; Beck's Br. at 39-41.)

C. *Miller v. Catholic Health Initiatives* is distinguishable from the facts of this case.

After the Banwarts and the appellees had filed their opening briefs in this case, the Iowa Supreme Court filed its opinion in *Miller v. Catholic Health Initiatives*, No. 22-1574, ___ N.W.3d ___, 2024 WL 2484448 (Iowa May 24, 2024). *Miller* is distinguishable from this case.

In that case, Meredith Miller was injured in a car accident and taken to the hospital where the defendants (doctors, surgeons, respiratory therapist) attempted to intubate her but allegedly performed an esophageal intubation instead of a tracheal intubation, depriving her of oxygen and causing her death. *Miller*, 2024 WL 2484448, at *2. Miller's estate sued alleging medical malpractice against the providers. *Id.* Under section 147.140, Miller had to serve a certificate of merit affidavit signed under oath by a qualified expert within sixty days of the defendants' answer. *Id.* Miller served an "unsworn, signed letter" by the expert within the sixty-day deadline. *Id.* Over ninety days later, Miller served the expert's sworn declaration attempting to cure the defect.[1] *Id.* at *3. The supreme court held that Miller's unsworn, signed letter did not

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[1] The supreme court held that the plaintiff's attempt to correct the noncompliance with section 147.140(1) forty-two days after the statute's deadline did not cure the violation. *Miller* at *7. No subsequent expert certificate was filed in this case, so that issue is not germane here.

substantially comply with 147.140's affidavit requirement, as an oath/affirmation is essential to the statute's objectives. *Id.* at *6.

The certificates of merit in this case are significantly different than those offered in *Miller*. Here, the Banwarts submitted two expert certificates of merit affidavits each signed respectively by Dr. Kevin Ferentz, M.D., (D0010, Cert. of Merit Aff. re Getta (11-20-2020), and Dr. Koebbe as to Defendant Beck on December 1, 2020, (D0011, Cert. of Merit Aff. re Beck (12-01-2020)). Each certificate states that the expert signed it "[i]n compliance with Iowa Code Section 147.140" stating that each expert "*does hereby affirm and state*" that the expert was aware of the "applicable standard of care" and that each expert "*certif[ed]* to a reasonable degree of medical certainty, that [each health care provider] breached the standard of care with respect to the care provided to Marlene Banwart." (*Id.* (emphasis added).) Based on those certificates, the district court then determined that "[t]he reference to the statute, the use of the word 'affirm,' and inclusion of the

required substantive information carries out the purpose for which § 147.140 is intended." (D0078 at 6-7.)

In *Miller*, the expert's letter made no reference to section 147.140, nor did it state anything to the effect that the expert swore under oath or affirmed its content. Here, referencing section 147.140 and the experts' affirming the content of the certificate substantially complies with section 147.140(1). This court should affirm the lower court.

(1) Dr. Koebbe's and Dr. Ferentz's certificates of merit substantially complied with Iowa Code section 147.140(1) by properly affirming their statements in the certificate of merit.

Defendants contend that the expert certificates of merit do not meet the requirements of Iowa Code section 147.140 because neither is signed under penalty of perjury, nor does it contain the word "oath." (Getta's Br. at 52-53; Beck's Br. at 42-43.) They also argue the certificates are flawed because they lack a jurat showing that an oath or affirmation was undertaken with a designated officer at the time of signing. (*See id.*) Their arguments establish

the distinction from *Miller*. In *Miller*, the expert "certificate" stated nothing in regard to section 147.140, nor was there any reference to oath or affirmation. *Miller*, 2024 WL 2484448, at *2. Here, we have both.

The *Miller* Court said that the certificate had to be an "affidavit". *See Miller* at *5. In that regard, the *Miller* Court stated:

> The Iowa Code defines an affidavit as "a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state." Iowa Code § 622.85; *see also* 2A C.J.S. *Affidavits* § 1, at 245 (2023) (defining an "affidavit" as "a written declaration under oath sworn to before a person with authority under the law to administer oaths"). The oath ensures that the person "recognize[s] the obligation to be truthful" when making the statement. *State v. Carter*, 618 N.W.2d 374, 376 (Iowa 2000) (en banc). To determine compliance with the oath requirement, "we look to see if the oath or affirmation was accomplished in such a way that the person's conscience was bound." *Id.*

Miller at *5. The text of section 147.140 says nothing about swearing or penalties of perjury, rather only referring to providing

certain statements "under the oath of the expert." *See* § 147.140(1)(b).

In this case, each certificate contained the legal case caption, signed by the expert, and begins as follows: "In compliance with Iowa Code Section 147.140, [the expert], does hereby affirm and state, as follows:" (D0010; D0011.) An affirmation is equivalent to an oath and to swearing. Iowa Code section 4.1 states:

> In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:
> ***
> 19. The word "oath" includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word "swear" includes "affirm".

Iowa Code § 4.1(19). Further, by stating the certificate was signed "*In compliance with Iowa Code Section 147.140*," each expert necessarily incorporated the requirements set forth in section 147.140 that certificates be sworn. Affirming a statement makes it an affidavit. *See Miller*, 2024 WL 2484448, at *5-*7. The certificates

substantially comply with section 147.140; therefore, dismissal is not justified. *See* § 147.140(6).

Other statutory oath requirements demonstrate that if the legislature wanted to delineate what it means to take an oath for a certificate of merit under section 147.140, they had precedent for so specifying. The Iowa Code has several examples. Iowa Code section 686B.4, a statute passed in the same legislative session as section 147.140, provides that, in certain asbestos actions, the defendant is to be provided a narrative medical report and specifically states it must be "signed under oath" by a qualified physician. This language is quite different from section 147.140, which only requires the certificate be "signed by the expert" and later provides that certain information be provided "under the oath of the expert." The legislature was well positioned to make these two statutes uniform when it came to oath requirements but chose not to do so.

Iowa Code section 809A.11, governing forfeiture of property, provides specifics regarding the affidavit and oath: "[t]he claim or

petition and all supporting documents shall be in affidavit form, signed by the claimant under oath, and sworn to by the affiant before one who has authority to administer the oath, under penalty of perjury and shall set forth all of the following …" Iowa Code section 622.5, governing court interpreters, states "[e]very interpreter and translator in any legal proceeding shall take an oath consistent with the rules the supreme court adopts under this chapter." Iowa Code section 277.28 states that school board members can "take" the "oath of office" at a board meeting, recorded by the secretary, and "administered" by a list of qualified persons; or if the school board member takes the oath "elsewhere," then it has to be "subscribed" by the person taking the oath in a particular form, and only certain persons can administer the oath. Iowa Code section 524.611, governing oaths for bank directors, provides "[t]he oath shall be signed by the director, acknowledged before an individual authorized to perform notarial acts, and delivered to the superintendent."

The foregoing inconsistencies in the Iowa Code when referring to an "oath" combined with the statutory construction of section 4.1(19) that "oath" includes "affirmation in all cases where an affirmation may be substituted for an oath" establish that the Banwarts' certificate use of the of the word "affirm" amounts to substantial compliance of section 147.140's requirements. (See D0010; D0011.)

(2) Dismissal under Iowa Code section 147.140 is appropriate only *if the Banwarts have not substantially complied with the oath requirement of subsection 1.*

Under the express terms of section 147.140, an action may *only* be dismissed if the certificate of merit fails to substantially comply with *subsection 1* of the statute, *which includes the oath* requirement. Aware of other Code sections like section 622.1, the legislature deliberately built substantial compliance into the requirements of section 147.140. *See McHugh*, 966 N.W.2d at 288-89. In the face of vague statutory language, such as the requirement that the certificate be provided "under the oath of the expert," the

substantial compliance language takes on critical importance. In tying the substantial compliance language to the dismissal penalty in subsection 6, the legislature intended to allow for relaxed and varied approach to the "oath of the expert witness" requirement.

Under section 147.140, "[s]ubstantial 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.

> It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Dix v. Casey's Gen. Stores, Inc., 961 N.W.2d 671, 682 (Iowa 2021).

In *Miller*, the supreme court approve of and applied the following language to certificates of merit:

> "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." *If Foley had included some language in his answer that indicated an effort at compliance with the penalty-of-perjury provision, we could evaluate whether such language substantially complied with the statutory requirement.* But, without some language showing an effort at compliance with the 'under penalty of perjury' requirement, the answer is fundamentally flawed. If we were to accept Foley's answer without a signature under penalty of perjury, we would effectively exempt Foley from possible prosecution for perjury while claimants who comply with section 809A.13(4) would remain subject to possible prosecution for perjury.

Miller, 2024 WL 2484448, at *6 (emphasis added). Here, the Banwarts' experts had "some language in [their] answer that indicated an effort at compliance with the penalty-of-perjury provision", namely that the certificate was signed with reference to section 147.140 and the expert affirmed the statements contained therein. (D0010; D0011.) Thus, the Banwarts substantially complied with the certificate obligation to deny a dismissal. *See* § 147.140(6).

The statutory objective of Iowa Code section 147.140 is to "enable healthcare providers to *quickly* dismiss professional

negligence claims that are not supported by the requisite expert testimony." *Struck v. Mercy Health Servs.*, 973 N.W.2d 533, 541 (Iowa 2022) (emphasis added). "[T]he 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." *Id.* at 539 (emphasis added). "[T]he certificate of merit requirement serves to 'identify and weed non-meritorious malpractice claims from the judicial system efficiently and *promptly*." *Id.* at 542 (emphasis added). "'Section 147.140 gives the defending health professional a chance to arrest a baseless action *early in the process* if a qualified expert does not certify that the defendant breached the standard of care'". *Id.* at 541 (quoting *McHugh,* 966 N.W.2d at 289–90 (emphasis added)).

NNI's failure to raise this issue after over two and one-half years of litigation is ipso facto evidence that the Banwarts substantially complied. (*Compare* D0001, Pet. (10-19-2020) *with*

D0060 Def. Mot Summ. J. (07-07-2023).) All the defendants were timely served with the experts' certificates of merit – Dr. Ferentz as to Defendant Getta on November 20, 2020, (D0010), and Dr. Koebbe as to Defendant Beck on December 1, 2020, (D0011). In late 2020, if either defendant felt the certificate was deficient in any way, that defendant should have moved to dismiss this action, as to avoid unnecessary "time, effort and expense" as well as the stress by being a named defendant in a pending medical malpractice lawsuit. *See McHugh*, 966 N.W.2d at 288. Instead, NNI moved forward with litigation for at least thirty-one months conducting extensive discovery. (*Compare* D0011 *with* D0060.)

If the Banwarts' certificates of merit did not substantially comply with the oath requirement, why would the defendants go through years of expensive and time-consuming litigation? The defendants' inaction resulted in substantial costs and legal fees contributing to the costs of care the legislature was concerned about in passing section 147.140. *See Struck*, 973 N.W.2d at 541

(discussing how section 147.140 "works in tandem with[] the expert disclosure requirements in Iowa Code section 668.11" to quickly dismiss potential nuisance cases to "presumably [cause] a positive impact on the cost and availability of medical services")). The defendants' delay prove the Banwarts' substantial compliance.

(3) An expert cannot be held to the penalty of perjury for an opinion.

Though section 147.140 does not expressly require the expert to sign the certificate under oath or penalty of perjury, the *Miller* Court required as much. *See Miller*, 2024 WL 2484448, at *6. The oath requirement in section 147.140 only applies to two statements: "(1) The expert witness's statement of familiarity with the applicable standard of care. (2) The expert witness's statement that the standard of care was breached by the health care provider named in the petition." § 147.140(1)(b). Neither statement would be a "material fact" required to form the basis of a perjury charge. *See* Iowa Code § 720.2 ("A person who, while under oath or affirmation in any proceeding or other matter in which statements

under oath or affirmation are required or authorized by law, knowingly makes a false statement of material facts or who falsely denies knowledge of material facts, commits a class "D" felony."). Moreover, "in general, to sustain a charge of perjury, the alleged false statement 'must be one of fact, and not of opinion or belief.'" *State v. Hawkins*, 620 N.W.2d 256, 262 (Iowa 2000). The statement regarding the breach of the standard of care requires an opinion not a statement of fact. The Banwarts' use of the word "affirm" is sufficient to invoke the penalty of perjury. The Iowa Code references penalties of perjury in a number of different areas, but not in section147.140.[2] The Banwarts' certificates providing that

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[2] For example, fiduciaries must "subscribe an oath or certify under penalties of perjury" that they will "faithfully discharge duties imposed by law…" Iowa Code § 633.168. There is no similar language in Iowa Code section 147.140. The voter identity statute goes farther and states "that any false statement is a class 'D' felony[.]" Iowa Code § 49.78(5). Iowa Code section 147.140 contains no such perjury warning, no class "D" warning, no "solemn" anything, and no "swearing" to anything.

the expert affirmed the statements therein substantially complied with the "oath" requirement.

The statute gives pro se plaintiffs an easier way to comply the oath requirement: "If the plaintiff is acting pro se, the plaintiff shall have the expert witness sign the certificate of merit affidavit or answers to interrogatories referred to in this section and the plaintiff shall be bound by those provisions as if represented by an attorney." Iowa Code § 147.140(5). If the legislature was serious about requiring an expert to sign under penalty of perjury, it would not have provided an exception for pro se litigants, allowing them to satisfy the statute with answers to interrogatories. *See* § 147.140(5). In this instance, if it were material to the objectives of the statute, the legislature did not need to carve out an exception for pro se litigants or could have expressly included language that the expert sign under penalty of perjury regardless of the litigant's status. *See id.*

D. The certificate of merit affidavit requirement of section 147.140 is vague.

In their resistance to NNI's motion for summary judgment the Banwarts raised the argument that the affidavit requirement in section 147.140 was unconstitutionally vague. (D0066 Pls' Memo of Auth. Resist Def Mot for Summ. J. at 4-6 (07-24-2023).) The Banwarts' vagueness challenge is preserved for appellate review because "a successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected" by the trial court. *See EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002) (quoting *Johnston Equip. Corp. v. Indus. Indem.*, 489 N.W.2d 13, 16 (Iowa 1992)).

Under both the federal and Iowa constitutions, no person can be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1; Iowa Const. art. I, § 9. Each Due Process Clause prohibits enforcement of vague statutes under the void-for-vagueness doctrine. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). That doctrine applies here as the failure "to

substantially comply" with oath requirement can result in the dismissal of the Banwarts' claim "with prejudice." *See* § 147.140(6); *Nail* at 539 ("We hold, therefore, that the void-for-vagueness doctrine applies to legislation establishing civil or criminal sanctions.").)

> There are three generally cited underpinnings of the void-for-vagueness doctrine. First, a statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. Second, due process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion. Third, a statute cannot sweep so broadly as to prohibit substantial amounts of constitutionally-protected activities, such as speech protected under the First Amendment.

Id. This case invokes the first "underpinning".

Oath requirements in other statutes in the Iowa Code demonstrate a wide variety of versions and approaches, which demonstrates that the "oath" requirement in section 147.140 is vague and open to broad interpretation for execution. Section 147.140 is silent as to the who, what, where, when, and how,

regarding oaths. In contrast, Iowa Code section 29B.43 states certain military personnel must "take an oath to perform their duties faithfully" and gives the adjutant general the power to adopt rules pertaining to the "form, time, place, and manner" of taking the oath. Iowa Code § 29B.43. The Iowa Rules of Evidence set forth the standard for an oath to testify truthfully, providing, "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." Iowa R. Evid. 5.603. Section 147.140 merely requires the required statements be provided "under the oath of the expert." § 147.140(1)(b). There is no reference to truthfulness or conscientious requirement found within section 147.140. Further, the statute does not use terms like "give" or "take," but rather says "under the oath of the expert." A vague

phrase that could be construed to mean the expert may create his or her own standard for the oath.[3]

The vagueness of the oath language in section 147.140 leaves it up to broad interpretation and runs contrary to the rigid and technical application of the statute to dismiss the Banwarts' claim. When a person of ordinary intelligence, either with or without reference to other, similar statutes, does not understand the meaning, then the statute is too vague for enforcement based on the strict interpretation by one party. When the legislature intends to particularize the who, what, where, when, why, and how for an oath, it has done so as seen in other statutes discussed herein. That was not the case with section 147.140. The vagueness of the oath requirement, considering the harsh and final penalty of dismissal with prejudice, necessitates a generous view of what constitutes an

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[3] A word search of the current Iowa Code using "under the oath" or "under the oath of" only turns up the language at issue in section 147.140.

"oath of the expert witness" under the terms of the statute and a finding that the experts' certificates of merit complied with such requirements in the statute.

Conclusion

The Supervisory Orders were a proper exercise of the Supreme Court's constitutional authority, so the Banwarts timely filed their petition. If the Supervisory Orders are void, then this Court should consider the Banwarts' petition timely filed unthe the doctrine of equitable tolling. Regarding the certificate of merit affidavit required by Iowa Code section 147.140, the Banwarts substantially complied and this court should affirm the district court. This court should reverse the district court on the statute of limitations issue, affirm on the certificate of merit issue, and remand for further proceedings.

Request for Oral Argument

Counsel for Appellant respectfully requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

/s/ *Andrew B. Howie*

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Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 29th day of May 2024, the Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Andrew B. Howie
Andrew B. Howie

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/s/ Andrew B. Howie May 29, 2024