IN THE SUPREME COURT OF IOWA

NO. 21-0859
Pottawattamie County No. LACV121204

REED DICKEY, MICHAEL DICKEY,
and ANDREA DICKEY

Plaintiffs-Appellants,

v.

JEREMY HOFF, JENNIE EDMUNDSON
MEMORIAL HOSPITAL,
LOESS HILLS BEHAVIORAL HEALTH,
JEFF RUTHLEDGE, THE SCHOOL
DISTRICT OF LINCOLN a/k/a LINCOLN PUBLIC SCHOOLS, and
EMILY GORMAN,

Defendants-Appellees.

APPEAL FROM THE POTTAWATTAMIE COUNTY DISTRICT
COURT, LAW NO. LACV121204
HONORABLE MICHAEL HOOPER, PRESIDING

FINAL APPEAL BRIEF OF APPELLEE JEREMY HOFF

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- *In re Evan's Will*, 193 Iowa 1240, 188 N.W. 774 (1922).
- *Harrington v. Toshiba Mach. Co.*, 562 N.W.2d 190 (Iowa 1997).
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Statutes of Other Jurisdictions:

- TEX. GOV'T CODE ANN. § 22.0035 (2019).
- N.Y. EXEC. LAW § 29-a(1), (4) (McKinney 2020).

Other Authorities:

- Susan Larson Christensen, Chief Justice, *In the Matter of Ongoing Provisions for Coronavirus/Covid-19 Impact on Court Services*, IOWA JUDICIAL BRANCH (Apr. 2, 2020), https://www.iowacourts.gov/collections/485/files/1076/embedDembedDo/.
- Susan Larson Christensen, Chief Justice, *In the Matter of Ongoing Provisions for Coronavirus/Covid-19 Impact on Court Services*, IOWA JUDICIAL BRANCH (May 8, 2020), https://www.iowacourts.gov/collections/497/files/1091/embedDembedDo/.
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- Ruling on Motion for Summary Judgment, *Carter v. Svensson et al.*, Polk Co. Case No. LACL148415 (Sept. 15, 2021).
- US LAW NETWORK, INC. *Statute of Limitations Quick Guide (During COVID-19 Pandemic*), US Law Network, Inc. (December 2020), USLaw.org.

II. WHETHER THE PLAINTIFFS' CLAIMS SHOULD HAVE BEEN DISMISSED BECAUSE THEIR FAILURE TO FILE A CERTIFICATE OF MERIT AFFIDAVIT IN THE FIRST ACTION COMPELLED A DISMISSAL OF PLAINTIFFS' CLAIMS WITH PREJUDICE

Cases:

- *State ex rel. Dickey v. Besler*, 954 N.W.2d 425 (Iowa 2021).
- *DeVoss v. State*, 648 N.W.2d 56 (Iowa 2002).
- *Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846 (Iowa 1997).
- *State v. Hammock*, 778 N.W.2d 209 (Iowa Ct. App. 2009).

Iowa Statutes:

- IOWA CODE § 147.140 (2021).
- IOWA CODE § 147.136A (2021).
- IOWA CODE § 280.13C (2021).

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- IOWA R. APP. P. 6.907 (2021).
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- *Colon v. N.Y.C. Health & Hosp. Corp.*, 564 N.Y.S.2d 130 (N.Y. App. Div. 1990) (memorandum decision).
- *O'Hara v. Randall, M.D., et al.*, 879 A.2d 240 (Pa. Super. Ct. 2005).

III. WHETHER PLAINTIFFS' CLAIMS SHOULD HAVE BEEN DISMISSED DUE TO THE DOCTRINE OF CLAIM PRECLUSION

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- *State v. Hammock*, 778 N.W.2d 209 (Iowa Ct. App. 2009).
- *Villareal v. United Fire & Cas. Co.*, 873 N.W.2d 714 (Iowa 2016).
- *Montana v. United States*, 440 U.S.147 (1979).
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- *Estate of Naeve ex rel. Naeve v. FBL Fin. Group, Inc.*, No. 18-0615, 2019 WL 2879936, at *3 (Iowa Ct. App. July 3, 2019).

Other Authorities:

- RESTATEMENT (SECOND) JUDGMENTS § 24 (1982).
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ROUTING STATEMENT

Plaintiffs ask the Iowa Supreme Court to retain this appeal on the basis that this appeal involves issues of constitutional law. However, the Iowa Supreme Court has not hesitated to transfer cases to the Iowa Court of Appeals when they involve constitutional issues that can be resolved through the application of existing legal principles. *See, e.g.*, *Hillman v. State*, No. 14-0158, 2015 WL 5278929, at * 2—3 (Iowa Ct. App. Sept. 10, 2015) (noting that the plaintiff raised constitutional issues on appeal and proceeding to analyze those issues by applying "existing legal principles"). As is established below, this case presents issues that were appropriate for summary judgment, and it involves the application of existing legal principles. Accordingly, this case should be transferred to the Iowa Court of Appeals. *See* IOWA R. APP. P. 6.1101(3)(a)—(b).

STATEMENT OF THE CASE AND FACTS[1]

First Action Filed By Plaintiff Reed Dickey

[1] The district court dismissed the underlying action on statute of limitations grounds. Therefore, the procedural history is pertinent to and included within the statement of facts. In addition, Defendant Hoff notes that Plaintiffs' Statement of Facts includes statements of law, as well as statements that are irrelevant to the issues presented for appellate review; thus, they should not be considered in this Court's review of this case. *See, e.g.*, IOWA R. APP. P. 6.903(2)(f) (2021) (noting that the statement of facts "shall recite *the facts relevant to the issues presented for review*" (emphasis added)).

On December 6, 2019, Plaintiff Reed M. Dickey filed his first Petition at Law and Jury Demand (hereinafter "First Petition") against Jeremy Hoff and Methodist Jennie Edmundson Hospital, in Pottawattamie County Case No. LACV120033 (hereinafter "First Action"). Plaintiff Reed Dickey alleged that he sustained multiple concussions during a wrestling match on December 7, 2018, which resulted in brain injuries, and he alleged those injuries were caused by the acts or omissions of Jeremy Hoff, the official overseeing the wrestling match, and Methodist Jennie Edmundson Hospital, the medical facility providing the trainer for the wrestling match. (*See* First Petition, filed in the First Action on December 6, 2019, at ¶ 4, App. p. 305). He brought claims of negligence per se and common law negligence against Defendant Hoff. (*See id.* at ¶¶ 13—39, App. pp. 306—11).

The basis of Reed Dickey's negligence per se claim against Defendant Hoff was that he failed to adhere to the requirements of Iowa Code section 280.13C in not removing Reed Dickey from participation in the wrestling match when he exhibited "clear signs, symptoms, and behaviors of a brain injury." (*See id.* at ¶ 27, App. p. 308). Regarding his common law negligence claim, Plaintiff Reed Dickey alleged Defendant Hoff breached a duty to use reasonable care to protect Dickey as follows:

> a. Failure to protect Dickey when he was concussed and unable to protect himself;

b. Failure to protect Dickey from the conduct of the other wrestler;
c. Failure to identify Dickey's brain injury following clear signs, symptoms, and behaviors of a brain injury;
d. Failure to adhere to reasonable and accepted protocols for students participating in an interscholastic sports activity;
e. Failure to stop the wrestling match before Dickey sustained multiple concussions after exhibiting clear signs, symptoms and behaviors of a head injury; and
f. Any other manner as may be discerned in the discovery of this matter.

(*Id.* at ¶ 37(a)—(f), App. p. 310).

Defendant Hoff filed his Answer to the Petition and Affirmative Defenses (hereinafter "Hoff First Answer") in the First Action on February 18, 2020, denying any liability to the Plaintiff. (*See* Hoff First Answer, filed in the First Action on 2/18/2020, App. p. 313). The parties engaged in discovery, and on October 5, 2020, Defendant Hoff filed his Motion for Summary Judgment against Plaintiff Reed Dickey. (*See* Defendant Hoff's Motion for Summary Judgment, filed in the First Action on 10/5/2020, App. p. 318). In support of his Motion for Summary Judgment, Defendant Hoff simultaneously filed a Memorandum of Authorities and asserted that (1) Plaintiff failed to timely serve Defendant Hoff with a copy of a Certificate of Merit Affidavit, as required under Iowa Code section 147.140; and (2) Plaintiff failed to state a claim for negligence per se under Iowa Code section

280.13C. (*See* Hoff's Memorandum of Authorities, filed in the First Action on 10/5/2020, at pp. 5—19, App. pp. 324—338).

A hearing was set on Defendant Hoff's Motion for Summary Judgment on November 24, 2020. (*See* Notice of Telephonic Hearing, filed in the First Action on 10/6/2020, App. p. 340). Plaintiff Reed Dickey did not file any resistance to Defendant Hoff's Motion for Summary Judgment. Instead, on November 20, 2020, just four days before the hearing was set on Defendant Hoff's Motion for Summary Judgment, Plaintiff Reed Dickey filed a dismissal of his Petition, purportedly pursuant to Iowa Rule of Civil Procedure 1.943. (*See* Notice of Dismissal of Petition Pursuant to Iowa R. Civ. P. 1.943, filed in the First Action on 11/20/2020, App. pp. 341—42).

Instant Action Filed by Plaintiffs Andrea, Michael, and Reed Dickey

On December 11, 2020, Plaintiffs Andrea Dickey, Michael Dickey, and Reed Dickey filed their Petition at Law and Jury Demand in the above-captioned cause of action. (*See generally* Petition, filed 12/11/2020, App. p. 005). Like in the First Action, Plaintiffs alleged that Reed Dickey sustained a concussion and/or other brain injury during a wrestling match on December 7, 2018, and they alleged those injuries were caused by the acts or omissions of Defendant Hoff and the other Defendants in this matter. (*See generally* Petition, App. pp. 005—020). In addition, Plaintiffs again brought claims of

negligence per se and common law negligence against Defendant Hoff. (*See id.* at ¶¶ 63—97, App. pp. 014—020.) Again, the negligence per se claim is based upon the allegations that Defendant Hoff failed to remove Reed Dickey from participation in the match after he showed signs of a brain injury or concussion. (*See id.* at ¶ 76, App. p. 016). The common law negligence claim is based upon the following allegations:

a. Failure to protect Reed when he was concussed and unable to protect himself;
b. Failure to protect Reed from ongoing harm caused by further blows to the head after already sustaining brain injury after the first blow to the head;
c. Failure to identify that Reed exhibited signs, symptoms, or behaviors consistent with a concussion or brain injury in an extracurricular interscholastic activity, or alternatively, willfully and/or intentionally ignoring Reed's signs, symptoms, or behaviors consistent with a concussion or brain injury and allowing Reed to continue in competition;
d. Failure to adhere to reasonable and accepted protocols for students participating in an interscholastic sports activity;
e. Failure to remove Reed from participation in the activity once he exhibited signs, symptoms, or behaviors consistent with a concussion or brain injury
f. Any other manner as may be discerned through discovery in this matter.

(*See id.* at ¶ 91(a)—(f), App. p. 019). Plaintiffs Andrea and Michael Dickey also brought parental loss of consortium claims and asserted entitlement to various damages. (*See id.* at ¶¶ 82, 93, App. pp. 017, 020).

On January 22, 2021, Defendant Hoff filed his Motion for Additional Time to Move or Plead. (*See* Motion for Additional Time to Move or Plead, filed 1/22/21, App. p. 343). The district court entered an Order granting Defendant Hoff until March 4, 2021 to file his Answer or responsive pleading. (*See* Order, entered 1/22/21, App. p. 346). On March 3, 2021, Defendant Hoff filed his Pre-Answer Motion to Dismiss under Iowa Rule of Civil Procedure 1.421(1)(f), and a Brief in Support of his Motion to Dismiss, asserting the following: (1) under Iowa Code section 147.140, Plaintiff's failure to timely serve a Certificate of Merit Affidavit in the First Action compelled a dismissal with prejudice of the action upon Hoff's motion, and Plaintiff Reed Dickey's action of dismissing his First Action before the Court entered a dismissal could not obviate the statutory requirement; (2) in light of the dismissal, the doctrine of claim preclusion prevented the Plaintiffs from relitigating the issues advanced and decided in the First Action; (3) Plaintiffs' Petition was filed after the statute of limitations ran under Iowa Code section 614.1(2), and their claims could not be saved by operation of Iowa's savings statute; and (4) the Plaintiffs could not rely upon the Supervisory Orders issued by the Iowa

Supreme Court, which purportedly granted a blanket tolling of all statutes of limitations in civil cases, as those orders were issued in violation of the Iowa and Federal Constitutions. (Defendant Jeremy Hoff's Pre-Answer Motion to Dismiss Under Iowa R. Civ. P. 1.421(1)(f), ¶¶ 9—12, App. pp. 350—52; Defendant Jeremy Hoff's Brief In Support of his Motion to Dismiss, pp. 11—29, App. pp. 364—82).

Plaintiffs filed their Resistance to Defendant Hoff's Motion to Dismiss on March 10, 2021, and Defendant Hoff filed his Reply Brief on March 17, 2021. (*See* Plaintiffs' Resistance to Jeremy Hoff's Motion to Dismiss, filed 3/10/21, App. p. 176; Defendant Jeremy Hoff's Reply Brief in Support of His Pre-Answer Motion to Dismiss, filed 3/17/21, App. p. 240). On March 31, 2021, a telephonic hearing was held on Defendant Hoff's Motion to Dismiss, as well as the Motions to Dismiss filed by the other Defendants in this matter. (*See* Order entered 3/31/21, App. p. 396). On May 14, 2021, the district court issued its Order on the Defendants' Motions to Dismiss. (*See* Order on Defendants' Motions to Dismiss, entered 5/14/21, App. p. 252). With regard to Defendant Hoff's Pre-Answer Motion to Dismiss, the district court first found that Defendant Hoff is not a healthcare provider within the meaning of Iowa Code sections 147.140 and 147.136A. (*See id.* at pp. 10—11, App. pp. 261—62). Therefore, Defendant Hoff's Motion to Dismiss due to

noncompliance with Iowa Code section 147.140 and application of claim preclusion was denied. (*See id.* at p. 11, App. p. 262).

However, the district court granted all Defendants' Motions to Dismiss (including Defendant Hoff's), based upon the running of the statute of limitations. (*See id.* at pp. 12—16, App. pp. 263—67). The district court first found that the statute of limitations for the types of claims brought by the Plaintiffs in this case is two years and, therefore, the statute ran on Plaintiffs' claims on December 7, 2020. (*See id.* at p. 12, App. p. 263). Since the Plaintiffs filed their Petition in the instant action four days later, on December 11, 2020, their claims would ordinarily be time-barred. (*See id.*, App. p. 263). However, the district court recognized that, pursuant to the Supervisory Orders issued by the Iowa Supreme Court on April 2, May 8, and May 22, 2020, the statute of limitations in all civil claims was purportedly tolled for 76 days. (*See id.* at p. 13, App. p. 264).

Importantly, the district court found that the Iowa Supreme Court did not have constitutional authority to issue the Supervisory Orders, as the issuance of those Orders was in violation of the Separation of Powers Doctrine and they were issued when the Iowa Supreme Court had no case or controversy before it. (*See id.* at pp. 13—15, App. pp. 264—266). Therefore, the Plaintiffs could not rely on the Supervisory Orders to correct their

otherwise untimely filing, and the district court found that equity would not save the Plaintiffs' claims from dismissal. (*See id.* at p. 15, App. p. 266). Therefore, the Plaintiffs' claims against all Defendants were dismissed. (*See id.* at pp. 15—16, App. pp. 265—66).

On May 21, 2021, Plaintiffs filed their Motion to Reconsider, Enlarge, and/or Amend (hereinafter "Motion to Reconsider"). (*See* Motion to Reconsider, filed 5/21/21, App. p. 261). On June 2, 2021, the district court issued its Order, denying Plaintiffs' Motion to Reconsider. (*See* Order, entered 6/2/21, App. p. 274). Finally, on June 22, 2021, Plaintiffs filed their Notice of Appeal. (*See* Plaintiffs' Notice of Appeal, filed 6/22/21, App. pp. 276—78). Plaintiffs' Certified Notice of Appeal was filed on June 24, 2021. (*See* Certified Notice of Appeal, filed 6/24/21, App. pp. 279—82).

ARGUMENT

Introduction. As the district court correctly found, Plaintiffs' claims are barred by the statute of limitations and could not be saved by operation of the Supervisory Orders issued by the Iowa Supreme Court, which purportedly tolled all civil statutes of limitations by 76 days, as those Orders were unconstitutionally issued. As alternative grounds for dismissal, the district court should have found that the Certificate of Merit Affidavit requirement under section 140.147 applied to Defendant Hoff, and as such, the First Action

was effectively dismissed with prejudice and, accordingly, that this dismissal precludes the claims brought by Plaintiffs in the case *sub judice*.

I. THE DISTRICT COURT CORRECTLY RULED THAT THE APPLICABLE STATUTE OF LIMITATIONS HAS RUN ON PLAINTIFFS' CLAIMS AND THEIR UNTIMELY CLAIMS CANNOT BE SAVED BY APPLICATION OF THE IOWA SUPREME COURT'S SUPERVISORY ORDERS

Error preservation. Defendant Hoff agrees that error has been preserved on this issue.

Scope of review. When a party alleges error involving a constitutional right, such as due process or equal protection, or an issue relating to the separation of powers doctrine, Iowa courts "make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made." *See State v. King*, 492 N.W.2d 211, 214 (Iowa Ct. App. 1992); *see also Hrbek v. State*, 958 N.W.2d 779, 784 (Iowa 2021) (discussing review of issue relating to separation of powers); *O'Hara v. State*, 642 N.W.2d 303, 314 (Iowa 2002) (noting that constitutional claims, such as claims involving the rights of due process and equal protection, are reviewed de novo) . Thus, the standard of review for constitutional issues is de novo. *See O'Hara*, 642 N.W.2d at 314. As in this case, when constitutional issues are raised on appeal from a motion to dismiss, the Court may consider the record on the motion, and may also "take judicial notice of events and conditions which are

generally known and matters of common knowledge within [the court's] jurisdiction." *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 835 (Iowa 1990). In addition, Iowa courts must keep in mind "the particular character of the issues and the parties or persons in interest to correctly apply legal principles." *Id.*

A. The District Court Correctly Found Plaintiffs' Claims are Untimely Under Iowa Code Section 614.1(2)

Iowa Code section 614.1(2) provides that personal injury claims must be brought within two years. IOWA CODE § 614.1(2) (2021). The Iowa Supreme Court has explained that the policies behind statutes of limitations include (1) protecting defendants from problems relating to defending stale claims, (2) freeing defendants from anxiety relating to the fear of litigation, (3) removing stale claims from the courts, and (4) "removing the uncertainty of unsettled claims from the marketplace." *Estate of Kuhns v. Marco*, 620 N.W.2d 488, 491 & n. 1 (Iowa 2000).

Plaintiffs' claims are based upon an alleged personal injury to Plaintiff Reed Dickey that occurred on December 7, 2018. Thus, by virtue of the plain language of section 614.1(2), the statute of limitations on Plaintiffs' claims ran on December 7, 2020. *See* § 614.1(2). As the district court recognized, Plaintiffs did not file the instant Petition until December 11, 2020 – four days after the statute ran. Therefore, Defendant Hoff, is entitled to judgment as a

matter of law, as Plaintiffs' claims are time barred. As they did at the district court, Plaintiffs claim the statute of limitations on their claims was tolled by operation of the Supervisory Orders issued by the Iowa Supreme Court. However, as detailed below, the district court correctly found that the Iowa Supreme Court lacked constitutional authority to issue a blanket tolling of all civil statutes of limitations in Iowa, so Plaintiffs cannot rely upon the Iowa Supreme Court's Supervisory Orders to save their claims.

B. The District Court Correctly Found that the Iowa Supreme Court Lacked Constitutional Authority to Issue a Blanket Tolling of All Civil Statutes of Limitations in Iowa

1. The Orders Issued by the Iowa Supreme Court Violate the Doctrine of Separation of Powers

On April 2, 2020, the Iowa Supreme Court issued a Supervisory Order, signed by Chief Justice Christensen, entitled, "*In the Matter of Ongoing Provisions For Coronavirus/COVID-19 Impact On Court Services*". In that Order, the Iowa Supreme Court included a provision that tolled all civil statutes of limitations and similar case deadlines in Iowa, as follows:

> **STATUTE OF LIMITATIONS**
>
> 33. **Tolled**. Any statute of limitations, statute of repose, or similar deadline for commencing an action in district court is hereby tolled from March 17 to June 1 (76 days). Tolling means that amount of time to the statute of limitations or similar deadline. So, for example, if the statute would run on April 8, 2020, it now runs on June 23, 2020 (76 days later).

Susan Larson Christensen, Chief Justice, *In the Matter of Ongoing Provisions for Coronavirus/Covid-19 Impact on Court Services*, IOWA JUDICIAL BRANCH 9 (Apr. 2, 2020), https://www.iowacourts.gov/collections/485/files/1076/embedDocument/. In a May 8, 2020 Supervisory Order, the Iowa Supreme Court expanded on the April 2, 2020 Order with respect to statues of limitations, stating as follows:

> 4. **Expansion on Prior Supervisory Order**. The court now expands on the earlier supervisory order to direct that the 76 days of tolling will apply if the deadline for commencing the action would otherwise expire *any time from March 17, 2020 to December 31, 2020*. . . .

Susan Larson Christensen, Chief Justice, *In the Matter of Ongoing Provisions for Coronavirus/Covid-19 Impact on Court Services*, IOWA JUDICIAL BRANCH 8 (May 8, 2020), https://www.iowacourts.gov/collections/497/files/1091/embedDocument/ (emphasis in original). As is set forth below, the district court correctly found that these Supervisory Orders violate the Separation of Powers Doctrine under the Iowa Constitution, and the Iowa Supreme Court did not have constitutional authority to issue such orders. Therefore, these Supervisory Orders should not apply to toll the statute of limitations applicable to

Plaintiffs' causes of action, and their claims were appropriately dismissed by the district court.

Article III, Section 1 of the Iowa Constitution states that the government shall be divided into three separate branches – namely, the legislature, the executive, and the judiciary – and "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted." IOWA CONST. art III, § 1 (1st, "Three Separate Departments"). Similar to the U.S. Constitution, the Iowa Constitution provides that the legislative authority of Iowa shall be vested in the House and Senate, and that the judicial power shall be vested in the supreme court and any inferior courts. *Compare* IOWA CONST. art. III, § 1 (2nd, "Legislative Department") (discussing legislative authority), *with* U.S. CONST. art. I, § 1 (same); *Compare* IOWA CONST. art. V, § 4; IOWA CONST. art. V, § 1 (discussing judicial authority) *with* U.S. CONST. art. III, § 1 (same). The jurisdictional limitations of the Iowa Supreme Court are further set forth in Article V, section 4, as follows:

> The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and

> shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

IOWA CONST. art. V, § 4.

In *State v. Phillips*, the Iowa Supreme Court addressed Iowa's Separation of Powers Doctrine and clarified that the doctrine "is violated if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch." *Phillips*, 610 N.W.2d 840, 842 (Iowa 2000). The Iowa Supreme Court has further defined the powers granted by the constitution to the various branches of the government. With regard to the judicial power, in *Klouda v. Sixth Judicial District Department of Correctional Services*, the Court clarified that the power, which has been granted to the courts under Iowa's Constitution, "is the power to decide and pronounce a judgment and carry it into effect." *Klouda*, 642 N.W.2d 255, 261 (Iowa 2002). According to the Blackstone definition of judicial power, the power consists of three elements: "examination of the 'truth of the fact', determination of the 'law arising upon that fact', and ascertainment and [a]pplication of the remedy." *Cedar Rapids Human Rights Comm'n v. Cedar Rapids Comm'y Sch. Dist.*, 222 N.W.2d 391, 395 (Iowa 1974).

In addition to the powers derived from the Constitution, the courts also have some inherent powers "to do whatever is reasonably necessary to discharge their traditional responsibilities." *State v. Hoegh*, 632 N.W.2d 885, 888 (Iowa 2001). Importantly, while these inherent powers "are necessary for courts to properly function as a separate branch of government", courts cannot use their inherent powers "to offend the doctrine of separation of powers by usurping authority delegated to another branch of government." *Id.* Thus, a court's inherent powers "may be controlled or restricted by statute" or, in some situations, even overridden by statute. *Id.* at 889. Therefore, a court cannot use its inherent powers to develop rules that circumvent or conflict with statutes or rules established by the legislature. *See, e.g.*, *De Berg v. Cty. Bd. of Ed. of Butler Cty.*, 248 Iowa 1039, 1051, 82 N.W.2d 710, 717 (1957) ("It is our function to interpret legislative enactments, but not to establish new legislative provisions by judicial procedure, nor to nullify the clear intention of such enactments."); *accord Carlisle v. United States*, 116 S.Ct. 1460, 1466 (1996) (noting that a federal court's inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure" and that federal courts have no more power to disregard mandates in the Federal Rules "than they do to disregard constitutional or statutory provisions").

The Iowa Supreme Court has recognized that "[t]he legislature is supreme in the field of legislation" and that "neither the wisdom nor the advisability of any legislation presents a judicial question." *Faber v. Loveless*, 249 Iowa 593, 597, 88 N.W.2d 112, 114 (1958). The legislative power, delegated in Iowa's Constitution to the House and Senate, has been defined as follows:

> Legislative power is authority to pass rules of law for the government and regulation of people or property. Where the legislative body has the power to enact a law as a necessary adjunct to such power, it has a legal right to adopt a procedure for the administration of such law.

Schneberger v. State Bd. of Soc. Welfare, 228 Iowa 399, 291 N.W. 859, 861 (1940). Thus, under Iowa's Constitution, the authority to enact rules of law and procedures related thereto, has been vested in the legislature, *not* the courts, and Iowa courts do not have constitutional authority to enact rules that conflict with those enacted by the legislature.

Consistent with this conclusion, the Iowa Supreme Court, in analyzing an issue extremely analogous to the issue *sub judice*, determined its inherent powers do not allow it to redefine or obviate statutory time standards via issuing supervisory rules. *See Root v. Toney*, 841 N.W.2d 83, 89—90 (Iowa 2013). To wit, in *Root v. Toney*, the Iowa Supreme Court examined whether a husband's notice of appeal, filed thirty-one (31) days after a judgment, was

timely. *Id.* In *Root*, the hours of the clerk's office in question had been shortened by a supervisory order, and the husband argued this shortening allowed him a one-day extension on filing his notice of appeal, pursuant to Iowa Code section 4.1(34). *Id.* at 87; *see also* IOWA CODE § 4.1(34) (2021). The wife argued the appeal was late, asserting a subsequent supervisory order of the Iowa Supreme Court had declared that the prior supervisory order shortening the clerk's hours redefined the clerk's regular business hours and thereby did not trigger the one-day extension of Iowa Code section 4.1(34). *Root*, 841 N.W.2d at 87.

In analyzing the wife's argument, the Iowa Supreme Court concluded as follows:

> The problem with [the wife's] position is that [the husband] was otherwise *entitled* to the one-day extension to file his notice of appeal under section 4.1(34), and the rule change, as interpreted in our supervisory order, thus effectively shortened his time to appeal by one day. *We may not change statutory terms under the guise of judicial construction. Specifically, the* ***time allowed to file a notice of appeal cannot be reduced without legislative approval****.*

Id. at 89—90 (citations omitted, emphases added). Likewise, the time allowed for Plaintiffs to file their suit here cannot be increased without legislative approval. Otherwise stated, "the supervisory order *cannot trump the general assembly's authority to set the time to file a notice of appeal [or lawsuit]*."

See id. (emphasis added); *see also Friedrich v. State*, 801 N.W.2d 628 (Iowa Ct. App. 2011) ("We are simply not at liberty to read exceptions into [a statutory limitation period] not otherwise provided by the legislature.")

Notably, in reaching the above conclusion in *Root*, the Iowa Supreme Court noted the legislature's role in rulemaking is governed by Iowa Code section 602.4201(3), which requires legislative involvement as set forth in Iowa Code section 602.4202 before certain rules can be modified. *Root*, 841 N.W.2d at 90; *see also* IOWA CODE §§ 602.4201(3) (2021); 602.4202 (2021). Importantly, the Iowa Rules of Civil Procedure are listed as being subject to the legislative rule making/altering requirements of section 602.4202. Pertinent to the case *sub judice*, Iowa Rule of Civil Procedure 1.301 provides that "a civil action is commenced by filing a petition with the court. ***The date of filing*** *shall determine whether the action is commenced within the time allowed by the statute of limitations of actions*." *See* IOWA R. CIV. P. 1.301(1) (2021) (emphases added). The Supreme Court's Supervisory Orders at issue purport to eliminate this rule, as the date of filing is no longer the operative date – the Supervisory Orders effectively subtract up to 76 days from the date

of filing. This cannot be done without engaging the process set forth in Iowa Code section 602.4202. *See* §§ 602.4201(3); 602.4202. [2]

Iowa Supreme Court Justice Mansfield, who was joined in his dissenting opinion by Justice Waterman in the 2015 Iowa Supreme Court case of *Concerned Citizens of Southeast Polk School District v. City Development Board of the State of Iowa*, further explained the requirement, as set forth in *Root*, that any purported changes to the Rules of Civil Procedure be first submitted to the legislature, as follows:

> [Iowa Code section 602.8012(9)] is fairly clear: An order is deemed filed when the clerk . . . enters the date of receipt. . . . *I do not believe that an interim EDMS rule, promulgated by this court but not submitted to or approved by the legislative council, can alter this result.* In *Root v. Toney*, we recently addressed a conflict between Iowa Code section 4.1(34) and a supervisory order of this court. 841 N.W.2d 83, 87—90 (Iowa 2013). We held that our supervisory order could not supersede section 4.1(34) and, therefore, the appellant had an additional day to file his appeal. *See id.* at 89—90. The same principle applies here. *The language of*

[2] In fact, in entering other orders that amend or modify the Rules of Civil Procedure, the Iowa Supreme Court has made clear that the amendments "are temporarily adopted immediately and will take permanent effect *subject to Legislative Council review as provided by Iowa Code section 602.4202*." *See, e.g., Orders – 2021 Archive*: *In the Matter of Adopting Felony Conviction Challenge for Cause Amendments to Chapter 1 Rules of Civil Procedure and Chapter 2 Rules of Criminal Procedure*, IOWA JUDICIAL BRANCH (Feb. 19, 2021), https://www.iowacourts.gov/iowa-courts/supreme-court/orders/archive/2021 (emphasis added). However, this *was not done* in connection with the COVID-19 related Supervisory Orders at issue.

> *the statute must prevail over any conflicting interim EDMS rule*.
>
> It is true that only certain enumerated categories of rules have to be submitted to the legislative council. *See* IOWA CODE §§ 602.4201(3), [602].4202(1)–(2). These include all "[r]ules of civil procedure" and several rules of appellate procedure, including those relating to the time for filing a notice of appeal. *Id.* § 602.4201(3)(a), (d). ***One could argue that a rose by any other name is still a rose, and an EDMS rule that purports to affect appellate deadlines is covered by Iowa Code section 602.4202 and must be submitted to the legislative council. That did not happen here. Regardless, a rule that has not been submitted to the legislature lacks the force of a statute like Iowa Code section 4.1(34) in the event of a conflict between the two***. *See Root*, 841 N.W.2d at 90.

Concerned Citizens, 872 N.W.2d 399, 405—06 (Iowa 2015) (Mansfield & Waterman, JJ., dissenting) (first emphasis in original, other emphases added). Here, the Supervisory Orders' purported modification of Rule 1.301, like the modification of the statute of limitations, is invalid and unconstitutional, as the purported modification was never submitted to the legislature for approval. *See id.*; *see also Root*, 841 N.W.2d at 89—90. Again, the Supervisory Orders are in direct conflict with the language in Rule 1.301, which provides that *the date of filing* determines whether the action has been timely filed under the applicable statute of limitations – not the date of filing *minus 76 days*, as the Supervisory Orders purport to provide. In light of this

conflict, the language in Rule 1.301 must prevail. *See Concerned Citizens*, 872 N.W.2d at 405—06 (Mansfield & Waterman, JJ., dissenting).

In sum, Iowa Code section 614.1 provides the limited times in which claims may be brought. *See* IOWA CODE § 614.1. Plaintiffs cannot dispute the fact that they did not bring their claims within the time allotted by this statute – i.e., two years. *See id.* The Iowa Constitution, Iowa Supreme Court precedent, and other authorities set forth above, establish that the Iowa Supreme Court lacks the authority to alter the time for filing a lawsuit. *See id.*; *Root*, 841 N.W.2d at 89-90; *accord De Berg*, 82 N.W.2d at 717 ("It is our function to interpret legislative enactments, but not to establish new legislative provisions by judicial procedure, nor to nullify the clear intention of such enactments."); *Carlisle*, 116 S.Ct. at 1466 (noting that a federal court's inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure" and that federal courts have no more power to disregard mandates in the Federal Rules "than they do to disregard constitutional or statutory provisions"); *see also Hoegh*, 632 N.W.2d at 888 (noting that courts cannot use their inherent powers "to offend the doctrine of separation of powers by usurping authority delegated to another branch of government"); *In re Evan's Will*, 193 Iowa 1240, 1245, 188 N.W. 774, 776 (1922) ('It is a matter of legislative enactment, and a court

is not privileged to amend the law. As it is written, it is written.')." . Accordingly, to the extent Plaintiffs relied upon the Iowa Supreme Court's Supervisory Orders to alter the legislative limitations period, such reliance was misplaced.

In light of the above, the district court correctly found that it must apply the statute of limitations as enacted and dismiss Plaintiffs' lawsuit, reasoning as follows:

> **In this case, the Supervisory Orders infringed upon the legislature's authority by changing the statu[t]es of limitations applicable to all cases brought in Iowa Courts and essentially created new law.** This law making power was expressly given to the legislative branch, and has not been abrogated or delegated to the judicial branch even during extreme times such as the pandemic. The Court in attempting to balance the need to reduce the spread of the virus while conducting necessary business felt the need to toll the statutes of limitations. **Neither the Constitution nor case law support the judicial branch having constitutional authority to issue orders altering statutes of limitations set by the legislature.**

(Order on Defendants' Motions to Dismiss, entered 5/14/21, p. 14, App. p. 265 (first emphases supplied by district court in italics, last emphases added in bold); *see also* Ruling on Motion for Summary Judgment, *Carter v. Svensson et al.*, Polk Co. Case No. LACL148415, at *3—4 (Sept. 15, 2021), App. p. 405 (finding that the Supervisory Orders issued by the Iowa Supreme

Court were unconstitutional as a violation of the Separation of Powers Doctrine)).

The district court also correctly reasoned that the doctrine of Separation of Powers must be adhered to, "even in the face of a pandemic". This conclusion is supported by Iowa Supreme Court precedent, which provides as follows:

> It is fundamental to our system of government that the authority for courts to act is conferred by the constitution or by statute. Yet, it is equally fundamental that in addition to these delegated powers, courts also possess broad powers to do whatever is reasonably necessary to discharge their traditional responsibilities. This type of judicial authority is known as inherent power, and it is derived from the separation of powers between the three branches of government, as well as limited by it. Inherent powers are necessary for courts to properly function as a separate branch of government, **but cannot be used to offend the doctrine of separation of powers by usurping authority delegated to another branch of government**.

(Order on Defendants' Motions to Dismiss, entered 5/14/21, p. 15, App. p. 266 (quoting *Hoegh*, 632 N.W.2d at 888) (emphasis supplied by district court)); *see also Harrington v. Toshiba Mach. Co.*, 562 N.W.2d 190, 192 (Iowa 1997) ("[T]he tolling of a statute of limitations is purely statutory, and **we are not free to expand the concept to avoid hardships.**" (emphasis added)).

2. The Orders Issued by the Iowa Supreme Court Were Unconstitutionally Issued When the Iowa Supreme Court Had No Case or Controversy Before it

Under the U.S. Constitution, courts may use their judicial power to decide cases and controversies arising under the Constitution, state laws, and treaties. U.S. CONST. art. III, § 2. The federal "case and controversy" rule is similar to Iowa's test for standing and, therefore, the Iowa Supreme Court has found federal authority to be persuasive on the issue of standing. *See Alons v. Iowa Dist. Court for Woodbury Cty.*, 698 N.W.2d 858, 869 (Iowa 2005). The federal "case and controversy" requirement means that (1) there must be a plaintiff who has suffered or is threatened with actual injury traceable to a defendant, (2) the injury is likely to be redressed by a decision in the plaintiff's favor, and (3) the injury or threat of injury must exist throughout the litigation. *See Spencer v. Kemna*, 118 S.Ct. 978, 983 (1998). Thus, a plaintiff "must continue to have a personal stake in the outcome of the lawsuit" at all stages of the judicial proceedings. *Id.* (citation and quotations omitted).

Here, as the district court recognized, the Iowa Supreme Court's Supervisory Orders were issued as a response to the ongoing COVID-19 pandemic and not as part of any particular case or controversy before the Court. (*See* Order on Defendants' Motions to Dismiss, entered 5/14/21, p. 15, App. p. 266). Rather, the Iowa Supreme Court purported to have authority to

issue such orders as part of its administrative function over Iowa State Courts. As discussed above, the Iowa Supreme Court had no express or implied authority to issue these Orders, even during a pandemic, and its attempt to do so undermines the legislature's clear intent to eliminate stale claims under Iowa Code section 614.1. As such, these Supervisory Orders are unconstitutional and cannot be relied upon by the Plaintiffs to extend the statute of limitations applicable to their claims. Therefore, this action was properly dismissed.

3. The Orders Issued by the Iowa Supreme Court Unconstitutionally Deprive Defendant Hoff of the Right to Dispose of Stale Claims Without Due Process of Law

The Supervisory Orders issued by the Iowa Supreme Court also unconstitutionally deprive Defendant Hoff of the right to dispose of stale claims without due process of law. Under Article 1, section 1 of the Iowa Constitution, all individuals have inalienable rights, which include the right to enjoy and defend life and liberty; acquire, possess, and protect property; and pursue and obtain safety and happiness. IOWA CONST. art I, §1. Furthermore, Article 1, Section 9 of the Iowa Constitution provides that "no person shall be deprived of property without due process of law." IOWA CONST. art I, § 9.

There are two forms of due process: substantive and procedural. *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005), *superseded by statute on other*

grounds, 2009 Iowa Acts ch. 119, § 4 (codified at IOWA CODE § 692A.103 (Supp. 2009)). "The first, substantive due process, prevents the government from interfering with rights implicit in the concept of ordered liberty . . . . Its companion concept, procedural due process, acts as a constraint on government action that infringes upon an individual's liberty interest, such as the freedom from physical restraint." *Id.* (citations and quotations omitted). Substantive due process involves a two-stage inquiry: first, there must be a determination regarding "the nature of the individual right involved" – i.e., whether it involves a fundamental right or not. If a fundamental right is implicated, a court will engage in strict scrutiny analysis; if no fundamental right is implicated, the action at issue must simply pass the rational basis test. *Id.*

An individual claiming a violation of procedural due process must first show an impairment of a protected interest by government action. *See, e.g.*, *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 566 (Iowa 2019) (citing *State v. Russell*, 897 N.W.2d 717, 732—33 (Iowa 2017); *Seering*, 701 N.W.2d at 665). Once it has been established that there was an impairment of a protected interest (life, liberty, or property), "the next question is what procedural minima must be provided before the government may deprive the complaining party of the protected interest." *Behm*, 922 N.W.2d at 566 (citing

In re C.M., 652 N.W. 204, 212 (Iowa 2002); *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002)). Ordinarily, procedural due process would require, at minimum, notice and an opportunity to be heard. *Id.* (citing *Bowers*, 638 N.W.2d at 690—91).

a. Violation of Substantive Due Process

The Iowa Supreme Court addressed an analogous substantive due process issue in *Thorp v. Casey's General Stores, Inc.*, 446 N.W.2d 457 (Iowa 1989). In *Thorp*, the mother of a child who was killed by a drunk driver brought a dram shop action against various establishments and the state where the driver purchased a bottle of whiskey prior to the accident. *Thorp*, 446 N.W.2d at 457. At the time of the accident, Iowa Code section 123.92 provided a right of action against an establishment that *sold or gave* alcohol to an intoxicated person, or served such person to the point of intoxication. *Id.* at 459 ((quoting IOWA CODE § 123.92 (1985)). The district court dismissed the suit, concluding language in a 1986 amendment to the statute retroactively modified the plaintiff's burden to establishing the dram shop *both sold and served* beer or liquor to an intoxicated person. *Id.* at 459.

Ultimately, the Iowa Supreme Court reversed the district court's ruling, finding that the statutory amendment violated the plaintiff's due process rights because it took away a previously-existing cause of action without due process

of law. *Id.* at 462. The Court reasoned that "a statutory amendment that takes away a cause of action that previously existed and does not give a remedy where none or a different one existed previously is substantive, rather than merely remedial, legislation." *Id.* at 461 (citations and quotations omitted). Further, substantive law creates, defines, and regulates rights. *Id.* (quoting *Schmitt v. Jenkins Truck Lines, Inc.*, 260 Iowa 556, 149 N.W.2d 789 (1967)). Even remedial statutes may violate due process when applied retroactively to alter or remove a vested right, leaving a party without a substantial remedy. *Id.* at 462.

Thus, the Court concluded as follows:

> The retroactive application of the 1986 amendment deprived [the] plaintiff of all redress against such dramshops as Casey's which do not sell and serve beer. This, therefore, was a substantial reduction in the total remedies available to plaintiff . . . and as such deprived her of her vested cause of action without due process of law. 'It is well settled . . . that . . . it is not competent for the legislature to cut off all remedy and that the right to sue within the existing statute of limitations is property, which cannot be thus summarily destroyed.'

Id. (quoting *Thoeni v. City of Dubuque*, 115 Iowa 482, 484, 88 N.W. 967, 968 (1902) (emphasis added)).

Here, the Iowa Supreme Court's Supervisory Orders retroactively tolled all statutes of limitations for 76 days for cases in which the applicable

statute of limitations was set to run between March 17, 2020 and December 31, 2020. Thus, 76 days were effectively tacked on to the end of all statutes of limitations, ostensibly giving plaintiffs an additional 76 days to file a suit that would otherwise have been prohibited by Iowa law. *See generally* IOWA CODE § 614.1. These Supervisory Orders thus retroactively and prospectively removed a defendant's ability to file a Motion to Dismiss due to the expiration of an existing statute of limitations. In the case sub judice, Defendant Hoff would have been able to file a Motion to Dismiss Plaintiffs' claims against him after December 7, 2020, when the statute of limitations expired in accordance with Iowa Code section 614.1. The Supervisory Orders purport to take that substantive right away from Defendant Hoff, and thus clearly interfere with a property right, "which cannot be summarily destroyed." *See Thorp*, 446 N.W.2d at 462. Therefore, if the Supervisory Orders are to be found constitutional, the Iowa Supreme Court's actions must pass the rational basis test.

The rational basis test requires a court to consider "whether there is 'a reasonable fit between the government interest and the means utilized to advance that interest.'" *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010) (quoting *Seering*, 701 N.W.2d at 662). In other words, this test requires a government action to "serve a legitimate governmental interest,"

and "the means employed by the [government action] must bear a rational relationship to that interest." *See State v. Bell*, 572 N.W.2d 910, 911 (Iowa 1997). While this level of scrutiny is deferential to the government's judgment, "it is not a toothless standard of review". *Hensler*, 790 N.W.2d at 584.

Here, there was no rational basis for the Iowa Supreme Court's Supervisory Orders. The purported "government interest" for issuing these Orders was to "take measures to reduce the spread of the [Covid-19] virus." *In the Matter of Ongoing Provisions for Coronavirus/Covid-19 Impact on Court Services*, IOWA JUDICIAL BRANCH 1 (Apr. 2, 2020), https://www.iowacourts.gov/collections/485/files/1076/embedDocument/. Defendant Hoff does not dispute that this is a legitimate government interest. However, the means employed by the Iowa Supreme Court – specifically, tolling all statutes of limitations in civil cases – do not bear any rational relationship to that interest. *See Bell*, 572 N.W.2d at 911.

To wit, Iowa Rule of Electronic Procedure 16.302 requires electronic filing by "[a]ll attorneys authorized to practice law in Iowa, all attorneys admitted pro hac vice, and all self-represented persons . . . ." IOWA R. ELEC. P. 16.302(1) (2021). In addition, all such persons must register to use EDMS as provided in rule 16.304(1). *See id*; IOWA R. ELEC. P. 16.304(1) (2021).

There are some exceptions to the electronic filing requirements for certain categories of individuals and under certain circumstances. *See* IOWA R. ELEC. P. 16.302(2). However, Plaintiffs do not fall within the categories of people excused from electronic filing, and as such, are required to use electronic filing. *See id.*; § 16.302(1).

In light of the electronic filing requirements, there was no risk of exposure to COVID-19 through in-person contact, which would have prevented Plaintiffs from timely filing their Petition in this case. The same is true for all other plaintiffs. Nothing about the COVID-19 pandemic or the restrictions imposed by County Health officials prevented citizens or their attorneys from electronically commencing lawsuits. In fact, in the case *sub judice*, the Plaintiffs were in an even better position to timely file their Petition than most other plaintiffs, as they had already filed a Petition against Defendant Hoff and others, *based upon the same set of facts/circumstances*, months earlier, and had filed a dismissal of the First Action just weeks earlier. In addition, if any real concerns did exist, Plaintiffs could have timely filed their Petition and then asked the district court judge to stay the proceedings. Unlike issuing a blanket stay of all statutes of limitations, once a case is timely filed, it is well within the administrative authority of a district court to extend case deadlines due to pandemic-related impediments on a case-by-case basis.

See Chicoine v. Wellmark, Inc., 894 N.W.2d 454, 460 (Iowa 2017) (noting that "[t]he power to grant a stay is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 255, 256, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1946) (noting that a party may be required to submit to a delay in proceedings if the terms of a requested stay are moderate in extent and "not oppressive in [their] consequences if the public welfare or convenience will thereby be promoted").

b. Violation of Procedural Due Process

Even assuming the Iowa Supreme Court acting as a quasi-legislature is not a violation of substantive due process, it is certainly a violation of Defendant Hoff's procedural due process rights. As noted above, procedural due process requires, at minimum, notice and an opportunity to be heard. *Behm*, 922 N.W.2d at 566. The Iowa legislature had every opportunity to pass – as part of its own COVID-19 emergency response – a tolling provision such as the one set forth in the Supervisory Orders. Such an action would have given Defendant Hoff, the other Defendants in this matter, and any similarly-situated persons, notice of a potential change in the statutes of limitations, as well as the opportunity for their opinions to be heard related to such

prospective changes. Instead, here, the Iowa Supreme Court unilaterally, and without giving defendants notice or the opportunity to be heard, altered the statutes of limitations for all civil claims. This action deprived Defendant Hoff of substantive rights properly granted by the legislature. As such, the Supervisory Orders unconstitutionally deprived Defendant Hoff of procedural due process.

4. The Legislature's Inaction Implies that the Legislature Intended the Existing Statutes of Limitations for Civil Cases to Remain In Force Even In Light of the COVID-19 Pandemic

As Plaintiffs recognize, the legislature has previously acted by enacting Iowa Code section 614.1(2), which is the statute of limitations applicable to personal injury claims. *See* IOWA CODE § 614.1(2). (*See* Plaintiffs' Proof Brief, pp. 22—23). As Plaintiffs also recognize, the legislature has not enacted any new legislation relating to civil statutes of limitations during the COVID-19 pandemic or otherwise acted to toll the statute of limitations applicable here. (*See* Plaintiffs' Proof Brief, p. 23). Therefore, the legislature clearly intended that the existing two-year statute of limitations should remain in force for personal injury claims, and that "the date of filing shall determine whether an action has been commenced within the time allowed by [the applicable statute of limitations]. . . ." *See* IOWA CODE § 614.1(2) (providing a two-year statute of limitations for personal injury claims); IOWA R. CIV. P.

1.301(1). If the legislature wanted to toll the statute of limitations in light of the pandemic, it would have. In fact, the legislature has enacted various other laws in light of the unique issues presented by the COVID-19 pandemic, such as the "Covid-19 Response and Back to Business Limited Liability Act", which went into effect on July 1, 2020. *See* IOWA CODE § 686D.1 *et seq.* (July 1, 2020).

Plaintiffs suggest the General Assembly should have enacted legislation that made clear the "statute of limitations should be held firm and not tolled in response to the global Covid-19 pandemic. . . ." (*See* Plaintiffs' Proof Brief, p. 23) Yet, inconsistent with this premise, Plaintiffs also argue that because the legislature was not in session, it could not have so acted, which, somehow, made the Iowa Supreme Court's Supervisory Orders constitutional. (*See* Plaintiffs' Proof Brief, p. 23). In addition to being inconsistent, these arguments are illogical.

First, it is absurd to require the legislature to enact legislation stating the statutes of limitations – or any other existing laws for that matter – should remain in force. The General Assembly affirmatively repeals or amends statutes; it does not implicitly do so by failing to reaffirm them. *See, e.g.*, *Harden v. State*, 434 N.W.2d 881, 884 (Iowa 1989) ("[T]he legislature will make specific provision for tolling when it intends to do so."). In addition,

the Iowa Supreme Court does not have constitutional authority, under any circumstance, to write legislation or amend existing laws when the legislature is not in session. *See* IOWA CONST. art. III, § 1 (1st, "Three Separate Departments" (providing that "no person charged with the exercise of powers properly belonging to one [branch of the government] shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted"); *see also* IOWA CODE § 602.4202 (discussing the Iowa Supreme Court's role in rulemaking procedures and the required involvement of the legislative council). Plaintiffs have provided no authority in support of their proposition that the "Iowa Supreme Court's Supervisory Order was a necessary and proper exercise of the judicial branch's constitutional authority over Iowa's court system to do its part to slow the person-to-person transmission" of COVID-19. (*See* Plaintiff's Proof Brief, p. 23).

5. Other States' Orders Responding to Covid-19 are Distinguishable

Plaintiffs imply the fact 22 other states extended their limitations periods somehow lends credence to the Iowa Supreme Court's Supervisory Orders. (*See* Plaintiffs' Proof Brief, p. 24). Of course, the actions of other states are not binding precedent for Iowa courts, and they do not render the Supervisory Orders constitutional under Iowa's constitution and law. Further,

Plaintiffs ignore the fact that, unlike with the Supervisory Orders in question, most of the extensions in other states were provided *with* involvement of other government branches.

For instance, the Kansas Legislature *passed legislation* providing the chief justice authority to issue an order to extend or suspend any deadlines or time limitations established by statute when such action is necessary to secure the health and safety of court users. US LAW NETWORK, INC. *Statute of Limitations Quick Guide (During COVID-19 Pandemic*), US Law Network, Inc., 17—18 (December 2020), USLaw.org. (hereinafter "*Statute of Limitations Quick Guide*"). Similarly, the Minnesota State Legislature *passed legislation* suspending all civil court filing deadlines, statutes of limitations, and other time periods until 60 days after the end of the peacetime emergency, or February 15, 2021, whichever is earlier. *Statute of Limitations Quick Guide* at 26—27.

In other states, such as California, the governor issued *executive or administrative orders granting courts authority* to adopt emergency rules in response to the pandemic. *Statute of Limitations Quick Guide* at 5—9, 20. In another approach, such as that taken by Indiana, Kentucky, Maryland, and Michigan, courts extended their respective statutes of limitations as part of a *judicial emergency, declared after their Governor declared a state of*

emergency. *Statute of Limitations Quick Guide* at 14—15,18—19, 21—22, 24—25.

Yet another procedure, such as that utilized in Delaware, involved a *pre-existing statute* permitting the state's Supreme Court to extend statutes of limitations as part of a judicial emergency once the state's Governor declared a state of emergency. *Statute of Limitations Quick Guide*, 9—10. Similarly, the Texas legislature previously enacted legislation that expressly provided authority for the state's supreme court "to modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor." *See* TEX. GOV'T CODE ANN. § 22.0035 (2019). New York also had an existing statute, which allows the governor, by executive order, to temporarily suspend provisions of a statute in the case of a disaster emergency under certain circumstances. *See* N.Y. EXEC. LAW § 29-a(1) (McKinney 2020). Importantly, the governor's ability to make such executive orders in New York is "*[s]ubject to the state constitution, federal constitution and federal statutes and regulations*", and the New York statute expressly provides that "[t]he legislature may terminate by concurrent resolution executive orders issued under [the New York Statute] at any time. *Id*. at § 29-a(1), (4) (emphasis added). Thus, these statutes provide safeguards

that preserve the separation of powers between the different government branches.

In sum, as emphasized above, the statutes of limitations were extended in other states through varying vehicles that, unlike the Iowa Supreme Court's orders, may not violate the separation of powers doctrine. As detailed above, Iowa law is clear: the Iowa Supreme Court cannot alter legislative time deadlines through Supervisory Orders that are not made subject to approval by the legislature. Therefore, the district court correctly concluded that the Iowa Supreme Court's Supervisory Orders were unconstitutionally issued and could not be relied upon by the Plaintiffs to save their untimely claims.

6. Equity Requires Dismissal

Plaintiffs have not identified any legally cognizable equitable basis for not applying the statute of limitations as written. In fact, equity supports dismissal of Plaintiffs' Petition. To wit, Plaintiffs were not unable to bring their claim within the statute of limitations because of COVID-19. Rather, Plaintiff Reed Dickey had already brought the same claims now advanced within the limitation period in the First Action. Plaintiffs had no problem accessing the court when they raced to file their voluntary dismissal on

November 20, 2020,[3] in an obvious attempt to avoid the dismissal with prejudice the district court was required to order in the First Action, pursuant to Iowa Code section 140.147. These are not circumstances warranting equitable tolling of the limitation period. Rather, equity supports[4] application of the protections provided by the legislature through Iowa Code section 614.1.

II. THE PLAINTIFFS' CLAIMS SHOULD HAVE BEEN DISMISSED BECAUSE THEIR FAILURE TO FILE A CERTIFICATE OF MERIT AFFIDAVIT IN THE FIRST ACTION COMPELLED A DISMISSAL OF PLAINTIFFS' CLAIMS WITH PREJUDICE

Error preservation. On appeal, Iowa courts "may affirm a district court ruling on an alternative ground provided the ground was urged in that court". *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 432 (Iowa 2021). In

[3] Plaintiffs appear to argue they should be provided additional time to file their second petition because their current counsel was quarantined during the summer of 2020. (*See* Plaintiffs' Proof Brief, at p. 27). Plaintiffs had other counsel in place for Mr. Dickey during the summer of 2020. In fact, they had an attorney file the voluntary dismissal in the First Action for Mr. Dickey on November 20, 2020. (*See* Notice of Dismissal, filed in the First Action on 11/20/20, App. p. 341). Moreover, current counsels' quarantine during the summer of 2020 has no logical relation to the failure to meet the applicable limitation deadline of December 7, 2020, especially when Iowa rules *require* electronic filing through EDMS.

[4] In fact, as was discussed above, equitable considerations already preclude Plaintiffs from availing themselves of Iowa's savings statute because the First Action was dismissed for negligence in its prosecution. *See Furnald v. Hughes*, 804 N.W.2d 273 (Iowa 2011).

other words, the court may affirm a district court ruling on grounds that did not form the basis of the district court's opinion, so long as those grounds were raised before the district court and reiterated in the briefing on appeal. *See id.*

Therefore, even if the court on appeal disagrees with the theory upon which the district court dismissed an action, the court may ultimately find that the motion to dismiss was properly sustained based on alternative grounds presented to the district court. *See DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002) (quoting *Regent Ins. Co. v. Estes Co.*, 564 N.W.2d 846, 848 (Iowa 1997)). Here, Defendant Hoff urged in his Motion to Dismiss, filed with the district court, that the Plaintiffs' failure to file and serve a Certificate of Merit Affidavit on Defendant Hoff in the First Action, compelled a dismissal of the Plaintiffs' claims with prejudice. (*See* Defendant Jeremy Hoff's Pre-Answer Motion to Dismiss Under Iowa R. Civ. P. 1.421(1)(f), ¶ 9, App. p. 104; Defendant Jeremy Hoff's Brief In Support of his Motion to Dismiss, pp. 7—11, App. pp. 114—118). Therefore, error has been appropriately preserved on this issue. *See id.*

Scope of review. Iowa courts "review a ruling on a motion to dismiss, and a court's interpretation of a statute, for correction of errors at law." *State*

v. Hammock, 778 N.W.2d 209, 210—11 (Iowa Ct. App. 2009); *see also* IOWA R. APP. P. 6.907 (2021).

A. Plaintiff Reed Dickey failed to timely file and serve Defendant Hoff with a Certificate of Merit Affidavit in the First Action, as Required by Iowa Code Section 147.140

Plaintiff Reed Dickey's failure to timely serve a Certificate of Merit Affidavit in the First Action compelled a conclusion that Plaintiff Reed Dickey's Petition in the First Action *must* be dismissed, with prejudice. To wit, Iowa Code section 147.140(1)(a) provides as follows:

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

IOWA CODE § 147.140(1)(a) (2021). The parties may agree to extend the deadline for the Certificate of Merit Affidavit, or the court may, for good cause shown, grant an extension of the deadline if a motion is filed prior to the expiration of the time limits identified above. *See* IOWA CODE § 147.140(4). If the deadline is not extended by agreement or by court order, then a party's failure to substantially comply with the requirements of section

147.140(1)(a) "*shall result*, upon motion, *in dismissal with prejudice* of each cause of action to which expert testimony is necessary to establish a prima facie case." IOWA CODE § 147.140(6) (emphases added).

Defendant Hoff filed his Answer to Plaintiff Reed Dickey's Petition in the First Action on February 18, 2020. (*See* Defendant Hoff's Motion for Summary Judgment, filed in the First Action on 10/5/2020, App. pp. 318—19; Defendant Hoff's Memorandum of Authorities, filed in the First Action on 10/5/2020, p. 2, App. p. 321). On April 1, 2020, Defendant Hoff served discovery requests. (Defendant Hoff's Memorandum of Authorities, filed in the First Action on 10/5/2020, p. 3, App. p. 322). The answers to Defendant's interrogatories were not received until September 23, 2020, at which time Plaintiff finally identified an expert regarding the "wrestling referee standard of care." (*See id.*, App. p. 322). However, no report was provided from the expert regarding the applicable standard of care and any alleged violation thereof by Defendant Hoff. (*See id.*, App. p. 322).

Plaintiff Reed Dickey never served Defendant Hoff with a Certificate of Merit Affidavit in the First Action. (*See id.*, App. p. 322). In addition, Defendant Hoff never agreed to extend the deadline for Plaintiff to provide the Certificate of Merit Affidavit. (*See id.*, App. p. 322). Thus, Plaintiff Reed Dickey failed to substantially comply with Iowa Code section 147.140(1). *See*

§ 147.140(1). Therefore, as was established in Defendant Hoff's unresisted Motion for Summary Judgment, Defendant Hoff was entitled to judgment as a matter of law, and Plaintiff Reed Dickey's First Action was effectively dismissed, *with prejudice*, as is required by Iowa Code section 147.140(6). *See* IOWA CODE § 147.140(6) ("Failure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case."); *see also* IOWA R. CIV. P. 1.981(3) (2021) ("The judgment sought *shall be rendered forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (emphasis added)).[5]

1. Defendant Hoff Falls Within the Definition of a Health Care Provider for Purposes of the Certificate of Merit Affidavit Requirement

The term "health care provider", as used in section 147.140, means the same as is defined in Iowa Code section 147.136A. *See* IOWA CODE § 147.140(7). In pertinent part, Iowa Code section 147.136A defines "health

[5] Notably, the district court in the case *sub judice* granted Defendants Jennie Edmundson's and Emily Gorman's Pre-Answer Motion to Dismiss on these very grounds. (*See* Order Granting Defendants' Motions to Dismiss, pp. 5—9, App. pp. 256—60).

care provider" as "any . . . person or entity who is licensed, certified, *or otherwise authorized or permitted by the law of this state* to administer health care in the ordinary course of business or in the practice of a profession." IOWA CODE § 147.136A(1)(a) (2021) (emphasis added). In his First Action, Plaintiff Reed Dickey pursued an action against Defendant Hoff under Iowa Code section 280.13C for purportedly negligently allowing Plaintiff Reed Dickey to participate in a wrestling match after he exhibited signs, symptoms, and behaviors of a concussion or brain injury. Notably, Iowa Code section 280.13C imposes duties on contest officials surrounding concussions that include the administration of healthcare in the practice of their profession.

Specifically, contest officials are required to complete training every two years regarding the "evaluation, prevention, symptoms, risks, and long-term effects of concussions and brain injuries." IOWA CODE § 280.13C(3)(a) (2021). Section 280.13C further imposes a duty on contest officials to immediately remove a student from participation in an extracurricular interscholastic activity if the official "observes signs, symptoms, or behaviors consistent with a concussion or brain injury". § 280.13C(5)(a). Therefore, Iowa Code section 280.13C is a "law of this state", which authorizes or permits, if not *requires* contest officials to administer health care (i.e., identify and diagnose concussions or brain injuries) in the ordinary course of

officiating. *See id.* Consequently, Defendant Hoff falls within the definition of a "health care provider" in Iowa Code section 147.136A.

In sum, by founding his claim on Defendant Hoff's alleged failure to recognize his concussion symptoms and remove him from the subject wrestling match, Plaintiff Reed Dickey is necessarily averring Defendant Hoff, as a contest official, is "authorized or permitted . . . to administer health care in the ordinary course of [officiating]." *See* § 147.136A(1)(a). Therefore, Defendant Hoff is a "health care professional" for purposes of the Certificate of Merit Affidavit requirement in Iowa Code section 147.140.

Plaintiff Reed Dickey's counsel never served Defendant Hoff with a Certificate of Merit Affidavit in the First Action. In addition, Defendant Hoff never agreed to extend the deadline for Plaintiff to provide the Certificate of Merit Affidavit. *See* IOWA CODE § 147.140(4) (noting that the parties may agree to an extension of the time limits provided in section 147.140(1)(a)). Clearly, Plaintiff Reed Dickey failed to substantially comply with Iowa Code section 147.140(1). Therefore, Plaintiff Reed Dickey's action was effectively dismissed, with prejudice, upon the filing of Defendant Hoff's Motion for Summary Judgment in the First Action. *See* IOWA CODE § 147.140(6) ("Failure to substantially comply with subsection 1, *shall result*, upon motion,

in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case." (emphasis added)).

B. Plaintiff Reed Dickey Cannot Avoid Iowa Code Section 147.140(6) by Dismissing and Refiling his Petition

Knowing that the district court was required to dismiss Reed Dickey's claims with prejudice by operation of Iowa Code 147.140(6), Plaintiff attempted to obviate the statute by "beating the Court" to the dismissal, and claiming his dismissal was "without prejudice." To wit, rather than resist Defendant Hoff's Motion for Summary Judgment, Plaintiff Reed Dickey filed a dismissal, purportedly under Iowa Rule of Civil Procedure 1.943. Plaintiffs then filed the above-captioned lawsuit, seeking to "reset" the Certificate of Merit deadline. If Plaintiff Reed Dickey's action of filing a "voluntary" dismissal to avoid the mandatory dismissal under Iowa Code section 147.140(6) were to be accepted, Iowa Code section 147.140 would be rendered superfluous. Stated otherwise, Reed Dickey's attempt to invoke Iowa Rule of Civil Procedure 1.943 in the First Action was invalid, and this action was necessarily dismissed *with prejudice* by operation of Iowa Code section 147.140. *See* IOWA CODE § 147.140(6).

Notably, the above conclusion is supported by decisions of courts in other jurisdictions with statutory merit affidavit requirements similar to that provided in Iowa Code section 147.140. To wit, courts have ruled that a

plaintiff cannot avoid or extend the time period required to comply with the certificate of merit affidavit requirement by amending a complaint or filing a subsequent action. For example, in *Colon v. New York City Health & Hosp. Corp.*, the lower court dismissed a plaintiff's complaint in an original action due to the plaintiff's failure to comply with discovery demands or file a certificate of merit. On appeal, the New York Supreme Court, Appellate Division, found that the dismissal was on the merits and, therefore the lower court "properly dismissed the re-served complaint on the ground that it was *nothing more than an attempt by plaintiff to circumvent the court's original order and judgmen*t." *Colon v. NYC Health & Hosp. Corp.*, 564 N.Y.S.2d 130, 131 (N.Y. App. Div. 1990) (memorandum decision) (emphasis added); *see also O'Hara v. Randall, M.D., et al.*, 879 A.2d 240, 245 (Pa. Super. Ct. 2005) (holding that the filing of an amended complaint does not provide a plaintiff an extension of the 60-day deadline to file a certificate of merit).

Here, Plaintiff Reed Dickey did not timely file and serve a Certificate of Merit Affidavit on Defendant Hoff. Nor did he move for an extension of time to file the Certificate in the First Action. As a result, Reed Dickey's claims were to be dismissed with prejudice. *See* IOWA CODE § 147.140(6). Like the plaintiffs in *Colon* and *O'Hara*, Reed Dickey and his parents attempted to avoid the effect of the applicable Certificate of Merit statute. To

wit, Reed Dickey "voluntarily" dismissed his First Action just days before the district court in the First Action would have applied the statute and dismissed the case with prejudice, and he filed a new Petition just weeks later. As the Pennsylvania and New York courts found, to allow such conduct would circumvent the very purposes of the Certificate of Merit Affidavit deadline. *See Colon*, 564 N.Y.S.2d at 131; *O'Hara*, 879 A.2d at 245. As such, Reed Dickey's Petition in the First Action was effectively dismissed *with prejudice*, such that Plaintiffs'[6] refiled Petition must also be dismissed with prejudice. *See* IOWA CODE § 147.140(6).

III. PLAINTIFFS' CLAIMS SHOULD HAVE BEEN DISMISSED DUE TO THE DOCTRINE OF CLAIM PRECLUSION

Error preservation. Defendant Hoff urged that the Plaintiffs' claims should be dismissed due to the doctrine of claim preclusion as part of his Motion to Dismiss, filed with the district court. (*See* Defendant Jeremy Hoff's Pre-Answer Motion to Dismiss Under Iowa R. Civ. P. 1.421(1)(f), ¶ 10, App. p. 105; Defendant Jeremy Hoff's Brief In Support of his Motion to Dismiss, pp. 11—16, App. pp. 118—24). Thus, error has been appropriately preserved. *See DeVoss*, 648 N.W.2d at 61.

[6] As is discussed further below, the dismissal of Reed Dickey's claims in the First Action operates as to all Plaintiffs in the instant action due to the doctrine of claim preclusion.

Scope of review. Iowa courts "review a ruling on a motion to dismiss . . . for correction of errors at law." *State v. Hammock*, 778 N.W.2d 209, 210—11 (Iowa Ct. App. 2009); *see also* IOWA R. APP. P. 6.907 (2021).

Argument. Iowa courts largely rely on the Restatement (Second) of Judgments in determining whether a claim is barred pursuant to the doctrine of claim preclusion. *Villareal v. United Fire & Cas. Co.*, 873 N.W.2d 714, 719 (Iowa 2016). This Restatement, at section 24, provides as follows:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) JUDGMENTS § 24 (1982). Thus, a subsequent action should be precluded when there is "a substantial overlap" in witnesses and proof of the first action, and it may even be precluded when there is not a substantial overlap. *Id.* at cmt. b.

Furthermore, Iowa courts have found that "both parties *and their privies* are bound by and entitled to the benefits of claim preclusion." *Estate of Naeve ex rel. Naeve v. FBL Fin. Group, Inc.*, No. 18-0615, 2019 WL 2879936, at *3 (Iowa Ct. App. July 3, 2019) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979) ("Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."); *Shumaker v. Iowa Dep't of Transp.*, 541 N.W.2d 850, 852 (Iowa 1995) (noting the general rule is that claim preclusion extends to privies of a party)) (emphasis in original). Thus, claim preclusion operates to prevent parties and their privies from relitigating controversies that were already decided by a previous judgment. *Naeve*, 2019 WL 2879936, at *3. In addition, a claim may be barred by application of claim preclusion even if it was never actually litigated, "when the party against whom it is asserted had a full and fair opportunity to litigate the claim against a party or privy in a prior action." *Id.*

Under Iowa law, a privy is defined as "one who, after rendition of the judgment, has acquired an interest of the subject matter affected by the judgment through or under one of the parties". *Goolsby v. Derby et al.*, 189 N.W.2d 909, 914 (Iowa 1971). Importantly, under the Restatement (Second) of Judgments, section 48, claims by parents, relating to the personal injuries

of their child, may be precluded by the determination of issues in a prior action brought by the child:

> When a person with a family relationship to one suffering personal injury has a claim for loss to himself resulting from the injury, *the determination of issues in an action by the injured person to recover for his injuries is preclusive against the family member*, unless the judgment was based on a defense that is unavailable against the family member in the second action.

RESTATEMENT (SECOND) JUDGMENTS § 48(2) (1982) (emphasis added). The losses which may be precluded under these circumstances include "the expenses of medical care for a minor whose parent is legally or morally obligated to pay them, or empowered to pay them" and "loss or diminution of companionship between parent and child, or for fright or other mental distress suffered by a party to such a relationship upon witnessing an injury to the other". *Id.* at cmt. a.

As discussed above, the facts upon which Plaintiff Reed Dickey relied in support of the claims asserted in his First Action are *exactly the same* as those relied upon in the instant action, and the claims asserted are identical. Plaintiff Reed Dickey did not timely resist Defendant Hoff's Motion for Summary Judgment. Instead, he filed a dismissal of his claims on November 20, 2020 (well after the deadline for any resistance to the Motion). (*See* Notice of Dismissal of Petition Pursuant to Iowa R. Civ. P. 1.943, filed in the First

Action on 11/20/2020, App. p. 341). A dismissal under Rule 1.943 is generally considered to be a dismissal without prejudice under Iowa's Rules of Civil Procedure. However, as the district court correctly found, Plaintiffs cannot use this voluntary dismissal rule to obviate Iowa's Certificate of Merit requirement, such that Plaintiff Reed Dickey's dismissal was *with* prejudice. (*See* Order Granting Defendants' Motions to Dismiss, pp. 6—9, App. pp. 257—60).

In an apparent attempt to rectify the fatal errors made in Plaintiff Reed Dickey's First Action, Plaintiffs filed their Petition in the instant action just weeks after the First Action was dismissed. However, given that the First Action effectively resulted in a dismissal with prejudice against Plaintiff Reed Dickey, he should not now be allowed to relitigate the same claims that were asserted and decided against him in the First Action. The doctrine of claim preclusion should apply to preclude the instant action. *See, e.g.*, *Naeve*, 2019 WL 2879936, at *3 (noting that a claim may be barred by application of claim preclusion even if it was never actually litigated, "when the party against whom it is asserted had *a full and fair opportunity to litigate* the claim against a party or privy in a prior action" (emphasis added)). In addition, as Plaintiffs Andrea and Michael Dickey are Plaintiff Reed Dickey's parents, they are his privies under Iowa law, and the doctrine of claim preclusion similarly applies

to preclude their claims for damages relating to Plaintiff Reed Dickey's alleged injuries. *See, e.g.*, *Shumaker*, 541 N.W.2d at 852 (noting the general rule is that claim preclusion extends to privies of a party); *see also* RESTATEMENT (SECOND) JUDGMENTS § 48(2) (noting that "the determination of issues in an action by the injured person to recover for his injuries is preclusive against the family member" who has a claim for loss based upon that family member's injuries).

CONCLUSION

In sum, Plaintiffs have failed to state a claim upon which any relief may be granted against Defendant Hoff, and their Petition was appropriately dismissed by the district court. Plaintiffs' actions are time-barred by operation of the plain language of Iowa Code section 614.1, and Plaintiffs cannot rely on the unconstitutional Supervisory Orders issued by the Iowa Supreme Court to toll the statute of limitations applicable to their claims. Even assuming Plaintiffs are able to establish an error was made on this issue, the Court may uphold the district court's Order on the alternative grounds that (1) Plaintiff Reed Dickey's failure to timely file and serve a Certificate of Merit Affidavit in his First Action necessitated dismissal with prejudice of his claims against Defendant Hoff and (2) the dismissal of Plaintiff Reed Dickey's First Action has preclusive effect on both his claims and those of his parents in the instant

action. Therefore, Defendant Hoff respectfully requests the Court to uphold the district court's Order, granting Defendant Hoff's Motion to Dismiss, either on the grounds relied upon by the district court, or on any of the other grounds asserted in Defendant Hoff's Motion to Dismiss.

WHEREFORE, Defendant Hoff prays the Court enter an Order affirming the district court's Order, which dismissed the Plaintiffs' causes of action against him.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests to be heard orally upon submission of this appeal.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that she electronically filed the foregoing Final Appeal Brief on January 11, 2022, via EDMS. The undersigned further certifies that on January 11, 2022, the foregoing Final Appeal Brief was served via EDMS and email on all parties of record, as follows:

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

1. This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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