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IN THE SUPREME COURT OF IOWA

NO. 22-0495

THE ESTATE OF DEANNA DEE FAHRMANN, by Executor Jeffrey A. Fahrmann; DENNIS C. FAHRMANN, by and through his Power of Attorney, Jeffrey A. Fahrmann; JEFFREY A. FAHRMANN, individually; and AMY J. FAHRMANN, individually, Plaintiffs-Appellants,

vs.

ABCM CORPORATION, an Iowa Corporation; KATHY MEYER-ALLBEE, individually; and LINSEY HENRY, individually, Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR FRANKLIN COUNTY
THE HONORABLE GREGG R. ROSENBLADT
FRANKLIN CO. CASE NO. LACV501891

Defendants-Appellees, ABCM Corporation, an Iowa Corporation, Kathy Meyer-Allbee, and Linsey Henry's Brief

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TRICIA HOFFMAN-SIMANEK AT0003634
ROSS T. ANDREWS AT0013724
GRAHAM R. CARL AT0012246
SHUTTLEWORTH & INGERSOLL, P.L.C.
115 Third St., Ste. 500, P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461
E-MAIL: phs@shuttleworthlaw.com
rta@shuttleworthlaw.com
grc@shuttleworthlaw.com

ATTORNEYS FOR DEFENDANTS-APPELLEES ABCM CORPORATION, an Iowa Corporation, KATHY MEYER-ALLBEE, and LINSEY HENRY

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Statement of the Issues

I. Whether the district court erred in holding Plaintiffs' initial disclosures did not substantially comply with the certificate of merit requirement in Iowa Code Section 147.140.

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II. Whether the district court erred in dismissing Plaintiffs' claims with prejudice as required by Iowa Code Section 147.140(6).

Cases

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Matter of Est. of Thompson, 512 N.W.2d 560 (Iowa 1994)
McHugh v. Smith, 966 N.W.2d 286 (Iowa Ct. App. 2021)
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State v. Klawonn, 609 N.W.2d 515 (Iowa 2000)
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Iowa R. App. P. 6.903 (f), (g)(3)
Iowa R. App. P. 6.903(2)(g)(3)

Routing Statement

The supreme court should transfer this case to the court of appeals because it involves the application of existing legal principles. *See* Iowa R. App. P. 6.1101(1), (3). The primary issue is whether the district court erred in holding Plaintiffs' initial disclosures did not substantially comply with the certificate of merit requirements in Iowa Code Section 147.140. The substantial compliance standard is well developed. *See e.g. Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993); *Superior/Ideal, Inc. v. Bd. of Rev.*, 419 N.W.2d 405, 407 (Iowa 1988). Also, the Iowa Court of Appeals has addressed whether a plaintiff's disclosures substantially complied with the certificate of merit requirement. *See McHugh v. Smith*, 966 N.W.2d 286 (Iowa Ct. App. 2021); *Schmitt v. Floyd Valley Healthcare*, 2021 WL 3077022 (Iowa Ct. App. 2021) (Table).

Plaintiffs' second argument is that the district court erred because its enforcement of Section 147.140 was "severely prejudicial." This issue involves well-established legal principles of separation of powers and the role of prejudice or harshness in courts' application of statutes. Thus, it is also appropriate for transfer to the court of appeals. Iowa R. App. P. 6.1101(1), (3).

If the court of appeals were to reverse the district court's order, however, it would warrant further review. A reversal would conflict with existing certificate of merit cases and longstanding principles governing the role of courts in Iowa's constitutional system. *See* Iowa R. App. P. 6.1103(b)(1).

Introduction

Plaintiffs raise two issues on appeal. First, Plaintiffs argue their identification of Bruce Naughton, MD, ("Dr. Naughton") in their initial disclosures substantially complied with Iowa Code Section 147.140, Iowa's certificate of merit statute. Plaintiffs' initial disclosures did not substantially comply because they were not signed by Dr. Naughton, did not establish his qualifications, nor clearly include the required information about Plaintiffs' claims. Plaintiffs eventually served a single certificate of merit that did not substantially comply because it was late and did not address the Defendants individually.

Second, Plaintiffs argue that even if they did not substantially comply with Section 147.140, the district court should have ignored the plain language of Section 147.140(6) and declined to dismiss Plaintiffs' claims. Plaintiffs cite no legal authority for this argument so the Court should deem it waived. Plaintiffs' second argument also fails on its merits. Plaintiffs

identify no legal error by the district court. Also, under Iowa's constitutional separation of powers, the district court could not decline to enforce Section 147.140 as written because the result was harsh. Finally, Plaintiffs' arguments about the ultimate merits of their case and the relative prejudice are irrelevant under Section 147.140. The district court did not err, and the Court should affirm.

Statement of the Case/Statement of Facts

Given the procedural posture of this case, the relevant facts and prior proceedings overlap, so Defendants will address them together. Defendants accept Plaintiffs' allegations as true only for purposes of this appeal. Defendants will discuss additional facts below as necessary.

Defendant ABCM Corporation ("ABCM") operates a care facility, the Rehabilitation Center of Hampton. (App. 6, ¶ 15-16). Plaintiffs' Petition never explains who Defendants Kathy Meyer-Allbee ("Ms. Meyer-Allbee") and Lisa Henry ("Ms. Henry") (collectively, the "individual defendants") are, what their professions are, or what their relationship to ABCM was. (App. 5, ¶¶ 7-8). Deanna Dee Fahrmann was a resident at the Rehabilitation Center of Hampton. (App. 6, ¶ 16). The Plaintiffs are Ms. Fahrmann's estate, her husband, and her adult children. (App. 4-5, ¶¶ 1-5). Plaintiffs allege Ms. Fahrmann died from a fall while she was a resident at the Rehabilitation

Center of Hampton. (App. 6, ¶¶ 15, 18-19). Other than the addition of irrelevant adjectives, Plaintiffs' Statement of the Case adequately explains the content of the Petition. The parties do not dispute that Plaintiffs' claims all require expert testimony to establish a prima facie case, or that Section 147.140, applies to all of Plaintiffs' claims. (Plaintiffs' Proof Br., at 7).

Defendants filed their answer on July 19, 2021. (App. 16-23). Under Section 147.140(1), Plaintiffs' deadline to serve certificates of merit on each Defendant was September 17, 2021. On September 1, 2021, Plaintiffs served their initial disclosures. The initial disclosures identified Dr. Naughton as an expert witness. (App. 47, ¶ 4). Plaintiffs' initial disclosures did not expressly state Dr. Naughton was familiar with each Defendant's applicable standard of care, or whether he believed one or more of the Defendants breached their standard of care. (App. 47, ¶ 4). Plaintiffs did not serve separate versions of the initial disclosures on each Defendant. (App. 31-32). Only Plaintiffs' counsel, not Dr. Naughton, signed the initial disclosures. (App. 49). The initial disclosures did not discuss Dr. Naughton's licensure status, disciplinary history, or his practice areas. (App. 47, ¶ 4).

Plaintiffs did not serve Defendants with a certificate of merit affidavit on or before September 27, 2021, nor did Plaintiffs request an extension of their certificate of merit deadline. On October 28, 2021, Defendants moved

to dismiss Plaintiffs' claims under Section 147.140(6). (App. 38-40). Plaintiffs served Defendants a single certificate of merit affidavit on October 29, 2021, forty-two days after the certificate of merit deadline. (App. 44, ¶ 13; App. 50-52). Plaintiffs resisted the motion to dismiss. (App. 41-45). Plaintiffs argued Defendants waived the initial disclosure requirement by serving discovery requests, [1] and that Plaintiffs' disclosure of Dr. Naughton in their initial disclosures substantially complied with the certificate of merit requirement. (App. 41-45). The district court granted Defendants' motion and dismissed Plaintiffs' claims with prejudice. (App. 82-89).

Plaintiffs filed an Iowa Rule of Civil Procedure 1.904 Motion to Enlarge, Amend, and Reconsider January 11, 2022 Order Regarding Motion to Dismiss (the "Motion to Reconsider"). (App. 90-96). The Motion to Reconsider added new arguments about the definition of substantial compliance not included in Plaintiffs' resistance to Defendants' Motion to Dismiss. (App. 93-94, ¶¶ 11-15). Defendants resisted the Motion to Reconsider, and the Court denied it. (App. 101-108).

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[1] Plaintiffs' Statement of the Case briefly discusses the waiver issue (Pls.' Proof Br., at 7) but Plaintiffs did not include the waiver issue in their motion to reconsider, Combined Certificate, statement of the issues, or their arguments. Thus, Plaintiffs did not preserve this issue for appeal and it is not before the Court. Even if Plaintiffs preserved the issue, a defendant serving discovery does not waive the certificate of merit requirement. *See Butler v. Iyer, No. 21-0796, 2022 WL 1100275, at *5 (Iowa Ct. App. Apr. 13, 2022)* (Table) (citing *McHugh*, 966 N.W.2d at 291).

Argument

I. The district court correctly held Plaintiffs did not substantially comply with the certificate of merit requirement.

A. Standard of Review

Defendants agree the Court reviews rulings on motions to dismiss for the correction of errors at law. *Struck v. Mercy Health Servs.-Iowa Corp.*, No. 20-1228, 2022 WL 1194011, at *3 (Iowa Apr. 22, 2022). Motions to dismiss under Section 147.140(6), unlike motions under Iowa Rule of Civil Procedure 1.421, require the district court to consider facts outside the pleadings. *Butler v. Iyer*, No. 21-0796, 2022 WL 1100275, at *2 (Iowa Ct. App. Apr. 13, 2022) (Table), *application for further review pending*. The Court reviews factual findings for substantial evidence. *Id.*

B. Error Preservation

Plaintiffs only preserved error on the substantial compliance arguments in their resistance to Defendants' Motion to Dismiss. Plaintiffs never raised the good cause issue (Pls.' Proof Br., at 18-22) to the district court. This Court cannot consider an issue raised for the first time on appeal. *See Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 166 (Iowa 2009) (refusing to address an issue not raised in a party's resistance to the motion at issue).

Plaintiffs also failed to preserve the issue of whether their October 29, 2021 certificate of merit substantially complied with Section 147.140. (*See* Pls.' Proof Br., at 19). In granting Defendants' motion to dismiss, the district court held "[t]he plaintiffs' late-filed certificate of merit affidavit is also not in compliance as it was not specific to, directed to or served separately on each defendant." (App. 87). Plaintiffs did not address this holding in their brief, so Plaintiffs failed to preserve this issue and cannot raise it on reply. *See State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009) (appellate courts will not consider issues raised for the first time on reply).

Plaintiffs also did not preserve their argument about the definition of substantial compliance. Plaintiffs raised substantial compliance in their resistance to Defendants' Motion to Dismiss, but did not discuss its definition. (App. 43, ¶¶ 10-11). Plaintiffs' Motion to Reconsider added new arguments about the definition of substantial compliance. (App. 93-94, ¶¶ 13-15). Plaintiffs largely repeat those arguments here. (Pls.' Proof Br., at 15-16). Raising an issue for the first time in a Rule 1.904 motion to reconsider does not preserve error. *Winger Contracting Co. v. Cargill, Inc.*, 926

N.W.2d 526, 543 (Iowa 2019).[2] Thus, Plaintiffs failed to preserve error on their arguments about the definition of substantial compliance.

C. The district court did not err.

1. Plaintiffs' initial disclosures did not substantially comply with the certificate of merit requirement.

a. The definition of substantial compliance is well established.

Substantial compliance with Section 147.140 "means 'compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" *McHugh*, 966 N.W.2d at 288-89 (quoting *Hantsbarger*, 501 N.W.2d at 504). Even assuming Plaintiffs preserved their arguments, the cases Plaintiffs cite do not alter the definition of substantial compliance the Court of Appeals has applied to Section 147.140.

Plaintiffs argue the Iowa Supreme Court approved a different definition of substantial compliance in *Hoekstra v. Farm Bureau Mutual Insurance Co.*, 382 N.W.2d 100 (Iowa 1986). (Pls.' Proof Br., at 15). The court did not hold the definition of substantial compliance quoted by Plaintiffs was correct. *Id.* at 107. Instead, the Court held the defendant failed

[2] *See also In re Marriage of Santee*, 952 N.W.2d 885 (Iowa Ct. App. 2020) ("Parties cannot raise an issue for the first time in a motion pursuant to rule 1.904(2), and doing so does not preserve error on that issue."); *Mills v. Robinson*, No. 08-0739, 2009 WL 2951479, at *3 (Iowa Ct. App. Sept. 2, 2009) ("A motion pursuant to rule 1.904(2) is not properly used as a method to introduce a new issue not previously raised before the court.").

to preserve error as to the language of the substantial compliance instruction. *Id.* The court never opined as to whether the instruction was a correct statement of law. *Id.*

Plaintiffs' comparison between substantial compliance and substantial performance is unpersuasive. (Pls.' Proof Br., at 15). In assessing substantial performance, courts consider whether omissions or deviations from the contract were intentional or done in bad faith, and whether money damages can remedy the defects in performance. *Clark v. Rodish*, 662 N.W.2d 375, at *2 (Iowa Ct. App. 2003) (Table). Substantial compliance, on the other hand, does not consider the actor's intent or the available damages, and instead focuses on the legislature's objectives in passing the statute. *McHugh*, 966 N.W.2d at 288-89. Plaintiffs offer no authority or reasoned argument to connect these two unrelated concepts.

Finally, Plaintiffs' reliance on *Putman v. Walther,* No. 20-0195, 2022 WL 1273428 (Iowa Apr. 29, 2022), is misplaced. In *Putman,* the issue was whether the district court incorrectly excluded evidence from its summary judgment analysis under Iowa Rule of Civil Procedure 1.517(3)(a). *Id.* at *6. Rule 1.517(3)(a) provides that improperly disclosed evidence should be excluded "unless the failure [to disclose] was substantially justified or is harmless." Iowa R. Civ. P. 1.517(3)(a). The court held, in light of the other

evidence produced, the plaintiff's failure to disclose her expert's opinions in a Rule 1.500(2) disclosure was harmless. *Putman*, 2022 WL 1273428, at *6.

Section 147.140, on the other hand, does not include a "harmlessness" exception. A defendant need not show prejudice to obtain dismissal under Section 147.140(6). *See McHugh*, 966 N.W.2d at 291 ("Nor can we read in a requirement for defendants to show they were prejudiced by the delay. The statute permits dismissal upon defendant's motion alleging plaintiff's inaction."); *Butler v. Iyer*, No. 21-0796, 2022 WL 1100275, at *6 (Iowa Ct. App. Apr. 13, 2022) (rejecting a "no harm, no foul" argument against dismissal under Section 147.140(6)). Thus, the *Putm*an case is irrelevant to the issue before the Court.

b. The reasonable objectives of Section 147.140

The Court must determine the reasonable objectives of Section 147.140 in light of a related and incorporated statute, Iowa Code Section 668.11. *See Struck*, 2022 WL 1194011, at *5 (noting Section 147.140 "incorporates by reference, and works in tandem with, the expert disclosure requirements in Iowa Code section 668.11"). Section 668.11 requires plaintiffs in professional liability cases to disclose expert witnesses within one hundred eighty days of the defendant's answer. *Id.* (citing Iowa Code § 668.11). Section 668.11 requires plaintiffs prepare their proof early in

litigation so professionals do not spend time and effort defending frivolous cases that drive up the cost and reduce the availability of medical services. *Id.* (citing *Hantsbarger*, 501 N.W.2d at 504).

Section 147.140 requires that the plaintiff provide, within sixty days of each defendant's answer, an affidavit signed by a qualified expert which includes "[t]he expert witness's statement of familiarity with the applicable standard of care" and '[t]he expert witness's statement that the standard of care was breached by the health care provider named in the petition." Iowa Code § 147.140(1). Section 147.140 serves the same goals as Section 668.11, but does so more aggressively by requiring the certificate of merit much earlier and providing for dismissal with prejudice instead of exclusion of a witness as a remedy. *Struck*, 2022 WL 1194011.[3]

"By enacting section 147.140, layered over the existing mandates of section 668.11, the legislature placed higher demands on medical malpractice plaintiffs. [Section 147.140] imposes two extra burdens: (1) provide verified information about the medical malpractice allegations to the defendants *and* (2) do so earlier in the litigation." *McHugh*, 966 N.W.2d at

[3] *See also Struck*, 2022 WL 1194011, at *6 ("[T]he certificate of merit requirement serves to identify and weed non-meritorious malpractice claims from the judicial system efficiently and promptly" which "reduce[s] the cost of medical malpractice litigation and medical malpractice insurance premiums[.]") (citations and internal quotation marks omitted).

290. To substantially comply, the plaintiff's disclosures must "satisf[y] the essence of those obligations." *Id.* The disclosures must also "relieve defendants of the burden to ferret out the details of plaintiffs' malpractice claims. *Id.* at 291.

Plaintiffs' initial disclosures did not substantially comply with Section 147.140. Plaintiffs' initial disclosures were not verified by Dr. Naughton, did not establish Dr. Naughton's qualifications, and did not expressly state Dr. Naughton was familiar with each Defendant's standard of care or that he believed each Defendant breached its respective standard. Each of these omissions alone is sufficient to support the district court's finding that Plaintiffs failed to substantially comply, but taken together it is apparent that the district court did not err.

c. Plaintiffs did not substantially comply because Dr. Naughton did not verify their initial disclosures.

One of the objectives of Section 147.140 is to require the plaintiff to provide verified information about the plaintiff's medical malpractice allegations to the defendant. *McHugh*, 966 N.W.2d at 290.[4] Specifically, the

[4] A certificate of merit must be in the form of an affidavit. Iowa Code § 147.140(1). Affidavits must be either executed under oath or signed with the statement "I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct." Iowa Code §§ 622.1, 622.85; Iowa R. Civ. P. 1.413(4).

information must be in the form of a signed affidavit from a qualified expert. Iowa Code § 147.140(1)(a)-(b). Here, Plaintiffs' counsel, not Dr. Naughton, signed Plaintiffs' initial disclosures. This does not substantially comply with the expert verification requirement, so Plaintiffs did not substantially comply with Section 147.140.

Attorneys are, by and large, laypeople when it comes to medical issues. *See* Iowa R. Evid. 5.702 (setting forth general requirements for expert testimony); Iowa Code § 147.139 (setting forth requirements to provide standard of care testimony in medical negligence cases). A lay attorney's signature on a certificate of merit (or allegedly equivalent disclosure) does not satisfy the essence of the verified information requirement. To the contrary, if a lay attorney could sign the certificate of merit, Section 147.140 "would hold no meaning." *McHugh*, 966 N.W.2d at 291.

Many expert disclosure rules require the expert, not the attorney, to sign the disclosure. *See* Iowa R. Civ. P. 1.500(2)(b); Fed. R. Civ. P. 26(a)(2)(B); *see also* Iowa R. Civ. P. 1.508(1)(a)(3) (2013). Consistent with these rules, Section 147.140 requires a qualified expert to sign the certificate of merit under oath. The expert's signature ensures the statements in the certificate of merit are "the expert's considered analysis of facts and statement of opinions applying the expert's special education, training and

experience" rather than the opinion of the attorney. *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 943 (E.D. Mich. 2014) (quoting *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 615-16) (D.N.J.1989)). Plaintiffs' counsel's signature did not provide the guarantee expert analysis the legislature required when it imposed the expert signature requirement. Thus, Plaintiffs' initial disclosures did not substantially comply with Section 147.140.

d. Plaintiffs' proposed application of Section 147.140 improperly renders it superfluous.

When courts construe a statute, they seek to harmonize it with other statutes on the same subject matter. *Freedom Fin. Bank v. Est. of Boesen*, 805 N.W.2d 802, 811 (Iowa 2011). Courts must presume the legislature intended the entire statute to be effective, and no portion of the statute is superfluous or meaningless. *See* Iowa Code § 4.4; *Little v. Davis*, No. 21-0953, 2022 WL 1434657, at *4 (Iowa May 6, 2022). Courts avoid construing statutes in a manner that makes them easy to circumvent. *See Roth v. Evangelical Lutheran Good Samaritan Soc.*, 886 N.W.2d 601, 614 (Iowa 2016).

When an attorney signs a petition the attorney certifies, "that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry," the claims have merit. Iowa R. Civ. P. 1.413(1).

Allowing an attorney to sign the certificate of merit renders it superfluous. The certificate would essentially provide no further guarantees about the merits of the case beyond those already included in the petition. Such a construction would undermine the legislature's reasonable objective of requiring plaintiffs to provide verified information about their claims *in addition* to the information in the petition.

e. Plaintiffs did not substantially comply because their initial disclosures did not establish Dr. Naughton's qualifications.[5]

Section 147.140 requires the expert signing the certificate of merit affidavit to be qualified under Section 147.139. Iowa Code § 147.140(1)(a). The expert qualification requirement is fundamental to the objectives of Section 147.140 because "[i]f allegations from a layperson could replace the medical expert's affidavit, [Section 147.140] would hold no meaning." *McHugh*, 966 N.W.2d at 290-91; *see also id.* at 289-90 (noting the legislature's purpose was to allow for dismissal "if a *qualified* expert does

[5] Plaintiffs' representation that "[t]here is no disagreement that Dr. Naughton was properly identified as an expert witness in compliance with Iowa Code § 147.140(1)(a)" has no support in the record. (Pls.' Proof Br., at 17-18). Section II of Defendants' resistance to Plaintiffs' Motion to Reconsider is entitled "Plaintiffs' initial disclosures identifying Dr. Bruce Naughton as an expert witness do not substantially comply with Iowa Code § 147.140." (App. 102). Among other reasons, Defendants argued that Plaintiffs' did not properly identify Dr. Naughton because their initial disclosures did not include enough information to establish that he was qualified to opine as to Defendants' respective standards of care. (App. 103, ¶ 2).

not certify that the defendant breached the standard of care." (emphasis added)).

In relevant part, Section 147.139 requires that a standard of care expert meet the following criteria:

1. The person is licensed to practice in the same or a substantially similar field as the defendant, is in good standing in each state of licensure, and in the five years preceding the act or omission alleged to be negligent, has not had a license in any state revoked or suspended.

2. In the five years preceding the act or omission alleged to be negligent, the person actively practiced in the same or a substantially similar field as the defendant or was a qualified instructor at an accredited university in the same field as the defendant.

Iowa Code § 147.139(1)-(2).

It is not enough that the expert be actually qualified, the certificate of merit must establish the expert's qualifications. Under Section 668.11, identifying an expert as "Dr." did not sufficiently disclose the expert's qualifications because it "require[d] defendant to spend further time and effort to obtain" the expert's qualifications. *Hantsbarger*, 501 N.W.2d at 504. "To an even greater degree than section 668.11, section 147.140 seeks to relieve defendants of the burden to ferret out the details of plaintiffs' malpractice claims." *McHugh*, 966 N.W.2d at 291. Thus, a certificate of merit must demonstrate the affiant's qualifications without requiring any additional inquiry from the defendant.

Plaintiffs' initial disclosures did not establish Dr. Naughton's qualifications to opine about Defendants' standards of care.[6] Plaintiffs' disclosures identify Dr. Naughton as a medical doctor, but do not state whether Dr. Naughton's license is in good standing, or whether he had his license revoked or suspended in the preceding five years. (App 47, ¶ 4); Iowa Code § 147.139(1). The initial disclosures also do not establish whether Dr. Naughton is licensed to practice, actively practices, or teaches in the same field as one or more of the Defendants. (App. 47, ¶ 4); Iowa Code § 147.139(1)-(2). The fact that Dr. Naughton is a medical doctor does not automatically mean he is qualified to testify about the standard of care for health care professionals, like Ms. Meyer-Allbee or Ms. Henry. *See Est. of Llewellyn ex rel. Johnson v. Genesis Med. Ctr.*, 2004 WL 2579741, at *3 (Iowa Ct. App. 2004) (Table) (affirming ruling that cardiologist was not qualified to opine as to a nurse's standard of care). Plaintiffs' initial disclosures did not substantially comply with Section 147.140 because they did not relieve Defendants of the burden to ferret out Dr. Naughton's qualifications.

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[6] Any argument that Defendants' counsel should have known Dr. Naughton's qualifications from other cases is improper because it relies on information outside the record. *See Hantsbarger,* 501 N.W.2d 501, 504 (Iowa 1993) ("While plaintiffs argue that the economist is well-known, this is a matter outside the record.").

Plaintiffs may argue that Section 147.140 does not require the plaintiff to disclose the expert's qualifications. This argument fails for two reasons. First, if the certificate of merit does not establish the expert's qualifications, then the defendant cannot immediately file a motion to dismiss arguing the expert is not properly qualified. Instead, the defendant would have to ferret out the expert's qualifications in discovery, which would delay a motion to dismiss for weeks or months after the certificate of merit deadline. Section 147.140's objectives include allowing defendants to dispose of cases *early* in the litigation process and relieving defendants of the burden to ferret out details of the merits of the plaintiff's case. *See Struck*, 2022 WL 1194011, at *6; *McHugh*, 966 N.W.2d at 219. Forcing a defendant to delay a motion to dismiss and engage in discovery to determine the expert's qualifications undermines both of these objectives.

Second, given Plaintiffs' own exhibits, Plaintiffs cannot credibly argue a certificate of merit need not establish the expert's qualifications. Plaintiffs attached two certificates of merit to their motion to reconsider as examples of conforming certificates. (App. 95, ¶ 17; App. 97-100). Both of these certificates identified the affiants' state of licensure, practice areas, and lack of professional discipline, i.e. all of the information required to establish the expert's qualification under Section 147.139. (App. 97, ¶¶ 1-4;

App. 99, ¶¶ 1-3). This emphasizes that any reasonable reading of Section 147.140 requires the affiant to establish their qualifications under Section 147.139.

f. Plaintiffs' did not substantially comply because they did not clearly provide the required information.

A certificate of merit must include "[t]he expert witness's statement of familiarity with the applicable standard of care" and "[t]he expert witness's statement that the standard of care was breached by the health care provider named in the petition." Iowa Code § 147.140(1)(b). The plaintiff must serve a separate certificate of merit on each defendant. Iowa Code § 147.140(1)(c).

Plaintiffs' initial disclosures do not explicitly state Dr. Naughton is familiar with each Defendant's standard of care. The disclosures state "Dr. Naughton will provide expert testimony and opinions as to . . . the appropriate standard of care for Mrs. Fahrmann's care and treatment while a resident of the defendant entity[.]" (App. 47, ¶ 4). The fact that an expert is willing to testify to an issue is not a guarantee that the expert is sufficiently familiar with it. *See e.g. Quad City Bank & Tr. v. Jim Kircher & Assocs., P.C.*, 804 N.W.2d 83, 93–94 (Iowa 2011) (affirming exclusion of proposed expert testimony because the expert was not sufficiently familiar with the applicable standards).

Even if Plaintiffs' disclosures showed Dr. Naughton was familiar with a standard of care, they do not establish which standard of care. The initial disclosures reference the standard of care while Mrs. Fahrmann was "a resident of the defendant entity[.]" (App. 47, ¶ 4). This does not clarify whether Dr. Naughton would testify about the standard of care provided *by* the defendant entity, ABCM, by the individual Defendants while Mrs. Fahrmann was a resident at ABCM's facility, or both. *McHugh*, 966 N.W.2d at 290. Plaintiffs' failure to serve separate certificates of merit on each Defendant exacerbated this lack of clarity.

Plaintiffs' initial disclosures also do not state Dr. Naughton will testify any Defendant breached the applicable standard of care. The initial disclosures state Dr. Naughton will testify to "the violations of any applicable rules, standards, or obligations of the defendant entity[.]" (App. 47, ¶ 4). Plaintiffs' use of the terms "any" and "or" imply it is possible that there were no such violations. Also, Plaintiffs' use of "standards" when Plaintiffs previously used the phrase "standard of care" makes it unclear if Plaintiffs meant for "standard" and "standard of care" to have different meanings. Further, Plaintiffs' initial disclosures are silent as to any violations of any rule, standard, or obligation by the individual defendants.

(*See* App. 47, ¶ 4) (discussing alleged violations "by the defendant entity" not by the individual defendants).

Plaintiffs argue Defendants could have inferred that Dr. Naughton was familiar with the standard of care and would testify that Defendants breached it. (Pls.' Proof Br., at 17-18). This is not substantial compliance. One purpose of Section 147.140 is to "relieve defendants of the burden to ferret out the details of plaintiffs' malpractice claims." *McHugh*, 966 N.W.2d at 290. The legislature placed the burden on Plaintiffs to provide specific information in a manner that required no further work from Defendants. Plaintiffs failed this simple task. Thus, they did not substantially comply with Section 147.140.

g. Plaintiffs' numerous failures to comply with the certificate of merit requirement undermined the reasonable objectives of the statute.

Plaintiffs' initial disclosures did not satisfy the essence of Plaintiffs' obligations under Section 147.140. The legislature placed the burden on Plaintiffs to provide specific information, verified by a qualified expert, about their allegations, and relieved Defendants of the burden to ferret out the details of Plaintiffs' claims. *See McHugh*, 966 N.W.2d at 290-91. Plaintiffs failed to meet their burden. Plaintiffs' initial disclosures used vague and convoluted language instead of the clear statements about the

standard of care and breach that Section 147.140 requires. Dr. Naughton did not verify Plaintiffs' initial disclosures, and even if he did, the disclosures did not establish he was qualified to offer the opinions referenced therein.

This is not a case of a minor or technical deviation from the certificate of merit requirements. Plaintiffs' initial disclosures failed to comply with every substantive aspect of Section 147.140, and thus frustrated its reasonable objectives. The district court did not err in dismissing Plaintiffs' claims with prejudice.

2. Plaintiffs' certificate of merit did not substantially comply with the certificate of merit requirement.

Plaintiffs served Defendants a single certificate of merit on October 29, 2021. This certificate of merit did not substantially comply with Section 147.140 in two respects. First, it was forty-two days late, which did not substantially comply with the sixty-day certificate of merit deadline. Second, Plaintiffs only served a single certificate of merit instead of separate certificates on each defendant.

a. Plaintiffs did not substantially comply because their certificate of merit was forty-two days late.

The timing of a certificate of merit is material to its purpose. *McHugh*, 966 N.W.2d at 291. Courts have held a certificate of merit does not substantially comply with the sixty-day deadline if it is more than sixteen

days late. *See Morrow v. United States*, No. 21-CV-1003-MAR, 2021 WL 4347682, at *5 (N.D. Iowa July 28, 2021) (certificate of merit served sixteen days late did not substantially comply); *see also Butler*, 2022 WL 1100275, at *6 (affirming dismissal because plaintiff's certificate of merit was eighteen days late). Plaintiffs' certificate of merit deadline was September 17, 2021. Plaintiffs served their certificate of merit on October 29, 2021, forty-two days after the deadline. This was more than double the delay other courts have found did not substantially comply. Thus, Plaintiffs' October 29, 2021 certificate of merit did not substantially comply with Section 147.140.

b. Plaintiffs did not substantially comply because they only served a single certificate of merit.

Section 147.140 requires plaintiffs to serve separate certificates of merit on each defendant, and each separate certificate must state that specific defendant breached its standard of care. Iowa Code § 147.140(1)(b)-(c). After Defendants filed their motion to dismiss, Plaintiffs served a single certificate of merit signed by Dr. Naughton stating he was familiar with "the applicable standards of care for the treatment and care of individuals in a nursing facility in the State of Iowa" and that "the Defendants breached the requisite standards of care." (App. 50-51, ¶¶ 2-3). The letter attached to the certificate of merit similarly did not distinguish between the three Defendants. (App. 52).

The district court correctly held Plaintiffs' single certificate of merit did not substantially comply with Section 147.140 because it "was not specific to, directed to or served separately on each defendant." (App. 87). Plaintiffs have not argued this ruling was incorrect, and thus waived the issue. Regardless, the district court's decision was not an error of law. Certificates of merit must provide verified information that "relieve[s] defendants of the burden to ferret out the details of plaintiffs' malpractice claims." *McHugh*, 966 N.W.2d at 291. By addressing all the Defendants in a single certificate, Plaintiffs failed to provide the requisite clarity about their allegations. Thus, Plaintiffs' certificate of merit failed to comply with Section 147.140.

3. Good cause does not excuse Plaintiffs' failure to substantially comply with the certificate of merit requirement.

Even assuming Plaintiffs preserved their good cause argument (Pls.' Proof Br., at 18-22), the Court should reject it for three reasons. First, Plaintiffs' good cause argument ignores the distinction between the substantial compliance and good cause standards. Second, good cause standard cannot apply because it considers the prejudice which is not relevant to a Section 147.140(6) motion to dismiss. Third, even if the Court

applies the good cause standard, there is no good cause to excuse Plaintiffs' lack of substantial compliance with the certificate of merit requirement.

a. Good cause is separate from substantial compliance and does not apply here.

The issue before the Court is whether the district court erred in finding Plaintiffs did not substantially comply with the certificate of merit requirement. Plaintiffs attempt to blend the issue of "good cause" into the substantial compliance analysis. (*See* Pl.'s Proof Br., at 18-19). This argument misconstrues *Hantsbarger v. Coffin*, 501 N.W.2d 501 (Iowa 1994), and ignores the plain language of Section 147.140.

In *Hantsbarger*, the Iowa Supreme Court made clear that "substantial compliance" and "good cause" are separate issues. The court divided its opinion into two sections, "I. Statutory compliance" and "II. Good Cause." *Hantsbarger*, 501 N.W.2d at 503, 505. In Section I, the court held the plaintiffs' identification of their three experts as "Dr." did not substantially comply with Section 668.11(1) because it required the defendant to expend further time and effort to determine the expert's qualifications and reasons for testifying. *Id.* at 504-05.

In Section II, the court considered whether there was "good cause" under Section 668.11(2)[7] to allow the plaintiffs' untimely-disclosed experts to testify. *Id.* at 505. The Court considered 1) the seriousness of the plaintiffs' deviation from the Section 668.11 deadline; 2) the prejudice to the defendant; and 3) defense counsel's actions. *Id.* at 505-06. The Court's good cause analysis did not change its holding that the plaintiffs failed to substantially comply. Instead, the court applied the express "good cause" language in Section 668.11(2), excused the plaintiffs' failure to substantially comply, and allowed their experts to testify. *Id.* As a matter of law, substantial compliance and good cause are separate and distinct legal issues. Unlike *Hantsbarger*, the only issue before the Court is substantial compliance, so Plaintiffs' good cause arguments are irrelevant.

Plaintiffs' good cause argument also ignores the language of Section 147.140. Section 147.140 includes both the "substantial compliance" and "good cause" standards, but applies them to different issues. The substantial compliance standard applies to motions to dismiss for failure to serve a proper certificate of merit. *See* Iowa Code § 147.140(6) ("Failure to substantially comply with subsection 1 shall result, upon motion, in

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[7] Section 668.11(2) states, "If a party fails to disclose an expert pursuant to subsection 1 or does not make the expert available for discovery, the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown."

dismissal with prejudice[.]”). The good cause standard, on the other hand, only applies to motions to extend the certificate of merit deadline. *See* Iowa Code § 147.140(4) (“[T]he court for good cause shown and in response to a motion filed prior to the expiration of the time limits specified in subsection 1 may provide for extensions of the time limits.”).

The Court must give effect to the legislature’s intent as evidenced by the words it used. *State v. Harrison*, 846 N.W.2d 362, 367 (Iowa 2014). The legislature expressly applied the “substantial compliance” standard to motions to dismiss. *See* Iowa Code § 147.140(6). The legislature’s use of “substantially comply” in Subsection 6, coupled with the separate application of the “good cause” standard in Subsection 4, shows the legislature did not intend the good cause standard to apply to motions to dismiss. *See Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016) (“It is an established rule of statutory construction that ‘legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.’” (quoting *Marcus v. Young,* 538 N.W.2d 285, 289 (Iowa 1995)). The court cannot rewrite Subsection 6 to apply both the substantial compliance and good cause standards to Defendants’ motion to dismiss. *See Matter of Est. of Thompson*, 512 N.W.2d 560, 564 (Iowa 1994).

Section 147.140 expressly applies a substantial compliance standard to motions to dismiss, and a good cause standard to motions to extend the certificate of merit deadline. Iowa Code § 147.140(4), (6). The Court must construe the legislature's express application of the substantial compliance standard to motions to dismiss to the exclusion of the good cause standard. The district court correctly applied the substantial compliance standard in ruling on Defendants' motion to dismiss, and Plaintiffs never moved to extend their certificate of merit deadline. Thus, Plaintiffs' good cause analysis is irrelevant to this appeal, and the Court should affirm.

b. Good cause cannot apply because prejudice is irrelevant to motions to dismiss under Section 147.140(6).

Plaintiffs' good cause argument relies in part on the alleged lack of prejudice to Defendants. (Pls.' Proof Br., at 20). Prejudice is irrelevant here. Section 147.140(6) does not expressly require prejudice before dismissal, and the Court cannot "read in a requirement for defendants to show they were prejudiced[.]" *McHugh,* 966 N.W.2d at 291. The *only* issue in a motion to dismiss Section 147.140(6) is "whether [the plaintiff's] conduct frustrated the reasonable objectives of the statute[,]" i.e. whether the plaintiff substantially complied. *Id.* (citation and internal quotation marks omitted). The Court of Appeals recently reaffirmed this proposition by rejecting a "no

harm no foul" argument by a plaintiff appealing dismissal under Section 147.140(6). *Butler*, 2022 WL 1100275, at *6 (citing *McHugh*, 966 N.W.2d at 289).

Prejudice is a factor in a good cause analysis but is irrelevant to whether dismissal under Section 147.140(6) is appropriate. The issue before the Court is whether the district court erred in dismissing Plaintiffs' claims under Section 147.140(6). Thus, Plaintiffs' good cause argument cannot be relevant to the issue before the Court.

c. If the Court addresses good cause, the district court did not err in finding no good cause.

The Court should not reach this issue because Plaintiffs failed to preserve it, and because good cause is irrelevant to whether the district court erred in dismissing Plaintiffs' claims. If the Court reaches this issue, however, it should find there was no good cause to excuse Plaintiffs' lack of substantial compliance with the certificate of merit requirement for two reasons. First, Plaintiffs failed to establish any factual basis for their failure to substantially comply. Second, under the relevant factors the district court did not err in dismissing Plaintiffs' claims.

i. Plaintiffs provide no basis for their failure to comply with the certificate of merit requirement.

"[G]ood cause . . . must be more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect." *Thomas v. Fellows*, 456 N.W.2d 170, 172 (Iowa 1990) (quoting *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989)). The party claiming good cause must "show affirmatively" that it intended to comply but "because of some misunderstanding, accident, mistake or excusable neglect failed to do so." *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998) (quoting *Donovan*, 445 N.W.2d at 766). "Excusable neglect . . . is not the same as neglect, carelessness, or inattentiveness; instead, it is that neglect which might have been the act of a reasonably prudent person under the same circumstances, or where there were circumstances beyond the control of the party who missed the deadline." 86 C.J.S. Time § 14 (May 2022 Update) (footnotes omitted).

The Court cannot find good cause. Plaintiffs never provided the district court a factual basis for their failure to comply with Section 147.140. Plaintiffs cannot establish that basis on appeal because the facts are outside the record. *See* Iowa R. App. P. 6.903 (f), (g)(3) (requiring that the statement of the case and argument sections be supported by references to the record);

see also In re Marriage of Keith, 513 N.W.2d 769, 771 (Iowa Ct. App. 1994) (appellate courts are "limited to the record before [them] and any matters outside the record on appeal are disregarded."). Absent a factual basis, Plaintiffs cannot establish that their failure to comply with Section 147.140 was due to anything more than their own neglect, carelessness, or inattentiveness.[8]

ii. The district court did not err in declining to find good cause under the *Hantsbarger* factors.

In *Hantsbarger*, the Iowa Supreme Court considered three factors in determining whether there was good cause to excuse a late designation under Section 668.11: 1) the seriousness of the deviation from the statute; (2) the prejudice to the defendant; and (3) defense counsel's actions. 501 N.W. 2d at 505-06. Given these factors, the district Court did not err in dismissing Plaintiffs' claims.

First, Plaintiffs seriously deviated from the certificate of merit requirement. As explained above, Dr. Naughton did not verify Plaintiffs' initial disclosures, and the initial disclosures did not establish Dr. Naughton's qualifications or include the required information about

[8] To any extent the failure to comply was due to Plaintiffs' counsel's neglect, Plaintiffs are "responsible for the actions of their counsel." *Nedved*, 585 N.W.2d at 241.

Plaintiffs' claims. Plaintiffs eventually served a certificate of merit, but it was forty-two days late and Plaintiffs failed to serve separate certificates on each Defendant. (App. 87). Plaintiffs' initial disclosures substantially deviated from Section 147.140, and Plaintiffs have never fully remedied their failure to comply.

Second, the Court should not consider the prejudice element. *See McHugh,* 966 N.W.2d at 291, *Butler*, 2022 WL 1100275, at *6. Regardless, Plaintiffs' improper and untimely certificate of merit was inherently prejudicial. Defendants were entitled to specific verified information about Plaintiffs' claims within sixty days of Defendants' answer. Plaintiffs failed to provide all of the required information in the time and manner required, which was prejudicial. *See Nedved*, 585 N.W.2d at 241 (some prejudice can "be presumed to occur when experts are not designated by the statutory deadline."); *Tamayo v. Debrah*, 924 N.W.2d 873, at *2 (Iowa Ct. App. 2018) (holding plaintiff's untimely Section 668.11 disclosures resulted in "some prejudice by virtue of the delay in [defendant] gleaning the merits of [plaintiff]'s case.")

Even if Defendants were not prejudiced, the district court did not err in dismissing Plaintiffs' claims. Lack of prejudice "is only one factor" and "by itself, does not excuse" Plaintiffs' failure to serve a timely and proper

certificate of merit. *Nedved*, 585 N.W.2d at 241; *see also Tamayo*, 924 N.W.2d 873, at *2.

Third, Defendants' counsel's conduct did not require the district court to find good cause. As Plaintiffs' concede, Defendants' counsel is not their brother's keeper. (Pls.' Proof Br., at 21). Plaintiffs do not allege Defendants' counsel did anything to prevent Plaintiffs from serving a certificate of merit. Section 147.140 is a straightforward statute that had been in effect for nearly four years when Plaintiffs filed suit. Defendants had no obligation to alert Plaintiffs' counsel to their failure to comply with Section 147.140 before Defendants filed their motion to dismiss. *See Tamayo*, 2018 WL 4922993, at *3 (holding that under Section 668.11 "the defense had no obligation to remind [plaintiff] of the deadline before moving to strike her experts.").

Simply put, Section 147.140 "permits dismissal upon defendant's motion alleging plaintiff's inaction." *McHugh*, 966 N.W.2d at 291. Plaintiffs' failed to serve a certificate of merit, and Defendants filed a motion as contemplated by the legislature. Defendants' counsel did nothing that would excuse Plaintiffs' failure to comply. The district court did not err in dismissing Plaintiffs' claims.

II. The district court properly applied Section 147.140 as written.

A. Standard of review

As explained in Section I(A), Defendants generally agree the standard of review is for correction of errors at law, but any factual findings are reviewed for substantial evidence.

B. Error preservation

"When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." *In re Det. of W.*, 829 N.W.2d 589 (Iowa Ct. App. 2013) (citation omitted); *see also* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). Plaintiffs cite no authority to support their arguments in Section II, so the Court should deem this issue waived.

C. The district court did not err.

1. Plaintiffs identify no legal error by the district court.

As explained above, the standard of review is for errors at law. Errors at law include thing like the application of incorrect legal principles or standards, incorrect conclusions of law, or the court materially misstating the law. *See Papenheim v. Lovell*, 530 N.W.2d 668, 671 (Iowa 1995); *Wilkerson v. State*, 707 N.W.2d 336 (Iowa Ct. App. 2005); *Asher v. OB-Gyn*

Specialists, P.C., 846 N.W.2d 492, 496 (Iowa 2014), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016). Plaintiffs do not identify any incorrect legal standard applied or incorrect conclusion of law reached by the district court. Plaintiffs argue they were "severely prejudiced" by the district court's ruling, but do not identify how legal error caused that prejudice. In the absence of any articulable error of law, the Court should affirm the district court's dismissal.

2. The district court correctly applied Section 147.140.

Plaintiffs argue that "even if the District Court correctly found [Plaintiffs] were not in substantial compliance with the requirements of Iowa Code § 147.140 . . . dismissal of the Petition with prejudice was an undue prejudice to the Plaintiffs and inappropriate under the circumstances." (Pls.' Proof Br., at 10). Essentially, Plaintiffs argue the district court erred even though they concede it applied Section 147.140 as written. This argument is incorrect because it ignores judiciary's constitutional role in applying laws and it lacks factual and legal support.

a. The district court was required to enforce Section 147.140 as written.

"The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Iowa Const. art. III, § 1. [It] tasks the legislature with making laws, the executive with enforcing the

laws, and the judiciary with construing and applying the laws to cases brought before the courts." *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 212 (Iowa 2018). Courts' primary goal in construing and applying laws "is to give effect to the intent of the legislature" as evidenced by the words used in the statutes. *Harrison*, 846 N.W.2d at 367 (quoting *State v. Walker,* 804 N.W.2d 284, 290 (Iowa 2011)). A court's role is not to reason why, but to read and apply the law as the legislature enacts it. *In re Det. of Geltz*, 840 N.W.2d 273, 276 (Iowa 2013) (citing *Anderson v. State,* 801 N.W.2d 1, 1 (Iowa 2011)); *see also In re K.N.*, 625 N.W.2d 731, 734 (Iowa 2001) ("The role of courts is only to interpret statutes, not second-guess the underlying policies.").

The district court's dismissal of Plaintiffs' claims was a straightforward application of Section 147.140 as the legislature enacted it. The legislature determined that a plaintiff's failure to substantially comply with the certificate of merit requirement "shall" result in dismissal with prejudice. Iowa Code § 147.140(6). By using "shall" the legislature removed discretion from the courts and made dismissal mandatory. *See* Iowa Code § 4.1(3); *see also In re Det. of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010); *State v. Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000).

The district court correctly held Plaintiffs did not substantially comply with Section 147.140(1). The district court was constitutionally bound to enforce Section 147.140(6) as written by the legislature, so it dismissed Plaintiffs' claims with prejudice. This was not an error of law, so the Court should affirm.

b. Plaintiffs' public policy arguments lack any factual or legal support.

Plaintiffs argue the district court's dismissal of their claims has "substantial public policy and legal implications." (Pls.' Proof Br., at 24). They assert, without citing to the record, that "[n]ursing home negligence is rapidly becoming a scourge in Iowa" and that "[a]dministrative penalties alone are an insufficient deterrent." (*Id.*). These allegations have no support in the record, so the Court cannot consider them. *See* Iowa R. App. P. 6.903 (f), (g)(3); *In re Marriage of Keith*, 513 N.W.2d at 771.

Even if Plaintiffs' allegations had any factual support, they are irrelevant. "Courts do not pass on the policy, wisdom, advisability or justice of a statute." *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977). "If changes in a law are desirable from a standpoint of policy or mere practicality, it is for the legislature to enact them, not for the court to incorporate them by interpretation." *State v. Monroe*, 236 N.W.2d 24, 36 (Iowa 1975). Even if the district court thought Section 147.140 was unwise

or unjust, it was bound to enforce it as written. The district court found Plaintiffs failed to substantially comply so it imposed the only sanction provided by the legislature, dismissal with prejudice. There was no error of law, and the Court should affirm.[9]

3. Plaintiffs' belated demonstration of the alleged merits of their claims is irrelevant.

Plaintiffs argue it was improper for the district court to dismiss their claims because Plaintiffs eventually demonstrated they had merit. (Pls.' Proof Br., at 23). The Iowa Court of Appeals has rejected similar "ultimate merit" arguments on multiple occasions. In *McHugh,* the plaintiff argued "her certificate of merit affidavit, when finally filed, established that her claim was not frivolous. So, in her view, dismissal did not serve the statute's purpose to weed out frivolous suits. Essentially, no harm, no foul." 966 N.W.2d at 289. The court rejected the argument because the plaintiff's demonstration of merit "did not substantially comply with [Section 147.140]'s demanding deadline." *Id.* at 292. The court of appeals succinctly reaffirmed this position, holding "[t]he fact that a plaintiff can belatedly

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[9] Plaintiffs' argument that the Court's decision will affect "countless other aggrieved parties" is irrelevant. (Pls.' Proof Br., at 24). Plaintiffs lack standing to raise this argument because they have no "specific personal or legal interest" in the claims of unnamed parties, and those unrelated claims have not injuriously affected Plaintiffs. *See Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 864 (Iowa 2005).

show the litigation was not frivolous is not an exception in the [certificate of merit] statute." *Butler*, 2022 WL 1100275, at *6. The Iowa Court of Appeals also upheld a dismissal under Section 147.140 even after the plaintiff designated its expert under Section 668.11. *See Est. of Knop v. Mercy Health Servs. Iowa Corp*, No. 21-0846, 2022 WL 1487124, at *2 (Iowa Ct. App. May 11, 2022). These holdings are consistent with the Iowa Supreme Court's interpretation of Section 668.11. *See Nedved*, 585 N.W.2d at 240 (affirming summary judgment following exclusion of experts under Section 668.11 even though "[t]he record suggests that this is not a case involving a frivolous claim . . ..").

Plaintiffs failed to demonstrate the alleged merits of their claims in the time and manner required by Section 147.140. The district court dismissed Plaintiffs' claims as required by Section 147.140(6). The ultimate merits of Plaintiffs' claims were irrelevant to the issue before the district court, so it did not err by failing to consider them. The Court should affirm.

4. Plaintiffs' prejudice arguments are irrelevant.

Plaintiffs ask the Court to consider the relative prejudice to Plaintiffs and Defendants in determining whether to reverse the district court. (Pls.' Proof Br., at 24). This argument is incorrect in two respects. First, Section 147.140 has no prejudice requirement. Second, although dismissal is a harsh

sanction, it was not the district court's role to mitigate the harshness of a duly enacted statute.

a. Section 147.140 has no prejudice requirement.

The presence or absence of prejudice to Defendants is irrelevant. Section 147.140 provides that a failure to substantially comply with the certificate of merit requirement "shall result, upon motion, in dismissal with prejudice[.]" Iowa Code § 147.140(6). There is no statutory requirement that the defendant be prejudiced before the court dismisses the plaintiff's claims. The Court cannot "rewrite an unambiguous statute" to add a prejudice requirement. *See Thompson*, 512 N.W.2d at 546. The court of appeals has rejected similar attempts to add a prejudice requirement to Section 147.140(6). *See McHugh*, 966 N.W.2d at 291 ("Nor can we read in a requirement for defendants to show they were prejudiced by the delay. The statute permits dismissal upon defendant's motion alleging plaintiff's inaction."); *Butler*, 2022 WL 1100275, at *6 (rejecting a "no harm, no foul" argument against dismissal under Section 147.140(6)). As a matter of law, the district court did not err by failing to consider the presence or absence of prejudice to Defendants before dismissing Plaintiffs' claims.

b. The harsh result does not affect the enforceability of Section 147.140.

Dismissal with prejudice is a “harsh consequence for noncompliance.” *McHugh*, 966 N.W.2d at 289. It is not the role of courts, however, to mitigate hardships or inconveniences imposed by the enforcement statutes. *See Reg’l Util. Serv. Sys. v. City of Mount Union*, 874 N.W.2d 120, 124 (Iowa 2016); *Kneppe v. Huismann*, 272 N.W. 602, 603 (Iowa 1937). The harshness of Section 147.140 is consistent with its legislative purposes and does not excuse a party’s lack of substantial compliance. *See McHugh*, 966 N.W.2d at 289-90; *see also id.* at 292 (affirming dismissal under Section 147.140 despite the “harsh consequences” because the legislature provided that Section 147.140 applied to her claims).

Like the plaintiff in *McHugh*, Plaintiffs were presumed to know the law, including that Section 147.140 applied to their claims. 966 N.W.2d at 292. Plaintiffs failed to substantially comply. The district court was bound to enforce Section 147.140 as written, and had no ability to mitigate any hardships or inconveniences imposed on Plaintiffs. The district court made no error of law, so the Court should affirm.

Conclusion

The district court did not err in holding Plaintiffs did not substantially comply with Section 147.140. The district court did not err in applying

Section 147.140 as enacted by the legislature and dismissing Plaintiffs' claims with prejudice. The Court should affirm the district court's dismissal with prejudice.

Oral Argument Statement

This case has a limited factual record and presents a straightforward issue of statutory application. The Court should affirm the district court's dismissal without oral argument. If the Court grants oral argument, Defendants ask for equal time to be heard.

/s/ Graham R. Carl

TRICIA HOFFMAN-SIMANEK AT0003634
ROSS T. ANDREWS AT0013724
GRAHAM R. CARL AT0012246
SHUTTLEWORTH & INGERSOLL, P.L.C.
115 Third St., Ste. 500, P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461
E-MAIL: phs@shuttleworthlaw.com
rta@shuttleworthlaw.com
grc@shuttleworthlaw.com

ATTORNEYS FOR DEFENDANTS-APPELLEES ABCM CORPORATION, an Iowa Corporation, KATHY MEYER-ALLBEE, and LINSEY HENRY

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The undersigned certified this Brief was electronically files and served on November 2, 2022, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

Laura R. Luetje
William C. Strong
LAMBERTI, GOCKE & LUETJE, P.C.
210 NE Delaware A venue, Suite 200
Ankeny, IA 50021

Bradley C. Obermeier
Obermeier and McBride, P.C.
1830 SE Princeton Drive, Suite C
Grimes, IA 50111

Clerk of the Iowa Supreme Court
Iowa Judicial Branch Building
1111 East Court Avenue, 4th Floor
Des Moines, IA 50319

/s/ Becky Mollenhauer