IN THE IOWA SUPREME COURT
No. 22-1574
Polk Co. No. LACL151799

DARRIN P. MILLER, Individually, as Executor of the Estate of MEREDITH R. MILLER, and as Parent, Guardian, and Next of Friend of S.M.M., a minor,

Plaintiff-Appellee,

v.

IOWA DEPARTMENT OF TRANSPORTATION, STATE OF IOWA, SNYDER & ASSOCIATES, INC., COMPANY INC. (an unidentified corporation),

Defendants,

and

CATHOLIC HEALTH INITIATIVES - IOWA, CORP. d/b/a MERCYONE DES MOINES MEDICAL CENTER, DR. WILLIAM NOWYSZ, DO, DR. JOSEPH LOSH, DO, DR. HIJINIO CARREON, DO, DR. NOAH PIROZZI, DO, DR. DANIELLE CHAMBERLAIN, and DARON E. DARMENING, RT,

Defendants-Appellants

Appeal from the Iowa District Court for Polk County
The Honorable Joseph Seidlin, Judge

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(2)(c), the Supreme Court should retain this appeal as it presents substantial issues of first impression.

STATEMENT OF THE CASE

This appeal involves two straightforward questions: (1) Is the "substantially similar field" required by ICA § 147.139 determined by the medical problem and method of treatment at issue or by the defendant's branch of medicine; and (2) does a plaintiff "substantially comply" with ICA § 147.140 when his expert has timely provided all the information and opinion required, but did not provide an affidavit until after the 60-day deadline?

Otherwise, pursuant to Iowa R. App. P. 6.903(3), Plaintiff-Appellee Darrin P. Miller, Individually, as Executor of the Estate of Meredith R. Miller, and as Parent, Guardian, and Next of Friend of S.M.M., a minor (Miller), is satisfied with the Statement of the Case articulated by Defendants-Appellants William Nowysz, DO and Hijinio Carreon, DO (NC Defendants).

STATEMENT OF THE FACTS

<u>The Accident, Treatment and Death</u>

On or about December 15, 2019, Meredith R. Miller (Decedent) was injured in a motor vehicle accident. App. p.270. Ankeny Fire Department paramedics arrived on the scene "minutes" after the accident and transported Decedent to Defendant Catholic Health Initiatives - Iowa, Corp. d/b/a MercyOne Des Moines Medical Center (MercyOne). *Id*. The Ankeny paramedics determined that Decedent required airway management, and on their 3rd attempt, successfully placed a supraglottic device. App. p.100. Decedent's blood oxygen saturation remained at 100% throughout that transport. App. p.270.

At MercyOne Decedent was cared for by each of the individually named defendants herein (Physicians and Providers). *Id*. These Physicians and Providers determined to replace the supraglottic airway device with an oral endotracheal tube. App. p.271; App. p.101).

After replacement, the Physicians and Providers failed to verify that the intubation was successful. App. p.101. Other failings included that cardiac life support was initiated without the aforementioned verification, and without adherence to airway

management protocols, which would have included alternatives to the endotracheal tube. *Id.* Notably, none of the six Physicians and Providers checked the continuous waveform capnography, oxygenation measurements or bronchscopic visualization of the trachea. *Id.*

And while gastric distension had been noted prior to the oral endotracheal intubation at 17:57, no attempt was made to decompress it between then and Decedent's death at 18:15. App. pp.100-1. After Decedent was pronounced dead, additional airway attempts were made by the Physicians and Providers. App. p.100. The Polk County Medical Examiner identified that Decedent's cause of death was "Craniocerebral trauma and Contributing: Esophageal intubation."[1] App. pp.100-1.

Dr. Mark's Qualifications & Expert Opinion

[1] "Esophageal intubation with delayed recognition was defined as misplacement of the endotracheal tube in the upper esophagus or hypopharynx, with time elapsed and desaturation." Ono, et al., *Expert-Performed Endotracheal Intubation-Related Complications in Trauma Patients*, 2018 EMERGENCY MED. INT'L, https://www.hindawi.com/journals/emi/2018/5649476/ (last visited Jan. 25, 2023). Or in a nutshell, her airway was blocked while the intubation was improperly serviced to her esophagus.

Lynette Mark, M.D. is highly qualified to opine on the subject matter of airway management, and she timely provided both her certification of merit and qualifications. *See generally*, App. pp.100-1, 102-46. She currently holds the following positions:

Johns Hopkins University School of Medicine:

- Associate Professor, Anesthesiology and Critical Care Medicine
- Associate Professor, Otolaryngology-Head and Neck Surgery
- Core Faculty, Anesthesiology & Critical Care Medicine Residency Program
- Core Faculty, Anesthesiology & Critical Care Medicine Center for Immersive Simulation and Telemedicine

Johns Hopkins Medical Institutions:

- Medical Director, Weinburg Surgical Suite
- Director, Difficult Airway Response Team (DART)

App. p.102.

Dr. Mark has been board certified by the National Board of Medical examiners since 1985 and by the American Board of Anesthesiology since 1988. App. p.123. Dr. Mark has 13 inventions, patents and copyrights, and she has 19 peer-reviewed journal articles of original science research. App. pp.104-5.

Among her research, writing, teaching, presentations and other creations that bear on her expertise regarding airway management, and in particular in the kind of traumatic, emergency, respiratory and general surgery at issue here, include:

- Mark, et al. *Difficult Airway Response Team: A Novel Quality Improvement Program for Managing Hospital-wide Emergencies*, 121 ANESTHESIA & ANALGESIA 127 (2015).
- Hillel et al., *A novel role for otolaryngologists in the multidisciplinary Difficult Airway Response Team*, 125 LARYNGOSCOPE 640 (2014)
- Mark, et al., *The difficult airway: mechanisms for effective dissemination of critical information*, 4 J. CLIN. ANESTH. 247-257 (1992)
- Mark & Drake, *Airway management and trauma centers/emergency departments: existing practices questionnaire*, MEDICALERT FOUNDATION INTERNATIONAL (1992)
- Mark & Drake, *Difficult airway/intubation alert,* MEDICALERT FOUNDATION INTERNATIONAL (1992) (brochure & database)
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- Mark & Flint, Difficult Airway Response Team (DART) Implementation Package, Johns Hopkins Medicine Difficult Airway Response Team (DART) (2014)

- Mark, Difficult Airway/Intubation Alert in the Emergency Department (Annual Trauma Anesthesia & Critical Care Symposium Series, 1993) (Lecture)
- Mark, Basic Airway Techniques (Mark Rossberg Memorial Multidisciplinary Emergency Airway Course, 2014) (Workshop Instructor)
- Johnson, et al., A team-oriented multi-disciplinary approach to emergency airway training using high fidelity simulation (Society for Airway Management, 2010) (Presentation)

In a letter signed by her, on letterhead that identifies (some) of her appointments at Johns Hopkins, Dr. Mark has opined as to the standard of care of airway management in this case, and that the esophageal intubation as performed by the Physicians and Providers breached the standard of care and contributed to Decedent's death. App. p.101. Dr. Mark has also opined that additional airway attempts after Decedent's death also breached the standard of care. *Id*.

ARGUMENT

I. The District Court properly found that Dr. Mark meets the expert qualifications of ICA § 147.139, and in doing so, applied the parties' relative burdens appropriately.

A. Standard of review and error preservation

Defendants-Appellants Catholic Health Initiatives-Iowa, Corp. d/b/a MercyOne Des Moines Medical Center, Dr. Joseph Losh, Dr. Noah Pirozzi, Dr. Danielle Chamberlain, and Daron Darmening, RT (CHI Defendants) attacked Dr. Mark and her opinion via a motion to dismiss. App. pp.64-71.

A district court's ruling on a motion to dismiss and rulings on statutory interpretation are reviewed for correction of errors at law. *Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 538 (Iowa 2022).

The NC Defendants challenged Dr. Mark and her qualifications via Motion for Summary Judgment. App. pp.86-90. Such a ruling is also reviewed for correction of errors at law. *Griffin Pipe Products Co., Inc. v. Board of Review of County of Pottawattamie*, 789 N.W.2d 769, 772 (Iowa 2010).

While the issue of Dr. Mark's qualifications was raised and decided below (App. pp.64-71, 86-90, 249-57, 258-66), the issue of the parties' respective burdens[2] was not. *Id*. *See also* App. pp.237-

[2] The NC Defendants seek review of this issue in their first argument, and the CHI Defendants have joined in that. (NC Appellants' Proof Brief p. 10-18; CHI Appellants' Proof Brief p. 58)

41.[3] Therefore, while Dr. Mark's qualifications, generally, has been preserved for review, the issue of whether the district court applied the right burden has not. *33 Carpenters Construction, Inc. v. State Farm Life and Casualty Company*, 939 N.W.2d 69, 75-76 (Iowa 2020); *Struck*, 973 N.W.2d at 540 ("Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.")

B. The district court correctly ruled that § 147.139 authorized Dr. Mark to serve as an expert for standard of care, its breach and proximate cause for each Physician and Provider.

> The relevant statue states in pertinent part:
>
> > If the standard of care given by a health provider … is at issue, the court shall only allow a person the plaintiff designates as an expert witness [if] …. The person is licensed to practice in the same or a substantially similar field as the defendant.

ICA § 147.139(1) (2018). The statute also requires the expert: (2) have practiced in the "same or substantially similar field" in the

[3] This issue was not addressed in any parties' motion, reply or resistance, or any ruling, and no party filed a motion to reconsider, enlarge or amend the rulings. Iowa R. Civ. P. 1.904(2).

previous 5 years; (3) have "the same or substantially similar" board certification; and (4) have an active license to practice. *Id*.

Prior to the 2017 legislation, this language was similar, but less detailed:

> [I]f the standard of care given by a physician … is at issue, the court shall only allow a person to qualify as an expert witness and to testify … if the person's medical … qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

ICA § 147.139 (2008).

Three points are immediately apparent from the amendment: (1) the change did **not** include a requirement that the expert practice in the same "branch of medicine;" in fact this is specifically rejected by the statute's express language: "substantially similar field," (2) there is no definition of "field;" and (3) if the Legislature had intended the focus to change from "medical problem or problems at issue and the type of treatment administered in the case," to "same branch of medicine," why did it not state that clearly instead of expressly including "a substantially similar field"?

The clearest resolution of each of these points is that the Legislature was not departing from the long-held standard of

focusing on the medical problem and type of treatment, but instead was refining this standard to preclude expertise proffered by persons less-qualified than the medical-professional-defendant. *See e.g. Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996) (where a nurse anesthetist testified as to an anesthesiologist's standard of care of delivering anesthesia).

"The first step in our statutory interpretation analysis is to determine whether the statute is ambiguous." *State v. Middlekauff*, 974 N.W.2d 781, 793 (Iowa 2022) ("Our inquiry ends with the plain language if the statute is unambiguous.") (citation omitted) Here, "substantially similar field" is not ambiguous, and clearly encompasses related fields that address the same medical problem and methods of treatment; any other construction - and in particular that urged by Defendants of a same "branch of medicine" - would make this phrase meaningless. This is not permitted. *Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 685 (Iowa 2022) ("We generally read legislation in a manner to avoid rendering portions of a statute superfluous or meaningless.")

But even were the statute ambiguous, consideration of the history of this statute and those related to it, makes it clear that the Legislature rejected any change of focus from the medical problem and treatment provided, when it refused to say so. *Myria Holdings Inc. v. Iowa Department of Revenue*, 892 N.W.2d 343, 348 (Iowa 2017) ("If a word is not defined by the statute, however, we assign the word its common, ordinary meaning, interpreted within the context of the statute *and its history*.") (emphasis added).

When the Legislature revised the statute, it was aware that several "fields" of medical care, included in the Health-Related Professions subtitle, were defined by the medical problem and treatment provided. For example, "emergency medical care provider" is defined as "an individual trained to provide emergency … medical care," and "emergency medical care" is defined as, among other things, "intubation." ICA § 147A.1(3), (4) (2016). Likewise, a "person[] shall be deemed to be engaged in the practice of medicine," when they "prescribe, or prescribe and furnish, medicine for human ailments or treat the same by surgery." ICA § 148.1 (2009). In addition, a respiratory therapist is defined in

pertinent part as a person who has "completed a respiratory care education program," which requires study in "respiratory care," which is defined in pertinent part as "the diagnostic and therapeutic use of … Maintenance of the natural airways … and maintenance of artificial airways." ICA § 152B.1(7), (9) (2015); ICA § 152B.3(1) (2012)[4]

"When construing a statute, we must be mindful of the state of the law when it was enacted and seek to harmonize the statute, if possible, with other statutes on the same subject matter." *Freedom Financial Bank v. Estate of Boesen*, 805 N.W.2d 802, 811 (Iowa 2011).

Note, too, that this method of defining different medical "fields" by the conditions they treat and methods of treatment is consistent across the health-related professions. *See* ICA § 149.1 (2009) (defining "podiatry" as persons who "diagnose, prescribe … and furnish medicine for ailments of the human foot, or treat such ailments"); ICA § 153.13 (2009) (defining dentists as those who

[4] It should also be noted that the Iowa society of anesthesiologists is one of the organizations that may recommend representatives to the trauma system advisory council. ICA § 147A.24 (2013).

"perform examination, diagnosis, treatment … of any disease, condition, disorder, lesion, deformity or defect of the oral cavity and maxillofacial area"); ICA § 154.1 (2012) (defining "optometry" as "employing any means for the measurement of the visual power and visual efficiency of the human eye"); ICA § 154B.1 (2017) (defining the "practice of psychology" as "the application of established principles of learning, motivation, perception, thinking, and emotional relations to problems of behavior adjustment, group relations, and behavior modification," by means of "counseling and the use of psychological remedial measures"); ICA § 152.1(7) (2017) (defining the "practice of the profession of a registered nurse" as "formulat[ing] nursing diagnosis and conduct nursing treatment of human response to actual or potential health problems"); ICA § 151.1 (1999) (defining "chiropractic" as those "who treat human ailments by the adjustment of the neuromusculoskeletal structures … rendering nutritional advice, utilizing chiropractic physiotherapy procedures"); ICA § 148A.1 (2007) (defining "physical therapy" as "that branch of science that deals with the evaluation and treatment of human capabilities and impairments

… uses the effective properties of physical agents"); ICA § 148B.2 (1999) (defining "occupational therapy" as "therapeutic use of occupations" to "address[] the physical, cognitive, psychosocial, sensory-perceptual and other aspects of performance"); ICA § 148F.2 (2013) (defining "orthotic and prosthetic scope of practice" as "a list of tasks … based on nationally accepted standards of orthotic and prosthetic care," and "orthotics" as "the science and practice of evaluating, measuring, designing, fabricating, assembling, fitting, adjusting or servicing an orthosis," with "orthosis" meaning the brace).

And, this method of defining health-related professions is consistent with the definition of "field" proffered by the CHI Defendants. (CHI Defendants Proof Brief p. 31 defining "field" as "an area or division of an *activity, subject or* profession") (emphasis added).

"[T]he common law and relevant legal history can serve only to inform - and not deform - the meaning of statutory text…. In determining the ordinary and fair meaning of the statute at issue, we do not look at the statutory language in isolation. Instead, we

take into consideration the language's relationship to … other provisions of related statutes." *State v. Hall*, 969 N.W.2d 299, 305 (Iowa 2022).

And, in fact, this was the process for evaluating an expert utilized by the Court of Appeals in *Ward v. Unity Healthcare*, 974 N.W.2d 178 (Table), 2021 WL 5918408 (Iowa Ct. App. Dec. 15, 2021). Examining the 2020 version of § 147.139, the Court considered that the proffered expert (an emergency and internal medicine specialist) was no longer practicing and no longer licensed, but still entertained that he may have been qualified to provide an opinion had he "any training or certification in hospital administration, nursing, or radiology" - each the subjects of those defendants' alleged malpractice. *Id*. at *5. Because he hadn't, and also could not articulate "what that continuing medical care would be," the Court concluded the proffered expert was properly rejected. *Id*. However, as the subject of this alleged malpractice is airway management/intubation, and Dr. Mark is trained, board certified and licensed in such, and she has expressed an opinion directly on the matter, the trial court below properly refused to reject her. *Id*.

Note, too, that courts in other jurisdictions have likewise construed their medical expert certification statutes. In *Borger v. Eighth Judicial Dist. Court ex rel. County of Clark*, 102 P.3d 600 (Nev. 2004), where the Nevada Legislature had the similar requirement for a medical malpractice expert - one "who practices or has practiced in an area that is substantially similar to the type of practice" - the Court rejected the defendant's position, which it called a "literal approach." *Id.* at 604. That literal approach contended that the person signing the expert affidavit of merit must "engage[] in the same type of practice area as the defendant." *Id.* (e.g. "a general surgeon must be supported by a general surgeon.") In rejecting this approach, the court identified that the "substantially similar" language meant that there was **no** requirement that "the affiant practice in the same area of medicine as the defendant." *Id.* at 605 And more importantly, the Court identified that "substantially similar" was present where the defendant entered the certifying expert's field to make a "diagnosis and treatment [that] implicates [the expert's] area of expertise, gastroenterology." *Id.* This is precisely the case at bar - each

Physician and Provider is charged with medical malpractice in their diagnosis and treatment related to their airway management and intubation of Decedent - Dr. Mark's area of expertise. *See generally*, App. p.102-46.

Likewise, in *Laws v. St. Luke's Hosp.*, 218 S.W.3d 461 (Mo. App. W.D. 2007), a laryngologist was allowed to testify as to the standard of care of a physician and anesthesiologist because his "specialty provided him with knowledge of both airway management, concerning intubation and extubation." *Id.* at 469.

As for public policy, Iowa's interest in the efficient resolution of controversies is hardly served by requiring four different experts to opine on the standard of care for the same procedure and proximate cause of the same injury. *See Capital Promotions, L.L.C. v. Don King Productions, Inc.*, 756 N.W.2d 828, 834 (Iowa 2008) (discussing minimum contacts and identifying the "interest in obtaining the most efficient resolution of controversies"); *Freeman v. Grain Processing Corporation*, 895 N.W.2d 105, 114 (Iowa 2017) (discussing Rule 1.216's policy of the "fair and efficient adjudication of the controversy.")

Finally, any other policy considerations implicated by an anesthesiologist opining as to the airway management care provided by general, trauma, respiratory and emergency professionals would be addressed by the governing instructions. *See Vezeau-Crouch v. Abraham*, 927 N.W.2d 202 (Table), 2019 WL 141362, at *6 (Iowa Ct. App. Jan. 9, 2019) (identifying that the different specialties of the expert and defendant "might be relevant to the weight," but are not on "the issues raised to disqualify.")

Therefore, as the Legislature refused to expressly change the focus from medical problems and methods of treatment, and given the history of the statute and the ubiquitous practice of defining medical professions in this manner, it must be concluded that it intended "substantially similar field" to be defined accordingly. *Myria Holdings*, 892 N.W.2d at 348.

C. The district court properly assigned the parties' respective burdens of proof.

While this issue has not been preserved for review, and this is not a waiver of the issue, as the Court has exercised its authority to address subjects related to unpreserved matter, Miller will brief the issue. *See Struck*, 973 N.W.2d at 939-40.

In rebutting the motions, Miller presented, consistent with his obligations under the statute, Dr. Mark's expert opinion and CV. See generally, App. pp.100-1, 102-46, ICA § 147.139 (2018), ICA § 147A.24. As set out above, these demonstrated Dr. Mark's license to practice, active practice and board certification in airway management. *Id*. The district court defined the relevant field as "airway management." App. pp.249-57, 258-66. This is consistent with the respiratory care statutes and regulations ICA § 152B.3 (2012) (discussing maintenance of airways); IAC § 645-265.5 (2014) (same).

Thus, Miller met his burden of proving Dr. Mark was qualified in a "substantially similar field." *See Office of Consumer Advocate v. Iowa Utilities Bd.*, 454 N.W.2d 883, 888 (Iowa 1990). After this, the burden shifted to the defendants to rebut it. *Id*. ("When the party having the burden has made its prima facie case, the 'burden' or 'duty' rests upon the opposing party to move forward with its proof to meet the prima face case.")

It was at this point that the district court identified: "No information provided by … Drs. Nowysz and Carreon … indicates

any different standard of care, for airway management in general or esophageal intubation in particular, for board certified anesthesiologists or emergency medicine physicians performing the same procedure." App. p.265.[5] This was perfectly correct and presents no ground for reversal. *See Office of Consumer Advocate*, 454 N.W.2d at 888.

II. The District Court properly held that Dr. Mark's report substantially complied with the certificate of merit statute.

A. Standard of review and error preservation.

A district court's ruling on a motion to dismiss and its rulings on statutory interpretation are reviewed for correction of errors at law. *Struck,* 973 N.W.2d at 538. Its ruling on a motion for summary judgment is as well. *Griffin Pipe Products*, 789 N.W.2d at 772.

The issue of whether the report provided by Dr. Mark substantially complied with the statute was raised and decided

[5] For the CHI Defendants, the Court identified: "No information provided by … the Defendants … indicates any different standard of care, for airway management in general or esophageal intubation in particular, for board certified anesthesiologists or trauma surgeons, general surgeons, or respiratory therapists performing the same procedure." App. p.255.

below. App. pp.64-71, 86-90, 249-57, 258-66. Therefore, it has been preserved for review. *33 Carpenters Construction*, 939 N.W.2d at 75-76.

B. Dr. Mark's report substantially complied with ICA § 147.140.

In addition to the expert's qualifications discussed above, the statute requires:

- An affidavit or other oath
- Signed by the expert
- That identifies the expert's familiarity with the applicable standard of care
- That identifies the standard of care was breached by the defendants.

ICA § 147.140(1)(b) (2017).

There is no dispute that the certificate was timely served on all defendants on February 20, 2022. App. p.61-3. The only dispute about the certificate of merit raised below was that it was not an affidavit (or under oath); this was remedied by Miller on June 2, 2022. App. pp.242-3.

In any event, absent substantial compliance with the statute, the statute directs the court to dismiss the action. ICA § 147.140(6).

Below, the district court found that the failure (the only failure) of pure compliance with the statute was that it lacked an oath or affidavit. App. pp.249-57, 258-66. In particular, it found:

> The facts particular to the certificate of merit affidavit of Dr. Mark are that 1) it was timely provided to Defendants [and Dr. Nowysz and Carreon]; 2) it is in the form of a report containing Dr. Mark's own statements and is set forth on her letterhead; 3) it was signed by Dr. Mark; 4) it includes Dr. Mark's entire curriculum vitae; 5) it sets forth Dr. Mark's familiarity with the applicable standard of care; 6) it contains Dr. Mark's own statement that the standard of care was breached by the health care providers named in the petition; and 6) {sic} Dr. Mark's signature was not under oath.

App. pp.253, 263.

In concluding that "[e]very reasonable objective of the statute is covered by Dr. Mark's report," the district court also noted that no defendant identified "prejudice or even anything they would do differently because Dr. Mark's signature was not under oath," and therefore, it substantially complied with the statute. App. pp.253-4, 263.

In reaching this conclusion, the district court relied on *Dix v. Casey's Gen. Stores, Inc.*, 961 N.W.2d 671, 682 (Iowa 2021)

(citations omitted) and *McHugh v. Smith*, 966 N.W.2d 285, 288-89 (Iowa Ct. App. 2021).

In *Dix*, in discussing whether substantial or strict compliance with a statute was required, the Supreme Court identified: "Substantial compliance is said to be in compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Dix*, 961 N.W.2d at 682 ("Substantial compliance … means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted.")

The Court of Appeals, in *McHugh* agreed with the substantial compliance definition in *Dix* and noted: "the legislature built substantial compliance into section 147.140," in order to be consistent with decisions holding that "substantial compliance was sufficient under section 668.11." *McHugh*, 966 N.W.2d at 288 *citing Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993).

The *McHugh* court agreed with its district court that the objective of the statute was "to show that the plaintiff's claim at last

has colorable merit" by the "sixty-day deadline." *McHugh*, 966 N.W.2d at 289. That is, it is intended to "give[] the defending health professional a chance to arrest a baseless action early in the process if a qualified expert does not certify that the defendant breached the standard of care." *Id*. at 289-90.

The Iowa Supreme Court similarly identified the objective of the statute: "The statute was enacted to enable early dismissal of meritless malpractice actions that require expert testimony to proceed." *Struck*, 973 N.W.2d at 536, 539 ("the legislature enacted section 147.140 to provide a mechanism for early dismissal with prejudice of professional liability claims against healthcare providers when supporting expert testimony is lacking.")

In this case, expert testimony is certainly not lacking and the coroner's concurrence that esophageal intubation contributed to Decedent's death, together with Dr. Mark's opinion, demonstrate that the action is in no way meritless. Accordingly, the reasonable objectives of the statute have been met, and the trial court ruled appropriately. *See also Burg v. Bryant*, 264 N.W.2d 750 (Iowa 1978) (identifying the preference "to insure resolution of disputes on their

merits" with regard to the civil rules); *Schneider v. Transamerica Life Insurance Company*, 965 N.W.2d 620 (Table), 2021 WL 3074493, at *1 (Iowa Ct. App. July 21, 2021) (discussing default judgments and identifying "a longstanding policy in our state favoring the resolution of legal disputes on the merits.")

Note, too, that the authority Defendants cite for their arguments are not directly on point. The reliance on *McHugh* for the proposition that substantial compliance requires "verification," is unwarranted as *McHugh* involved a late-provided opinion - not an unverified one. *McHugh*, 966 N.W.2d at 290-91. Likewise, *State v. Carter*, 618 N.W.2d 374, 378 (Iowa 2000) is a straw man Defendants set up regarding oaths, and that does not even discuss a certificate of merit.

As for *Schmitt v. Floyd Valley Healthcare*, 965 N.W.2d 642 (Table), 2021 WL 3077022 (Iowa Ct. App. July 21, 2021), it actually supports Miller's argument, as the documents provided in *Schmitt* are pertinently unlike Dr. Mark's report in all respects except the affidavit/oath omission:

> Neither of these records are in affidavit form or otherwise submitted under oath. Additionally, *and far*

> *more importantly*, these records do not contain any of the "proof" or "expert opinions" that Plaintiffs assert…. Both of these records are merely routine treatment notes …. Neither of these documents, at any point, makes any reference whatsoever to the applicable standard for the care …. to any breach of a standard of care … [or] makes any reference or allegation that Mrs. Schmitt's current symptoms or conditions were caused by any previous event involving her care. Neither of these documents, at any point, even refers to … prior care [or] … contains any opinion of any physician on any topic related to Mrs. Schmitts previous care.

Id. at *2 (emphasis added)

Likewise, reliance on *Provident Life and Acc. Ins. Co. v. Goel*, 274 F.3d 984, 1000 (5th Cir. 2001), *Maytag Corp. v. Electrolux Home Products*, 448 F.Supp.2d 1034, 1064 (N.D. Iowa 2006) and *McCoy v. State*, 949 N.W.2d 246 (Table), 2020 WL 2363924, at *3 (Iowa Ct. App. Jun. 17, 2020) is misplaced as these merely hold that unsworn expert reports may be disregarded on summary judgment. *Id*. In their resistance to summary judgment, Miller provided an affidavit from Dr. Mark confirming her entire report and all of her opinions. App. pp.242-3.

Therefore, as all the objectives of the statute have been met, Dr. Mark's report was in substantial compliance with ICA § 147.140, and the district court's rulings must be affirmed.

CONCLUSION

For the reasons aforesaid, Plaintiff-Appellee Darrin P. Miller, Individually, as Executor of the Estate of Meredith R. Miller, and as Parent, Guardian, and Next of Friend of S.M.M., a minor, respectfully requests this Court enter a decision affirming the rulings on motion for summary judgment and motion to dismiss below.

Respectfully submitted,

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REQUEST FOR ORAL SUBMISSION

Counsel for Appellant respectfully requests this appeal be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of the Iowa Rules of Appellate Procedure because it has been prepared in proportionally spaced typeface using Century Schoolbook in 14-point font and contains **5,043** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

/s/ Joshua L. Dewald

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon all parties to this appeal by EDMS on the 6th day of April, 2023.

/s/ Joshua L. Dewald