IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 22-1574
Polk County No. LACL151799

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

Plaintiff-Appellee,

vs.

THE STATE OF IOWA; SNYDER & ASSOCIATES, INC.; C.J. MOYNA & SONS, LLC; J. PETTICORD, INC.

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, CO; DR. NOAH PIROZZI, DO; DR. DANIELLE CHAMBERLAIN; and DARON DARMENING, RT

Defendants-Appellant.

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's Final Reply Brief

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3 Weinstein's Federal Evidence § 601.14

IV. CHI Defendants Incorporate Any Applicable Arguments Made by Defendants Nowysz and Carreon's Appellate Reply Brief as their Own.

ARGUMENT

I. Plaintiff Failed to Bring a Qualified Expert and Meet their Burden of Proof.

Plaintiff argues that the new version of Iowa Code section 147.139 does not substantively change the expert testimony requirements that were provided under the previous version of Iowa Code section 147.139. Plaintiff also questions whether the burden of proof argument was properly preserved and alternatively argues the District Court properly analyzed the burdens on each party.

A. Anesthesiology is not a Substantially Similar Field to Emergency Surgery, General Surgery, and Respiratory Therapy.

Plaintiff has conceded, or not explicitly resisted, two major points from CHI Defendant's Brief. *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 507 n.12 (Iowa 2012); *Cf.* 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."). Plaintiff does not resist that Dr. Mark's report stated that she was licensed to practice and actively practiced in anesthesiology. *See* App. 100. Plaintiff also does not resist that they admitted in the District Court hearing Dr. Mark, as an anesthesiologist, is not in the same field as the CHI Defendants. Tr. Pg. 14:10-15, 15:14-17. The appellate court

should move forward with the understanding that Dr. Mark's field is anesthesiology.[1]

Plaintiff's core argument is that the "substantially similar" language in Iowa Code section 147.139 saves the day. Plaintiff's Proof Brief Pg. 19. Plaintiff invokes various statutory interpretation techniques including clashing with the CHI Defendants on the plain language, a variation of *in pari materia*, and public policy considerations. These arguments miss the mark.

1. The Plain Language Does Not Support Plaintiff's Interpretation.

The term "field" is modified by "as the Defendant." CHI Defendant's Proof Brief Pg. 31. Dictionary definitions, Iowa caselaw, medical professional boards, and the medical literature, each indicate that the plain and ordinary meaning of a Defendant's, or healthcare provider's, "field" refers to the Defendant's professional practice or branch of medicine, not simply a procedure. *Id.* at 31–35; *see, e.g.*, *Ward v. Unity Healthcare*, No. 20-1516, 2021 Iowa App. LEXIS 1039, at *10-17 (Iowa Ct. App. Dec. 15, 2021) (comparing the plaintiff's expert's field, as

[1]Plaintiff's brief oscillates between whether Dr. Mark's field is anesthesiology or "difficult airway management." To recap, difficult airway management is not a field of medicine but more akin to a procedure. For example, a healthcare provider cannot get a board certification in difficult airway management. Even if difficult airway management is a field, Dr. Mark's Report and C.V. indicate her experience in difficult airway management is limited to quality improvement activities, research, and membership in a medical society. These do not constitute an active practice or being a qualified instructor in difficult airway management as required under Iowa Code section 147.139(2), nor board-certification under any of the approved boards in section 147.139(3).

an emergency medicine physician, was not substantially similar with the fields of hospital administration, nursing, radiology, surgery, and hospitalists). "Substantially similar" requires the Plaintiff's expert's professional practice to have the "material characteristics" or the "essential likeness" as applied to each named Defendant's professional practice. CHI Defendant's Brief Pg. 43–44.

Plaintiff argues that the plain language of "substantially similar field" language should be construed to "encompass[] related fields that address the same medical problem and methods of treatment." Plaintiff's Proof Brief Pg. 19. Plaintiff does not use traditional hallmarks of plain language or ordinary meaning analysis. Notably, Plaintiff never reconciles how the legislature chose to modify field *i.e.* "as the Defendant." *See* Iowa Code § 147.139(1-3) (2017). The legislature's modification gives context to what Iowa courts guidance, context, and insight as to what to compare. Iowa courts are not solely evaluating Plaintiff's expert's experience with the procedure at issue but rather the qualifications of the Defendant.

2. Plaintiff's Other Cannons of Statutory Interpretation Fail.

Plaintiff argues that the "Legislature rejected any change of focus from the medical problem and treatment provided, when it refused to do so." Plaintiff's Proof Brief Pg. 20. Plaintiff's argument fails to recognize the proper weight to the presumption the legislature intends to change the law when it amends the law.

Chavez v. MS Tech. LLC., 972 N.W. 2d 662, 670 (Iowa 2022). The amendments to section 147.139 repeatedly added comparisons to "as the Defendant," which was non-existent in the previous statutory version. *Compare* Iowa Code § 147.139 (2017) *with* Iowa Code § 147.139 (2016). Additionally, the legislature removed the qualification focused on the "medical problem or problems at issue and the type of treatment administered in the case" from the previous statute. *Id.* As thoroughly explained in CHI's Brief, the legislature had the opportunity to include the specific procedure at issue as an expert qualification requirement as shown within the text of section 147.139, the 2017 Act, and the legislative history of that Act. CHI's Brief Pg. 34–41. It chose not to.

These revisions were not a marginal "refinement" to the expert qualification standard. Plaintiff's Proof Brief Pg. 19. They were a wholesale rewrite. *Ronnfeldt v. Shelby Cnty.*, No. 22-0365, 2023 Iowa Sup. LEXIS 5, *7 (Iowa Jan. 6, 2023) ("[The 2017 Act] imposed stricter requirements on the qualifications for expert witness in medical malpractice suits."). Plaintiff's other statutory construction arguments fail to overcome this strong presumption. *Chavez*, 972 N.W. 2d at 670.

Overall, whether a single procedure overlaps between two fields is minimally relevant to the "material characteristics" or "essential likeness" inquiry. More important factors should include the frequency of the procedure between fields, the context of that procedure in those fields, and what other procedures

cross or do not cross between the two fields. Anesthesiologists do not usually perform intubations as a regular part of their duties. Such statement cannot be said for emergency personnel. *Cf.* Iowa Code § 147A.1(3) (2022). And to the extent anesthesiologists do perform intubations, it is generally in a critical care environment that involves significantly different calculations than in an emergency medicine environment. *See* CHI Defendant's Brief Pg. 46–47. These notable differences were well documented by Dr. Mark's own research and publications explaining how different disciplines or fields need to be more cohesive on intubation procedure. Lynette J. Mark, M.D. et. al., *Difficult Airway Response Team: A Novel Quality Improvement Program for Managing Hospital-Wide Airway Emergencies*, HHS Public Access, Pg. 3, 8, 11 (emphasis added). Further, emergency personnel perform countless more procedures that make up their field of emergency medicine that anesthesiologists simply do not perform. Iowa Code § 147A.1(3); *see* CHI Defendant's Brief Pg. 44–45. The same can be said for general surgeons and respiratory therapists.

The "material characteristics" or "essential likeness" inquiry should also not stop at the ability to do perform a similar procedure. Other factors include the different educational requirements or residencies, the different licensing obligations or continuing medical education, and whether the experts can obtain the same board certifications. For example, an anesthesiologist generally cannot

obtain the same board certification that an emergency or general surgeon can because the testing, education, and training requirements between them are drastically different. *Compare Get Certified*, The American Board of Anesthesiology, https://www.theaba.org/get-certified/ (providing the tests for an anesthesiologist) *with Become Certified*, The American Board of Emergency Medicine, https://www.abem.org/public/become-certified *and Becoming Certified*, The American Board of Surgery, https://www.absurgery.org/default.jsp?examoffered. Essentially, an anesthesiologist's ability to do one procedure that crosses fields is insufficient to constitute having the the "material characteristics" or make her "essentially like" an emergency surgeon, general surgeon, or a respiratory therapist.

3. The Public Policy Considerations Favor the CHI Defendant's Interpretation.

Plaintiff generally makes two public policy points. Plaintiff's Proof Brief Pg. 26-27. First, having different experts for different branches of medicine is inefficient. *Id.* Second, any other policy considerations would be addressed by the governing instructions. *Id.*

The legislature decided the best way to ensure a plaintiff's lawsuit has merit was to match a plaintiff's expert(s) with each named defendant. Matching the plaintiff's expert's qualifications with the defendant's qualifications makes it more likely the plaintiff's expert can succinctly and effectively explain why the

plaintiff's medical malpractice claims have merit. As pointed out by Defendants Nowysz and Carreron's Proof Brief, this reasoning explains why the legislature requires a separate certificate of merit affidavit to be served on each defendant named in the petition. NC Defendants Brief Pg. 16; *see* Iowa Code § 147.140(1)(*c*). Each named Defendant might have different licenses, practice fields, and board certifications necessitating a different plaintiff's expert, as is certainly the case here.

Plaintiff then cites to *Verzeau-Crouch v. Abraham* explaining that expert qualifications are a question of credibility for the jury. 17-1213, 2019 Iowa App. LEXIS 24 (Iowa Ct. App. Jan. 24, 2019). But *Abraham* was based on the old expert qualification statute. *Id.* at *15 (explaining that "none of the issues raised disqualify [plaintiff's expert] under the *governing section* 147.139" (emphasis added)). And the question of an expert's qualifications under the new and governing section 147.139 provisions is a matter of law. *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 686 (Iowa 2010) (explaining the district court's responsibility as a gatekeeper for expert qualifications). These new revisions in sections 147.139 and 147.140 emphasized to Iowa courts the need to fortify their gates prevent who are outside of their chosen fields to claim error by the Defendants. *Id.*; *Jones v. Bagalkotakar*, 750 F.Supp.2d 574, 581 (D. Md. 2010).

This case will be a good test to determine whether the legislature's deliberate and distinctive overhaul to Iowa Code section 147.139 makes any appreciable difference. Simply put, an expert's ability to perform one procedure that the Defendant also may also perform in their field is insufficient to make them "essentially alike" or have "material characteristics." Plaintiff has failed to show that an anesthesiologist is "substantially similar" to an emergency surgeon, general surgeon, or respiratory therapist. Although Dr. Mark carries impressive credentials, her credentials fail to adequately match up with each named Defendant as required under Iowa Code section 147.139. Therefore, dismissal with prejudice is required under Iowa Code section 147.140(6).

B. The Proper Burden of Proof was Properly Preserved and the District Court Failed to Properly Conduct that Test.

CHI Defendant's brief in support of the motion to dismiss specifically noted that "Plaintiff must meet all of the requirements set forth in Iowa Code § 147.139." App. 80. The same brief also stated that "Plaintiffs cannot meet their burden" from the information provided in Dr. Mark's report. *Id.* at 81-82; *see also id.* at 66. The District Court also acknowledged the explicit language in Iowa Code section 147.140(1)(*a*) placing the burden on the Plaintiff to show their expert is qualified. *Id.* at 254. Error was sufficiently preserved on the burden of proof issue.

As mentioned, the Plaintiff has the burden of providing information sufficient to show their expert was qualified. *McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021) (explaining that the burden is on the plaintiff to provide verified information); *see also Ranes*, 778 N.W.2d at 686 ("In all circumstances involving expert testimony, the proponent of the evidence has the burden of demonstrating to the court as a preliminary question of law the witness's qualifications."). Plaintiff's Brief acknowledges that it had the initial burden of production. Plaintiff's Proof Brief Pg. 28. The District Court made various presumptions in violation of the Plaintiff's initial burden of production regarding licensure, board certifications, and practices. App. 255. Further, Plaintiff's Brief also conveniently uses ellipses to hide the District Court's full statement that it had "no information provided by Dr. Mark" to decide whether her field and each Defendant's fields were substantially similar. *Compare* Plaintiff's Proof Brief Pg. 29 n.2 *with* App. 255. The District Court's own factual findings and presumptions show that Plaintiff failed to meet their burden to provide sufficient information to show that Dr. Mark was qualified. This inconsistency necessitates reversal alone. Dismissal with prejudice is required under Iowa Code section 147.140(6).

II. The Plaintiff's Failure to Place Dr. Mark Under Oath Requires Dismissal.

CHI Defendants identify two general arguments raised by Plaintiff. First, a Plaintiff should be able to cure a deficient certificate of merit affidavit after the

strict sixty-day deadline. Plaintiff's Proof Brief Pg. 31, 35–36. Second, Dr. Mark's Report achieved substantial compliance. *Id.* at 31–35.

Plaintiff failed to properly preserve the curing argument at the District Court level. And even if error was preserved, Iowa Code section 147.140 does not allow for a curing mechanism. Dr. Mark's Report does not substantially comply with the oath requirement. No evidence was provided to sufficiently show that Dr. Mark was conscience bound in issuing her Report. *State v. Carter*, 618 N.W.2d 374, 378 (Iowa 2000) (en banc).

A. Plaintiff's Curing Argument Was Not Properly Preserved and is Otherwise Contrary to Iowa Code section 147.140.

Certificate of merit affidavits were due for the CHI Defendants on March 4, 2022 based on CHI Defendant's first answer. Motion practice regarding the deficiency occurred in May. Plaintiff later filed an affidavit on June 2 signed by Dr. Mark in an attempt to cure there pre-existing Report. This affidavit states that "I, Dr. Lynette Mark, M.D., certify, under penalty of perjury and pursuant to the laws of the State of Iowa, that the expert opinion letter dated February 20, 2022, which I produced to Counsel for the Plaintiffs, was true and correct, and all opinions made therein were made within a reasonable degree of medical certainty." App. 242-43. The affidavit was ninety days after the certificate of merit affidavits were due. *Days Calculator: Days Between Two Dates*, timeanddate

https://www.timeanddate.com/date/durationresult.html?m1=03&d1=04&y1=2022&m2=06&d2=02&y2=2022.

The Appellate Court should determine that error has not been preserved and/or has been waived, as to whether the Plaintiff can cure a deficiency in the certificate of merit affidavit after the strict sixty-day deadline has passed. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012); *see Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 552 (Iowa 2021) (explaining when the appellate court will not address an alternative argument where the record was limited). There was limited briefing on a curing argument as the affidavit was submitted well after the conclusion of motion practice. Plaintiff did make a blanket statement at the June 30th hearing that they substantially complied with section 147.140 by supplementing an affidavit after the deadline. Tr. Pg. 19:8-11. The District Court did not consider this supplementation in its ruling. *See generally* App. 249-57. The June 2nd supplementation appears nowhere in the factual section of its order. *Id.* Nor does it appear in the analysis of whether Dr. Mark's report substantially complied with the statute. *Id.* There is no citation to authority for a curing mechanism in Iowa Code section 147.140 in the Plaintiff's appellate brief. These are all sufficient reasons for the appellate court to not consider this argument. *Ripperger*, 967 N.W.2d at 552.

Irrespective of error preservation or waiver issues, Plaintiff's curing argument is contrary to the plain language, context, and legislative history surrounding Iowa Code section 147.140. First, the plain language states that a substantially compliant certificate of merit is due within sixty days of the Defendant's answer. Iowa Code § 147.140(1)(*a*). As explained in *McHugh*, "the time of the certificate of merit affidavit is material." 966 N.W.2d at 291; *see Ronnfeldt*, 2023 Iowa Sup. LEXIS at *8 (explaining "the sixty-day dismissal rule is strict"). The Defendant is entitled to receive a substantially compliant certificate of merit affidavit within the sixty-day deadline; not one provided afterwards.

Furthermore, Iowa Code section 147.140(6) provides that "[f]ailure to substantially comply with subsection 1 shall result, *upon motion*, in dismissal with prejudice." A good motion should identify how the certificate of merit affidavit is not substantially compliant. *See* Iowa R. Civ. P. 1.431(1–3). So, it makes little sense to read in a curing mechanism when the dismissal with prejudice remedy is based on a Defendant's motion outlining to the Court how the Plaintiff's certificate of merit affidavit is substantially deficient. *Cf. Hantsbarger v. Coffin*, 501 N.W.2d 501, 505 (Iowa 1993) (rejecting the notion that Defendant needs to act as "his or her 'brother's keeper' "). Plaintiff's curing argument would render the "upon motion" language practically superfluous. *State v. Middlekauff*, 974 N.W.2d 781, 801 (Iowa 2022) (explaining the superfluous cannon).

Additionally, Plaintiff is provided with two "escape hatches" if they could not secure a substantially compliant certificate of merit affidavit in time. Iowa Code section 147.140(4) allows a Plaintiff to extend time to get a substantially compliant certificate of merit affidavit by filing a motion establishing good cause or a stipulation by the parties "prior to the expiration of the time limits." Moreover, Plaintiff's long-standing ability to voluntarily dismiss their case before there has been a ruling on whether the certificate of merit is substantially compliant exists and is available to them. *Ronnfeldt*, 2023 Iowa Sup. LEXIS 5 at *16–17. Plaintiff's request for a curing mechanism "read[s] a 'good-cause' provision into section 147.140 that would be applicable even after the statute's 60-day deadline." *Morrow v. United States*, 47 F.4th 700, 705 (8th Cir. 2022). The Iowa appellate courts should "decline to read the statute in that manner" like the Eighth Circuit. *Id.; see also McHugh*, 966 N.W.2d at 291 ("We cannot read a grace period into the new statute that the legislature did not communicate through its drafting."). The legislature ultimately chose to provide Plaintiff's with an extension mechanism or a voluntary dismissal mechanism rather than a curing mechanism to allow Plaintiff's to correct their certificate of merit affidavits.

Indeed, the legislative history also supports Defendant's position. Both introduced bills provided a curing mechanism whereby "a written notice of deficiency may be served upon the plaintiff for failure to comply with subsection 1

because of deficiencies in the certificate of merit affidavit." Introduced House File 487, 87th Gen. Assemb., Reg. Sess. (Iowa 2017); Introduced Senate File 465, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) (same). The Plaintiff would then have twenty days to cure that deficiency or risk being dismissed with prejudice. *Id.* The Iowa legislature considered these provisions but then eliminated them from the final act. *Compare* Introduced House File 487, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) *and* Introduced Senate File 465, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) *with* 2017 Iowa Acts ch. 107.

Perhaps a football analogy, modeled after *Victoriano v. City of Waterloo,* explains the faultiness of Plaintiff's curing argument best. No. 22-0293, 2023 Iowa Sup. LEXIS 2, *11-12 (Iowa Jan. 6, 2023). The Plaintiff broke the huddle and lined up in an initial formation. Plaintiff then attempted to do a necessary presnap motion under Iowa Code section 147.140. However, the Plaintiff's presnap motion resulted in an illegal formation. The Plaintiff continued to remain in this illegal formation until the play clock expired under Iowa Code section 147.140(1)(*a*). *Cf. Victoriano,* 2023 Iowa Sup. LEXIS at *11-12 ("[T]he Plaintiff must call a play and line-up in a final, legal formation before the ball is snapped.").

The Plaintiff could have corrected this illegal formation before the play clock expired. *Id.* Plaintiff could have even called a timeout altogether. *Id.*; *cf. Ronnfeldt*, 2023 Iowa Sup. LEXIS at *16–17. Yet, Plaintiff did not. Any attempt to

fix the illegal formation and snap the ball, well after the play clock expired, would be a prejudicial delay of game penalty.

To conclude, Plaintiff's request for a curing mechanism to remedy deficient certificate of merit affidavits after the strict sixty-day deadline is best made to the legislature. The Appellate Court should not read in such a curing mechanism and, as such, not consider Dr. Mark's June 2nd affidavit for purposes of its analysis.

B. Dr. Mark's Initial Report Did Not Substantially Comply with the Certificate of Merit Statute Because It Was Not Under Oath or Under Penalty of Perjury.

Defendants argues that the failure to provide a certificate of merit affidavit under oath or under penalty of perjury is fatal. Plaintiff argues the District Court correctly found substantial compliance because of other factors associated with her report.

Plaintiff argues the appellate court should not consider *State v. Carter*'s analysis of oaths because it is "a straw man" and *Carter* was decided before Iowa Code section 147.140 was enacted. Plaintiff's Proof Brief Pg. 34. Under established principles of statutory interpretation, a court "may refer 'to prior decisions of this court and others' " when the legislature has not defined a statutory term. *Middlekauff,* 974 N.W.2d at 793 (quoting *Good v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853, 860 (Iowa 2019)). It is entirely appropriate to look at

older Iowa cases, such as *Carter*, to help explain a term in a new statute that was not outlined by the Iowa legislature. Based on *Carter*, Iowa courts are reviewing the certificate of merit affidavit to ensure the Plaintiff's expert was sufficiently conscience bound at the time of signing it. 618 N.W.2d at 378.

"We assume 'when a legislature enacts statutes it is aware of the state of the law.' " *Ronnfeldt*, 2023 Iowa Sup. LEXIS 5, at *17 (quoting *Simon Seeding & Sod. Inc. v. Dubuque Hum. Rts. Comm'n*, 895 N.W.2d 446, 467 (Iowa 2017)). This cannon is particularly relevant here considering *Carter*'s note to the legislature. Specifically, the legislature was "free to alter this traditional requirement [(the presence of another)] of an oath or affirmation by statute." 618 N.W.2d at 376. The legislature did not explicitly alter the traditional requirement of another for oaths under Iowa Code section 147.140(1)(*b*). Nor has the legislature changed the "under penalty of perjury" exception in Iowa Code section 622.1 since *Carter*.

Plaintiff then argues that *McHugh* is factually inapplicable because it "involved a late opinion rather than an unverified one." Plaintiff's Proof Brief Pg. 34. But *McHugh* frames substantial compliance by determining whether the Plaintiff's expert has provided "*verified* information." The oath requirement serves a valuable purpose in verifying medical malpractice claims. An oath ensures that the Plaintiff's expert witness understands the gravity of the allegations they are about to make in the certificate of merit. The oath requirement works in tandem

with the goal of deterring frivolous actions by making the Plaintiff's expert think long and hard about the allegations they will be signing to. *Struck v. Mercy Health Servs.*, 973 N.W.2d 533, 539 (Iowa 2022). Further, an expert who knowingly supports a frivolous action, but does not sign under oath or penalty of perjury, can escape criminal prosecution like what occurred in *Carter*. 618 N.W.2d at 378. Without an oath, or its equivalent, a Plaintiff's expert may not properly acknowledge or weigh what causes of action in a Plaintiffs' petition have merit, an important part of the verified information a Defendant is entitled to know early in this type of litigation.

As a last-ditch effort, Plaintiff argues that *Schmitt v. Floyd Valley Healthcare* "actually supports" their position that the Plaintiff's expert does not need to be under oath in order to substantially comply with the statute. Plaintiff's Proof Brief Pg. 34–35. True, the District Court in *Schmitt* was "*additionally*, far more importantly" concerned with the use of medical records that did not provide any expert opinions from Plaintiff as a certificate of merit rather than them being in affidavit form or the records being under oath. No. 20-0985, 2021 Iowa App. LEXIS 560, *5 (Iowa Ct. App. July 21, 2021) (emphasis added). But the "far more importantly" language is just emphasizing the degree of *how* substantially non-compliant Schmitt was with the statute. *Id. Schmitt* recognizes that failure to provide a certificate of merit "in affidavit form or otherwise submitted under oath"

on its own is fatal. *Id.* Otherwise, the District Court would not have used the word "additionally" in its analysis transitioning between the oath requirement to the content requirements. *Id.*

No evidence exists indicating that Dr. Mark took an oath in front of another to make her conscience bound to her report. *Carter*, 618 N.W.2d at 378; *see* App. 253. To the extent section 622.1 is applicable, her report was not under penalty of perjury to make her conscience bound. *Carter*, 618 N.W.2d at 378; *see* App. 252. Facts that the report contained Dr. Mark's own letterhead, a statement that the care was breached, and contained Dr. Marks signature does not rise to the level of being conscience bound that the legislature was intended its explicit oath requirement. *Carter*, 618 N.W.2d at 375, 378 (explaining that the language of a certification on a Board of Pharmacy registration form stating "that the information I have provided on this registration application is *true and correct* . . . fell far short of substantially complying with the language required by the statute." (emphasis added)); *see Taylor v. Community Med. Ctr.*, No. A-5727-08T2, 2011 N.J. Super. Unpub. LEXIS 143, at *11 (N.J. Super. Jan. 21, 2011) ("The absence of the oath or affirmation is not a technical flaw, but a defect that strikes at the heart of the statutory requirement, which recognizes the need for the solemnity of the truth."). Dismissal with prejudice on this independent ground is required under Iowa Code section 147.140(6).

III. The Amicus Brief Cannot Save Plaintiff's Failure to Place Dr. Mark Under Oath.

The Iowa Association of Justice has filed an amicus brief focused solely on the oath requirement of section 147.140. *See generally* Amicus Brief. The amicus requests that the oath requirement should be stricken as unconstitutional under vagueness grounds or, in the alternative, hold that the "any written document which is signed, and which has sufficient indicia of subjective good faith or truthfulness should be deemed to satisfy the purpose of the statute." *Id.* at 15. The amicus's constitutional argument should be immediately disregarded as an unpreserved argument. Even if it was preserved, there are no vagueness issues that rise to an unconstitutional level. The amicus's requested statutory holding also flies in the face of our caselaw and would render explicit terms used by the legislature as superfluous.

A. The Amicus Seeks an Advisory Opinion on an Unpreserved Constitutional Issue That Would Provide Different Relief.

The amicus's first argument is that Iowa Code section 147.140's oath requirement is unconstitutionally vague. Amicus Brief Pg. 7-13. "[W]e normally do not allow the amici curiae to raise new issues." *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710, 745 (Iowa 2022) (plurality opinion) (hereinafter *PPH IV*); *see also* Iowa R. App. P. 6.906(1), (5)(*b*)(3) (emphasizing

that amicus briefs should only assist the court on answering preserved issues). "It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 489 (Iowa 2003). The amicus candidly concedes that error was not preserved on whether the statute is unconstitutionally vague. Amicus Brief Pg. 7 n.1.

The amicus also seeks relief that was not asked for at the District Court. The amicus's request to hold the statute facially unconstitutional is a "substantive difference" in the arguments presented and "deciding this issue could result in granting the [appellee] more relief than it requested on appeal." *PPH IV*, 975 N.W.2d at 745. "[I]t is one thing to consider an additional argument, another to grant additional relief not sought by" Plaintiff. *Id.* (emphasis omitted). Frankly, the amicus's request for the Appellate Court to decide the void for vagueness argument "for the benefit of future litigants" "smacks of a request for an advisory opinion." *In re Marriage of Mrla*, No. 19-1222, 2020 Iowa App. LEXIS 865, at *14 (Iowa Ct. App. Sept. 2, 2020); *see* Amicus Brief Pg. 7 n.1.

Simply put, the amicus is asking for an advisory opinion on an unpreserved constitutional issue that is beyond the scope of the relief asked by Plaintiff. The Appellate Court should deny that invitation.

B. The Oath Requirement is Not Unconstitutionally Vague Under Pertinent Caselaw and Statutes.

Without waiving their argument that the amicus's request to hold the statute unconstitutional should be categorically dismissed, the amicus's constitutional arguments are vastly overstated.

"In determining whether a statute is unconstitutionally vague, this court presumes the statute is constitutional and gives 'any reasonable construction' to uphold it." *Middlekauff*, 974 N.W.2d at 801 (quoting *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007)). To determine reasonable constructions, the court looks at pertinent caselaw and references to similar statutes of the same subject matter. *Id.*[2]

The amicus makes no attempt to reconcile its analysis of oaths with *State v. Carter*. *See generally* 618 N.W.2d 374 (Iowa 2000) (en banc). *Carter* is pertinent caselaw regarding oaths and explains the oath is designed to bind the conscience of the oath-taker and that essential element of binding the conscience is the presence of another. *Id.* at 377–78. Further absent from the amicus is any analysis of Iowa Code section 622.1 which may allow a party to file an affidavit under penalty of perjury in lieu of an oath. *Carter* and section 622.1 answer many of the

[2]"Although the incorporation of code books and case law in the evaluation of fair notice has been criticized on the ground that ordinary citizens lack access to them, United States Supreme Court holdings that vagueness may be cured through judicial narrowing have been widely accepted and characterized as settled law." *Nail*, 743 N.W.2d at 540. Amicus makes no argument to the contrary.

hypothetical questions posed by amicus. The oath requirement is not unconstitutionally vague.

C. The Amicus's Interpretation of the Oath Requirement Attempts to Bypass the Essential Requirement of an Oath.

Amicus alternatively requests that the oath requirement be interpreted loosely by appellate courts. This means an oath does not need to be "administered by a third party" and that an expert's "subjective good faith or truthfulness" is sufficient. Amicus Brief Pg. 15. The amicus cites two cases for this proposition. Neither case is supportive of waiving the presence of another requirement in conducting an oath.

State v. Angel involves a situation where a detective orally swore that a warrant application was true and correct in the presence of a judicial officer. 893 N.W.2d 904, 905 (Iowa 2017). The amicus's main use of *Angel* is to argue that if written evidence of an oath is not necessary for a warrant application, then it does not need to be done for a certificate of merit affidavit. But amicus misses issue. Both dueling opinions in *Angel* would agree that an oath in front of a judicial officer was necessary to bind the conscience of the individual taking the oath. *Id.* at 910; *Id.* at 918 (Appel, J., dissenting); *Cf. Carter*, 618 N.W.2d at 378. That clearly did not occur with Dr. Mark.

In the Interest of J.D.S. involves an incident of sexual assault where the defendant argued that error was established because a four-year-old survivor was not formally placed under oath as required under Iowa Rule of Evidence 5.603. 436 N.W.2d 342, 347 (Iowa 1989). It is well established that young children may not have the ability to understand certain language used in an oath or why an oath is being administered. 3 Weinstein's Federal Evidence § 601.14. In lieu of administrating a formal oath, the district court may question a child to ensure that they understand the difference between right and wrong and why it is important to tell the truth in open court. *In the Interest of J.D.S.* 436 N.W.2d at 346-47 (examining whether a child understood the difference between a truth and a lie). A young child and a highly-educated medical professional are far from the same in terms of ability to understand an oath. Further, like in *Angel*, this colloquy was done under the presence of another, the judge, which is a necessary element of an oath to ensure the conscience of the individual is bound. *Carter*, 618 N.W.2d at 378.

Amicus's request to not require any administration of an oath by a third party is contrary to the long line of caselaw identifying the essential element of an oath includes the presence of another as described in *Carter*. *Id.* Amicus's request to eliminate the presence of another in conducting an oath for a certificate of merit

affidavit is best taken up with the legislature. *Id.* The appellate courts should decline render an express provision of Iowa Code section 147.140 superfluous.

IV. CHI Defendants Incorporate Any Applicable Arguments Made by Defendants Nowysz and Carreon's Appellate Reply Belief as their Own.

CONCLUSION

For the reasons stated in its appeal brief, its reply brief, and the co-medical defendants brief, CHI Defendant's respectfully request that the case be dismissed with prejudice.

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CERTIFICATE OF FILING AND SERVICE

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type and contains 5,431 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Theodore T. Appel* — March 20th, 2023

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ATTORNEY COST CERTIFICATE

I hereby certify the cost of printing the foregoing Defendants-Appellant' Final Brief was the sum of $0.00.

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