IN THE SUPREME COURT OF IOWA

No. 22-1574
Polk County No. LACL151799

DARRIN P. MILLER, Individually, as Executor of the ESTATE OF MEREDITH MILLER, and as Parent, Guardian and Next 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 MARCYONE 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 DARMENING, RT,
Defendants/Appellants

INTERLOCUTORY APPEAL *from the* IOWA DISTRICT COURT
in and for POLK COUNTY

Honorable DISTRICT COURT JUDGE JOSEPH SEIDLIN, *Presiding*

Conditional AMICUS BRIEF of the IOWA ASSOCIATION FOR JUSTICE

IOWA ASSOCIATION FOR JUSTICE by
Chair, Amicus Brief Committee

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2023, I electronically filed this document with the Clerk of the Iowa Supreme Court using the Appellate EDMS system which will serve the following parties or their attorneys:

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IDENTITY & INTEREST OF AMICUS CURIAE

As stated in the Iowa Association for Justice's (hereinafter "IAJ") Motion for Leave to File Amicus Curiae Brief filed contemporaneously with this brief, incorporated herein by reference, the IAJ is an organization comprised of over 700 attorneys primarily practicing on behalf of injured persons. Whether an injury occurs at work, on Iowa's roadways, at a school, in jail, or, in this case, at a medical facility where someone goes to get help, IAJ is there to seek justice.

Justice isn't just about going to trial and telling a story to the jury, though. Justice is also about *getting* to court. And the past several years, for sure, seem like it is a legislative mandate to make obtaining a day in court more difficult and expensive for those among us who are already hurt, sometimes gravely so. Iowa Code section 147.140 is another one of those devices, designed to kill a case before it sees the light of day in court. Way too many good cases are lost

through artifices like 147.140, and if IAJ can help this Court craft an interpretation of section 147.140 which marries the purpose of the statute with the democratic functions of a civil justice system (to avoid self-help measures in the streets), without losing too many good cases on technicalities then it is a good day for justice.

CERTIFICATE OF COMPLIANCE-AUTHORSHIP

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), counsel herein authored this brief in whole in combination with members of the Iowa Association for Justice Amicus Brief Committee, primarily including Peter Larsen. No party's counsel contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

/s/ Jessica A. Zupp. 2/17/23
Jessica A. Zupp, Attorney/Chair, Date
Iowa Association For Justice
Amicus Brief Committee

CERTIFICATE OF COMPLIANCE- BRIEF REQUIREMENTS

Pursuant to Iowa Rule of Appellate Procedure 6.906(4), the undersigned states that this brief complies with rule 6.903(1)(g) as cross-referenced by Iowa Rule of Appellate Procedure 6.906(4). This brief is prepared in Times New Roman, a proportionally spaced typeface, and contains 2,906 words, which is less than one-half the length permitted for Appellant's brief. See Iowa R. Civ. P. 6.903(1)(g) (permitting 14,000 words for a proportionally spaced typeface).

/s/ Jessica A. Zupp 2/17/23
Jessica A. Zupp, Attorney/Chair, Date
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ARGUMENT & AUTHORITIES

I. THE OATH REQUIREMENT IN IOWA CODE SECTION 147.140 SHOULD BE DEEMED VOID FOR VAGUENESS.[1]

A. The Oath Requirement in Chapter 147 is Subject to Hundreds of Reasonable Interpretations in Violation of Due Process .

The "oath" requirement of Iowa Code section 147.140, the "certificate of merit" statute, is a hot mess. It is so vague that it probably shouldn't even be enforced if one is being honest about what it means to have "reasonable notice" of a statute's requirements like due process commands. Even the most cursory review of the statute reveals that it is so replete with gaping, obvious holes that, statistically speaking, each of us is more likely to get a perfect score on the SAT than to guess the meaning of this statute correctly! https://www.news-daily.com/multimedia/slideshows/odds-of-50-random-events-happening-to-you/collection_2190bd4a-e534-5c79-b36d-677f44f9b809.html#15 (last visited February 14, 2023) (noting the odds of getting a perfect score are only .03% compared to 1/225 possibilities for properly interpreting this statute, which is a .004%).

First, the certificate of merit statute doesn't say *who* administers the oath to the expert. Will any third-party suffice or are there special qualifications to administer the oath? Need the administrator be a clerk or judge? Would a party's counsel be qualified, or is counsel too

[1] The Iowa Association for Justice recognizes that neither party expressly raised or briefed the issue of the void for vagueness doctrine. However, assuming this Court were to affirm the district court's ruling on substantial compliance anyway, then failure to preserve error would be harmless, and the vagueness issue could be decided for the benefit of future litigants who will also encounter this issue. See Thomas Mayes & Anuradha Vaitheswaran, Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice, 55 Drake L. Rev. 40, 71 (2006) (noting that "...Iowa's courts are more likely to reach unpreserved errors when they would otherwise affirm on the merits.")

biased? Could a child administer the oath? Is there a stamp of some kind, like a notary uses? There are five possibilities here, at least. Likely more, but five for sure.

Presuming someone locates (and pays for) a qualified oath administrator, what are the right words for the oath? The statute again is silent. Is it an oath to tell the truth? Is it the *whole* truth, and nothing but the truth, or just *some* truth in terms of the elements of the statute: standard of care and causation? What if the oath is merely to be truthful about standard of care and causation, the subjects listed in the statute, but it is *not* an oath to be truthful about other statements in the certificate of merit, such as the expert's qualifications, for example? Is it okay if the expert is wrong or lies about his or her curriculum vitae in the certificate? Or, maybe instead of testing for truth, the oath is to confirm that the doctor's opinions are given to a reasonable degree of medical certainty? Is that it? Or maybe the oath is more like a court officer's oath: to uphold and defend the Constitution of the United States and the State of Iowa, and follow Iowa Rule of Civil Procedure 1.508 or Iowa Code section 147.140 in good faith? Or maybe it is like a judge's oath: to operate without fear or favor. A great expert witness shouldn't change his opinions based upon fear or favor, after all. Without any guidance at all in the statute one could reasonably hypothesize about at least five different options for determining the proper content of the oath,.

How must the oath be administered? The statute doesn't say it has to be in writing, necessarily. The only things which have to be in writing, according to the plain language of the statute, are the standard of care and causation. Iowa Code § 147.140. So, how does one know if an oath was administered at all if it isn't required to be in writing? And, whether the oath is in writing or not, when it comes to taking the oath, must the witness swear on a bible? Raise a right hand? Need there be a witness? Must the witness have qualifications, or need he or she sign as a

witness? And if, indeed, the oath *does* have to be in writing, must the oath be at the *top* of the certificate of merit document since the statute technically says the standard of care and causation content have to be provided "under the oath" of the expert? Iowa Code section 147.140. If so, why; what purpose would that serve? Whether the oath is at the top or the bottom is totally arbitrary. Or, instead, does "under the oath of the expert" instead mean that the *expert determines* how, when, where, she or he is deemed "under" his or her *own* oath? There are at least three possibilities, then, for how an oath is administered: oral, writing, and expert's choice.

Finally, when must the oath be given? Should the oath be administered before the expert signs the document? After the expert signs, but before the document is served? Can an oath be made, taken, or given at any time prior to the expiration of the certificate of merit service deadline? Is it okay for the expert to never effectuate an oath at all unless or until defense counsel questions requests it, and *then* the expert can just do it *pro forma*? And if so, what's the purpose of that? Hoops for the sake of hoops? Any one of these possibilities for *when* to do an oath is correct under gaping holes in the statute. That makes three or four options, at least.

Mathematically, if there are not less than five options for "who", not less than five options for "what", not less than three options for "how", and not less than three options for "when", then there are at *least* 225 different permutations for properly interpreting and applying the oath statute (5 x 5 x 3 x 3). And if there is only one proper interpretation out of 225, to be deciphered by this Court, since the statute is abundantly *un*clear, then medical malpractice practitioners are doomed from the start; they have less than a 1% chance of picking the right permutation and crafting their expert's affidavit accordingly. .0004% are the chances, to be precise (1/225). And *God forbid* the expert wants to write his or her *own* certificate of merit affidavit; there is basically no chance it will pass the magic "oath" test then! And so, while the

legislature nobly wanted to weed out bad cases with section 147.140, which is a legitimate end, , the means chosen by the legislature are *so vague* that the statute weeds out good cases too. No reasonable person can discern how to correctly comply.

Because the possibilities are too remote for a reasonable practitioner to properly understand and apply the new "oath" requirement in Iowa Code section 147.140, it should be deemed void for vagueness as a matter of due process of law, and the district court should be affirmed, but on due process grounds instead of substantial compliance grounds. State v. Nail, 743 N.W.2d 535, 539 (Iowa 2007) (setting forth three components of the void for vagueness doctrine and noting that a lack of clarity in drafting triggers due process concerns).

B. Oath Requirements in Other Parts of the Code Vary Widely.

When comparing Iowa Code section 147.140 to other oath statutes, it is obvious that whoever drafted 147.140 didn't do their homework at all. Id. at 540 (advancing a constitutional avoidance theory which would allow the court to compare statutes *in pari materia* in order to attempt to judicially narrow the statute and save it from unconstitutionality). Other statutes in Iowa with "oath" requirements differ substantially from section 147.140 and demonstrate that the "oath" requirement in Iowa Code section 147.140 is fatally vague.

For example, in Iowa Code section 29B.43, regarding military proceedings, certain military personnel must "*take* an oath to perform their duties faithfully…" however, the legislature gave the adjutant general the power to adopt rules pertaining to the "form, time, place, and manner" of taking the oath. Iowa Code § 29B.43. No such descriptors are present in section 147.140 nor is any person *other than the expert him or herself* vested with the power to determine the content of the oath. So, while the military has a process for determining when to administer an oath, when does the expert have to take the oath in section 147.140? Before

signing? After? Before service? After service? And who gives the oath in section 147.140? The lawyer collecting the affidavit? The doctor's secretary or nurse? Human Resources at the doctor's clinic or hospital? Does the doctor need to waste time and go visit a court clerk or a judge to get sworn? Section 147.140 is silent as to who, where, when, what, and how, and while 29B.43 isn't the epitome of clarity either, at *least* that statute gives *someone* the power to decide. Section 147.140, on the other hand, leaves everyone guessing.

Likewise, in Iowa Rule of Civil Procedure 5.603, regarding witnesses testifying in court, there is a requirement that a witness "give" an oath to "testify truthfully" and the oath "must be in a form designed to impress that duty on the witness's conscience." Iowa R. Civ. P. 5.603. By contrast, no such truthfulness or conscientious requirement is found in section 147.140,. Does that absence mean the oath requirement in section 147.140 does *not* pertain to being truthful then? Also, what is the difference between "taking" and oath like section 29B.43 says, and "giving" an oath like the rule of civil procedure says? In common speak, give and take are opposites: I can give candy or take candy. So, why the different words then: give and take? To complicate the differences even more, Iowa Code section 147.140 uses *neither* give nor take, but instead says for the expert to give information "under the oath of the expert"! So, either the legislature is incredibly sloppy, which is not the preferred interpretive canon, or those words mean different things.

Another example: in Iowa Code section 63.10, regarding oaths for civil officers, the statute says they shall "take *and subscribe* an oath…" to uphold the laws and Constitution. Iowa Code § 63.10. Iowa legislators, likewise, must "take *and subscribe*" an "oath or affirmation" to uphold the law and Constitution. These oaths, notably, deal with upholding the law, not finding truth. Is section 147.140 concerned with upholding the law, too, then, or finding truth? No one

knows because 147.140 doesn't say. Also, since section 63.10 says "take and subscribe" meaning sign the oath but section 147.140 doesn't say "and subscribe", is that statutory confirmation that the oath in section 147.140 does not have to be signed at all? Seems so.

Iowa Code § 147.140 is also peculiar when compared to section 277.28. Section 277.28 says school board members can "take" the "oath of office" at a board meeting, recorded by the secretary, and "administered" by a list of qualified persons; or, if the school board member takes the oath "elsewhere", then it has to be "subscribed" by the person taking the oath in a particular form, and only certain persons can administer the oath. Iowa Code § 277.28. So, since section 147.140 does not state when or where the expert must provide the oath, does that mean it can be anywhere, and be both before or after signing the certificate of merit? Also, since section 277.28 lists persons who can administer the oath, but section 147.140 is silent as to who administers it, does that mean anyone can administer it? Can the expert self-administer the oath, too, then? Seems like that should be the correct interpretation since the legislature didn't clarify or qualify.

Fiduciaries have a very serious "oath" requirement. Fiduciaries have to "subscribe an oath or certify under penalties of perjury" that they will "faithfully discharge duties imposed by law…". Iowa Code § 633.168. Perjury implications! That is felony-level severity. Cleary the Iowa legislature treats fiduciary oaths seriously, but since there are no perjury implications in section 147.140, does that mean that section is *not* concerned with truth-seeking and is *not* as big of a deal as being a fiduciary? The voter identity statute, Iowa Code section 49.78, goes a step further even than the perjury warning in section 633.168. In the voter ID statute, an attesting witness must "solemnly swear or affirm" to a voter's identity *and* confirm the witness's understanding that "any false statement in this oath is a class D felony…". Iowa Code § 49.78. Wow! Express felony-acknowledgment in section 49.78 is much more serious than the general

"perjury" warnings in 633.168. But again, by contrast, Iowa Code section 147.140 has no perjury warning, no class "D" warning, no "solemn" anything, and no "swearing" to anything. Without similar indicia of importance in section 147.140, it lends credence to a construction of the statute which merely requires the expert to put his or her standard of care and causation opinions in writing and sign it. Any other rationale is just wishful guesswork.

Accordingly, it is clear that when the legislature intends to particularize the who, where, what, when, why, and how, it does so. It knows how to give power to administer oaths. It knows how to make them subject to writing requirements. It knows how to prescribe content. It knows how to inject perjury warnings. It knows how to distinguish between the truth-seeking function and merely upholding or applying the law. Yet, *none* of the above elements are found in Iowa Code section 147.140. It is almost as though when drafting section 147.140, the legislature was sloppy on purpose so that more medical malpractice plaintiffs would fail. But regardless of whether the legislative intent was to wreak havoc and promote failure, nonetheless, the chilling effect is that almost no one has a chance at guessing the meaning of this statute right.

When the basics: who, where, what, when, and how cannot be answered by a person of ordinary intelligence, either with or without reference to other, similar statutes, then the statute is too vague for enforcement, and should not be applied at all.

C. The Oath Requirement Should be Applied Liberally to Achieve the Purpose of the Statute.

Oaths aren't always treated that strictly by the Court. For example, in State v. Angel, 893 N.W.2d 904 (Iowa 2017), a case involving a search warrant application which an officer failed to sign, Justice Mansfield, writing for the majority, explained that the search warrant statute only required the oath to be given in the presence of the judicial officer, and not actually be in writing at all, and thus, the warrant was valid. So, if the Court isn't even going to read into the warrant

statute a written oath requirement, and that is in the context of infringing people's fundamental constitutional rights, then certainly a written oath requirement should not be read into the statute here which is a more basic, mundane, and procedural rule merely designed to have cases trickling into court, rather than flooding in. In short, no important or fundamental interest of justice will be harmed by this Court choosing to loosely interpret the certificate of merit "oath" requirement.

Indeed, even when an "oath" is clearly and expressly required by the Code, the Supreme Court has still dispensed with it entirely! In In the Interest of J.D.S., 436 N.W.2d 342 (Iowa 1989), a case where a four-year old boy was testifying as a witness, but the judge didn't administer the normal oath to the boy, but instead quizzed him on truth and lies, and getting in trouble for lies, the Court held that the judge's inquiries of the boy were sufficient to satisfy the "oath" requirement because the boy indicated he knew he would get in "big trouble" for lies.

Applying J.D.S., since Dr. Mark's affidavit in this case contained language saying it was "based on information available to me at this time" and that the information was provided in "good faith" and she reserved her right to make changes, it implies that she, like the four-year-old, understood the importance of telling the truth. Accordingly, her written, signed, detailed statement satisfied the purpose of the statute: to weed out bad cases early by having a doctor confirm there is merit to a case. Struck v. Mercy Health Servs. Iowa Corp., 973 N.W.2d 533, 539 (Iowa 2022). And if a Johns Hopkins doctor's multi-page letter isn't good enough for the Iowa legislature in light of the Swiss cheese that is section 147.140, then nothing is good enough.

CONCLUSION

The "under the oath of the expert" requirement is too vague to be enforced. That is true especially when it is compared to other oath statutes. This Court literally would have to be

legislating from the bench, rather than "judicially narrowing" the statute, in order to make it make sense. How the Court would fill the gaps is anyone's guess. When people have to guess at the meaning of a statute, it shouldn't be enforced. While no mathematical test of "reasonable notice" is required for due process and how clearly a statute should be written, lawyers should have much better odds than .004% at getting the interpretation right on any given day in order to say a statute satisfies due process.

If the oath requirement is enforceable, then the content and form of the "oath" should be at the subjective, but good faith, discretion of the expert, and it shouldn't need to be in writing. The oath should not have to be administered by a third party, and it shouldn't require any particular words, timing, or form. 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. In this case, Dr. Mark's letter satisfies that test, and like the district court determined, substantially complied with the purpose of the statute, and therefore, the ruling should be affirmed.