IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 23-0719
Clinton County No. LACV048488

ESTATE OF SHIRLEY KAY GOMEZ, by GLORIA ANN SHONTZ, Administrator, ANDREA MARIE BELL, individually, KRISTINA CHRISTIAN LINCOLN, individually, and KIM MARIE KERR, individually,

Plaintiffs-Appellees,

vs.

MERCY MEDICAL CENTER-CLINTON, INC., and AMARESHWAR CHIRUVELLA, M.D.,

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
HON. STUART WERLING

Final Reply Brief for Defendants-Appellants

Frederick T. Harris #AT0003198
Theodore T. Appel #AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: 515-513-5003
Fax: 515 298-6536
Email: rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLANTS
MERCY MEDICAL CENTER-CLINTON, INC. and
AMARESHWAR CHIRUVELLA, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Iowa Court Rules:

Secondary Sources:

STATEMENT OF ISSUES

I. Iowa's Certificate of Merit Affidavit Statute Requires that the Expert be Properly Conscience Bound When They Sign Their Certificate of Merit. Failure to do so Requires Dismissal with Prejudice.

Cases:

Bazel v. Mabee, 576 N.W.2d 385 (Iowa Ct. App. 1998)

Bride v. Trinity Hosp., 927 N.W.2d 416 (N.D. 2019)

Callenius v. Blair, 309 N.W.2d 415 (Iowa 1981)

Cornblatt v. Barow, 708 A.2d 401 (N.J. 1998)

Essig v. Advocate BroMenn Med. Ctr., 33 N.E.3d 288 (Ill. App. Ct. 2015)

Estate of Fahrmann v. ABCM Corp., 999 N.W.2d 283 (Iowa 2023)

Hantsbarger v. Coffin, 501 N.W.2d 501, 504 (Iowa 1993) (en banc)

Hummel v. Smith, 999 N.W.2d 301 (Iowa 2023)

In re Estate of Entler, 398 N.W.2d 848 (Iowa 1987)

In re Foley, No. 16-1676, 2017 Iowa App. LEXIS 848 (Iowa Ct. App. Aug. 16, 2017)

Kinseth v. Weil-Mclain, 913 N.W.2d 55 (Iowa 2018)

Kostic v. Music, No. 01-1534, 2022 Iowa App. LEXIS 809 (Iowa Ct. App. July 31, 2022)

McHugh v. Smith, 966 N.W.2d 285 (Iowa Ct. App. 2021)

Miller v. Palo Alto Board of Supervisors, 84 N.W.2d 38 (Iowa 1957)

Morel v. Napolitano, 64 A.3d 1176 (R.I. 2013)

Paradis v. Webber Hosp., 409 A.2d 672 (Me. 1979)

Philips v. Iowa Dist. Ct. for Johnson Cnty., 380 N.W.2d 706 (Iowa 1986)

Reyes v Smith, No. 21-0303, 2022 Iowa App. LEXIS 431 (Iowa Ct. App. May 25, 2022)

Schmitt v. Floyd Valley Healthcare. No. 20-0985, 2021 Iowa App. LEXIS 560 (Iowa Ct. App. July 21, 2021)

Sothman v. State, 967 N.W.2d 512 (Iowa 2021)

State v. Carter, 618 N.W.2d 374 (Iowa 2000) (en banc)

State v. Roby, 495 N.W.2d 773 (Iowa Ct. App. 1992)

State v. Shorter, 945 N.W.2d 1 (Iowa 2017)

Struck v. Mercy Health Servs., 973 N.W.2d 533 (Iowa 2022)

Tunia v. St. Francis Hosp., 832 A.2d 936 (N.J. Super. Ct. App. Div. 2003)

Statutes:

Iowa Code § 4.1

Iowa Code § 4.6

Iowa Code § 147.140

Iowa Code § 572.32

Iowa Code § 633.418

Iowa Code § 639.34

Iowa Code § 649.2

Iowa Code § 662.85

Iowa Code § 668.11

Iowa Code § 720.2

Iowa Court Rules:

Iowa R. Civ. P. 1.500

Iowa R. Civ. P. 1.501

Iowa R. Civ. P. 1.508

Iowa R. Evid. 5.603

Secondary Sources:

Black's Law Dictionary 54 (5th ed. 1979)

Jennifer Acton, *Fiscal Note*, Legislative Services Agency,

https://www.legis.iowa.gov/docs/publications/FN/1368141.pdf.

ARGUMENT

I. Iowa's Certificate of Merit Affidavit Statute Requires that the Expert be Properly Conscience Bound When They Sign Their Certificate of Merit. Failure to do so Requires Dismissal with Prejudice.

The unambiguous plain language of Iowa Code section 147.140(1)(*b*) requires that the Plaintiffs' expert be under oath when they sign their certificate of merit. Plaintiffs have not put forth any evidence or even identified any qualified individual who administered a proper affirmation to Dr. Gordon when he signed his certificate of merit. Nor do plaintiffs justify why Dr. Gordon could not be.

Plaintiffs' failure to follow this important and unambiguous requirement prevents their certificates of merit from substantially complying with the statute. The under-oath provision ensures that their expert is adequately conscience bound to the certificate of merit and helps deter frivolous medical malpractice filings against Iowa healthcare professionals. Plaintiffs' interpretation of substantial compliance hinders these purposes and is fundamentally unfair to all other plaintiffs, and their experts, who have put their name on the line in medical malpractice filings. The Appellate Court should reverse the District Court and enter a dismissal with prejudice pursuant to Iowa Code section 147.140(6).

A. The Certificates of Merit Served in this Case were Not Affidavits, Did Not Contain Evidence of A Properly Conducted Affirmation, and Were Not Signed Under Penalty of Perjury.

Binding Iowa caselaw provides an affirmation, like an oath, requires a qualified individual to administer it. *Final Brief for Defs.-Appellants* at Pg. 27 (citing *State v. Carter*, 618 N.W.2d 374, 376 (Iowa 2000) (en banc)[1]); *see also id.* at Pg. 28 n.4 (quoting other Iowa cases repeating this principle). The administration of an affirmation in the presence of another ensures that the affiant is conscience bound to whatever they are signing. *Carter*, 618 N.W.2d at 376; *see, e.g.,* Iowa R. Evid. 5.603. The presence of another requirement for a proper affirmation is consistent to how the Iowa legislature defined an affidavit under Iowa Code section 622.85. *See also Callenius v. Blair*, 309 N.W.2d 415, 417 (Iowa 1981), *overruled on other grounds by Philips v. Iowa Dist. Ct. for Johnson Cnty.*, 380 N.W.2d 706 (Iowa 1986) ("Affidavit is defined as '[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.' " (quoting Black's Law Dictionary 54 (5th ed. 1979) (emphasis added)).

[1] Plaintiffs argue *State v. Carter* is not relevant because it involves the crime of perjury. *Pls.-Appellees' Final Brief* at Pg. 18–19. The consequence for submitting an affidavit that contains false information, like stating a healthcare provider breached the standard of care when they signer knows they did not, subjects the signer to a penalty of perjury charge. *See* Iowa Code § 720.2 ("A person who, while under oath or affirmation . . . knowingly makes a false statement of material facts" . . may be subject to penalty of perjury charge); *see also Morel v. Napolitano*, 64 A.3d 1176, 1180 (R.I. 2013) ("The potential consequence of knowingly swearing to an untruthful statement made within an affidavit is a conviction for perjury."). *Carter* is plainly relevant to explaining what constitutes a proper oath or affirmation.

Proving that a proper affirmation was conducted is generally demonstrated by a jurat that identifies the who, when, what, and where of the affirming by the affiant. *Miller v. Palo Alto Board of Supervisors*, 84 N.W.2d 38, 40 (Iowa 1957). If there is no jurat, the party submitting the affidavit needs to provide independent proof that a proper administration of an affirmation occurred. *In re Estate of Entler*, 398 N.W.2d 848, 850 (Iowa 1987).

The only exception to requiring a qualified individual to administer an affirmation to an affiant is Iowa Code section 622.1. This statute requires distinct and specific certification language: the document must contain a signature under penalty of perjury to ensure the signer adequately understands the consequences of submitting false information. *Carter*, 618 N.W.2d at 377–78.

Plaintiffs do not discuss or distinguish the aforementioned binding Iowa caselaw and fundamentally misunderstand this issue on appeal. Defendants' argument is not that an expert must "swear" rather than "affirm" to a certificate of merit affidavit. *Pls.-Appellees' Final Brief* at Pg. 14–15, 19; *see Final Brief for Defs.-Appellants* at Pg. 26 n.3 (explaining that an affirmation is a permissible substitute for an oath under Iowa Code). Defendants' argument is not necessarily that the certificates "were not signed in front of a notary," like an acknowledgement. *Pls.-Appellees' Final Brief* at Pg. 14, 19. Defendants' argument is that plaintiffs have not demonstrated that any qualified individual *ever* administered a proper oath or

affirmation to bind Dr. Gordon's conscience to his certificates of merit, to ensure he understood the gravity of the allegations he was attesting to as explained by the binding Iowa caselaw on affidavits and affirmations. *See Final Brief for Defs.-Appellants* at Pg. 23–46.

It is apparent that no proper affirmation was ever administered to Dr. Gordon. Plaintiffs do not dispute that their certificates of merit do not contain a jurat. They have not provided independent evidence that any qualified person administered an affirmation to Dr. Gordon when he signed either certificate of merit. They did not even identify a qualified person who could have administered the affirmation to Dr. Gordon. Nor have they provided any justification as to why a qualified individual could not have conducted a proper affirmation with Dr. Gordon.

Notwithstanding, plaintiffs subtly claim that because the certificate of merit states Dr. Gordon "affirmed" the contents in the certificate of merit, that means a proper affirmation was conducted. *Pls.-Appellees' Final Brief* at Pg. 14–15. The Iowa Supreme Court has already rejected an identical argument in *Entler*. *See generally* 398 N.W.2d 848 (Iowa 1987).

In *Entler*, the plaintiff filed a claim under Iowa Code section 633.418, which also requires an affidavit. *Entler*, 398 N.W.2d at 849; *see also* Iowa Code § 633.418 (requiring the claim to be "accompanied by the affidavit of the claimant"). The document concluded that "the undersigned, **being duly sworn (or affirmed)**, states

that he is the attorney for the claimant," much like the certificates of merit in this appeal. *Compare Entler*, 398 N.W.2d at 849 (emphasis added) *with* App. at 18–19, 33–34. But there was "no signature or seal of an officer authorized to administer an oath . . . affixed," much like the certificates of merit in this appeal. *Compare id. with* App. at 18–19, 33–34. The *Entler* Court effectively held that the stand-alone statement that a person was "duly sworn (or affirmed)" is insufficient to establish that a proper oath or affirmation had been conducted. *Id.* ("We conclude the claimant has failed to establish the claim filed on May 10, 1984, was sworn or accompanied by an affidavit."). This binding Iowa Supreme Court precedent has not been overturned and applies directly to this appeal.

Moreover, the language contained in the certificate of merit that Dr. Gordon "affirms" the contents of his certificates of merit does not come remotely close to the certification language necessary under Iowa Code section 622.1 to ensure that Dr. Gordon was conscience bound. *Carter*, 618 N.W.2d at 378 (explaining that a signature for an application that the content was "true and correct" did not comply with section 622.1); *see also Entler*, 398 N.W.2d at 850 (explaining that "the undersigned, being duly sworn (or affirmed)," language was insufficient under Iowa Code section 622.1). Plaintiffs have not complied with the statutory requirement to provide their certificates of merit under oath or otherwise ensure Dr. Gordon was

sufficiently "conscience bound" when he signed them. *See* Iowa Code § 147.140(1)(*b*).

B. An Affidavit or Proper Oath, Affirmation or Signature Under Penalty of Perjury is Required to Substantially Comply with the Certificate of Merit Affidavit Statute.

Plaintiffs mainly argue that the substantial compliance standard prevents dismissal. *Pls.-Appellees' Final Brief* at Pg. 19. But plaintiffs, for the most part, either concede or do not address the arguments raised in defendants' brief. Defendants' brief thoroughly explains why an affidavit, or "binding of the conscience" requirement through a proper oath, affirmation, or signature under penalty of perjury ensures that the Court receives "verified information" to satisfy substantial compliance standard. *McHugh v. Smith*, 966 N.W.2d 285, 291 (Iowa Ct. App. 2021). These arguments included:

1) **The plain text** of the Iowa Code section 147.140. This analysis included repetitive use of the term "affidavit" (which the legislature as defined in section 662.85) throughout section 147.140, the specific teasing out of an explicit under oath provision in section 147.140(1)(*b*) despite presumed knowledge of what an affidavit is under section 622.85, and the use of the word must (which is defined as a requirement under Iowa Code section 4.1(30)(*b*)) preceding the under-oath provision.

2) **The legislature's intent** to differentiate and harmonize between Iowa Code section 147.140 and the Iowa Rules of Civil Procedure. This analysis includes the clear distinction between a Rule 1.500(2)(*b*) expert report (explicitly not required to be in affidavit form) and the certificate of merit affidavit, and the fact that even a *pro se* individual must satisfy the same type of requirement to be under-oath pursuant to Rule 1.509(1)(*c*) or under penalty of perjury

pursuant to Rule 1.501(4) in filing interrogatory answers in lieu of an affidavit.

3) **The purpose** of Iowa Code section 147.140. This analysis included how "binding the conscience" of the expert helps deter frivolous actions, and provides expert testimony early in litigation, the fundamental unfairness to all other experts currently subjected to a penalty of perjury charge, the consequence of failing to provide an affidavit, and the widespread doctrine of courts rejecting the use of expert reports not being considered on summary judgment.

Defendants' arguments are corroborated by several states who have explicitly held that the substantial compliance doctrine cannot save a tort reform document that is not in affidavit form when that form is required by law. *See Hummel v. Smith,* No. 22-1572, 2023 Iowa Sup. LEXIS 94, at *20 (Iowa Dec. 22, 2023) ("While our interpretation of this 2017 statutory revision is a matter of first impression, it is not made in a vacuum. Several of our sister states with similar statutes . . . have come to the same conclusion."); *see, e.g, Essig v. Advocate BroMenn Med. Ctr.*, 33 N.E.3d 288, 299 (Ill. App. Ct. 2015); *Paradis v. Webber Hosp.*, 409 A.2d 672, 675 (Me. 1979); *Tunia v. St. Francis Hosp.*, 832 A.2d 936, 939 (N.J. Super. Ct. App. Div. 2003); *Bride v. Trinity Hosp.*, 927 N.W.2d 416, 420 (N.D. 2019). "[T]he letter of a clear and unambiguous statute cannot be disregarded under the pretext of pursuing its spirt" *i.e.* the guise of substantial compliance. *Bride*, 927 N.W.2d at 420. While other "contexts of invoking the doctrine of substantial compliance to 'avoid technical defeats or valid claims' " may appropriate, "the failure to place a declarant

under oath . . . goes to the very nature of what an affidavit is." *Tunia*, 832 A.2d at 939 (first quoting *Cornblatt v. Barow*, 708 A.2d 401, 411 (N.J. 1998)).

1. *Current Iowa Supreme Court caselaw,* Estate of Fahrmann v. ABCM Corporation*, strongly supports defendants' arguments.*

The Iowa Supreme Court recently released a unanimous opinion, *Estate of Fahrmann v. ABCM Corporation,* that embraces defendants' arguments on the affidavit issue. 999 N.W.2d 283 (Iowa 2023); *Cf. Pls.-Appellees' Final Brief* at Pg. 18 (claiming a lack of Iowa caselaw on the issue). In *Fahrmann*, the Court assessed whether a plaintiff that served an initial disclosure which identified an expert but did not "timely serve the certificate of merit affidavit signed under oath by a qualified expert stating the expert's familiarity with the applicable standard of care and its breach by the defendants" was substantially compliant. 999 N.W.2d at 285. The Iowa Supreme Court held that the plaintiffs' initial disclosure was not substantially compliant. *Id.* The Court explained that the initial disclosure lacked an expert's signature under oath as required by the statute and that the initial disclosure failed to meet the specificity requirements of the statute to prevent substantial compliance. *Id.* at 287–88.

The Iowa Supreme Court in *Fahrmann* recognized and adopted several arguments that Defendants make in this appeal. First, the Court acknowledged that the statute is entitled "Expert witness-certificate of merit *affidavit*." *Fahrmann,* 999 N.W.2d at 287 (emphasis added). Second, the Court explained that the "statute

unambiguously requires that the expert witness personally sign the certificate of merit *under oath*." *Id.* (emphasis added).

In assessing whether the initial disclosures were substantially complaint in face of the under-oath provision, the Iowa Supreme Court affirmatively quoted *Tunia v. Saint Francis Hospital*. *Id.* at 288 (citing 832 A.2d 936, 939 (N.J. Super. Ct. App. Div. 2003)). New Jersey has a similar certificate of merit affidavit statute that requires the plaintiff to "provide each defendant with an affidavit" explaining that a breach in the standard of care occurred. N.J. Stat. § 2A:53A-27. In *Tunia*, the New Jersey Appellate Division of Superior Court was faced with a certificate of merit, again, like the certificates of merit in this appeal, that provided the following:

> Farid Hakimi, D.P.M. upon his oath deposes and says:
>
> 1. I am a licensed physician in podiatric medicine in the State of New Jersey. I have no financial interest in the outcome of this case, which I have reviewed.
>
> 2. Based on the record which I have reviewed, there is a reasonable probability that the care, skill and/or knowledge exercised in the treatment of John B. Del Monte, D.P.M. St. Francis Hospital, and John Does 1-5 upon the Plaintiff Laura Tunia fell outside professional treatment standards.

832 A.2d at 938; *compare id. with* App. at 18–19, 33–34. A notary also completed an acknowledgement on this certificate of merit. *Tunia*, 832 A.2d at 939. However, there was no jurat "evidencing that the notary placed the doctor under oath at the time the document was executed." *Id.*

The *Tunia* court rejected a claim of substantial compliance explaining "[w]e cannot, however, consider the failure to place a declarant under oath a mere 'technical' deficiency. In our view, it goes to the very nature of what an affidavit is." *Id.* at 939. This very specific language was directly quoted by the Iowa Supreme Court in *Estate of Fahrmann*. 999 N.W.2d at 288. As identified by Defendants, *Tunia* is consistent with a vast range of other state cases explaining why an under oath provision or an affidavit is critical to serving the purposes of a certificate of merit affidavit statute.

Fahrmann strongly suggests that a certificate of merit that is not an affidavit cannot substantially comply with the statute. This reading would be consistent with what the Iowa Court of Appeals identified in *Schmitt v. Floyd Valley Healthcare*. No. 20-0985, 2021 Iowa App. LEXIS 560 (Iowa Ct. App. July 21, 2021) (explaining that medical records failed to substantially comply with the certificate of merit statute as they were not "in affidavit form or otherwise submitted under oath."). Defendants' argument on the affidavit issue is simply a logical extension of what the Iowa Supreme Court has explained is required for a substantially compliant certificate of merit affidavit in *Fahrmann*, what the Iowa Court of Appeals explained in *Schmitt*, and what other states have already held. Plaintiffs cite to no other certificate of merit or similar tort reform caselaw providing otherwise.

2. *Plaintiffs' arguments that they have substantially complied with the certificate of merit affidavit statute have already been rejected by Iowa courts.*

Plaintiffs further argue that they have substantially complied with the statute because their certificates of merit may[2] have complied with other aspects of the statute. *Plaintiffs-Appellees' Final Brief* at Pg. 19. Iowa Courts have consistently rejected this type of argument in healthcare professional suits.

For example, in *Hantsbarger v. Coffin*, the plaintiff had designated experts as "doctors" but did not certify the qualifications and purposes for calling them as required by a similar expert designation statute, Iowa Code section 668.11. 501 N.W.2d 501, 504 (Iowa 1993) (en banc); *see also McHugh*, 966 N.W.2d at 288 (identifying the strong similarities between Iowa Code section 668.11 and 147.140). The Iowa Supreme Court determined the plaintiff did not substantially comply with the statute, even though the designation complied with one requirement of the statute and was timely, much like plaintiffs argue in this case. *Hantsbarger,* 501 N.W.2d at 504.

Iowa caselaw in the certificate of merit affidavit context has produced similar results to *Hantsbarger*. In *Hummel v. Smith*, the Iowa Supreme Court dismissed the case even though the certificate of merit was only deficient on just one of the expert

[2] While it cannot be doubted that plaintiffs have timely served their certificates of merit, there was no argument or ruling on whether Dr. Gordon was sufficiently qualified under section 147.139. *Cf. Plaintiffs-Appellees' Final Brief* at Pg. 19 (claiming that Dr. Gordon is "licensed, actively practicing, physician in the same field as the Defendant.").

qualifications under Iowa Code section 147.139. 999 N.W.2d 301, 309 (Iowa 2023) ("Having concluded that the statute requires experts to be currently licensed to practice, we do not believe that an affidavit from a physician who retired in 2019 and took inactive or retired status at that time amounts to substantial compliance."). And in several cases, Iowa Courts have rejected that substantial compliance applies even when the only defect is that the certificate of merit affidavit is untimely. *See, e.g., Fahrmann*, 999 N.W.2d at 288 ("The district court ruled that Dr. Naughton's certificate was untimely and did not substantially comply with the statute. We agree.") (collecting cases).

Requiring a certificate of merit as a proper affidavit is another one of the requirements to ensure the defendant and Court is provided with "verified information," just like an expert who is actively licensed, and a timely certificate of merit affidavit. *See McHugh*, 966 N.W.2d at 291; *see, e.g., Hummel,* 999 N.W.2d at 309; *Fahrmann*, 999 N.W.2d at 288. This logic is demonstrated by the unambiguous plain text requiring the certificate of merit to be signed under oath, *i.e.* be an affidavit, the under-oath provision's intersection with the other Iowa Rules of Civil Procedure, the under-oath provision's purpose in deterring frivolous actions, and other state decisions on similar statutes. The substantial compliance inquiry does not fall on whether the plaintiffs may have complied with other provisions of the statute.

Plaintiffs also argue there is no prejudice regarding their failure to ensure that was Dr. Gordon was properly under affirmation when he signed his certificates of merit. *See Plaintiffs-Appellees' Final Brief* at Pg. 19. Binding Iowa caselaw undoubtedly holds that a defendant need not prove prejudice. *Fahrmann*, 999 N.W.2d at 288 ("The defendants need not show prejudice. Nothing in the text of section 147.140 implies a prejudice requirement.").

3. Plaintiffs' interpretation of substantial compliance hinders the purpose of the certificate of merit affidavit statute.

Plaintiffs' interpretation on substantial compliance creates severe consequences for medical malpractice litigation. *See* Iowa Code § 4.6(5). Iowa averages around 160 medical malpractice filings per year. *See* Jennifer Acton, *Fiscal Note*, Legislative Services Agency, at 2 https://www.legis.iowa.gov/docs/publications/FN/1368141.pdf. (identifying Iowa Judicial Branch data from 2017 to 2022); *see also Sothman v. State*, 967 N.W.2d 512, 524–25 (Iowa 2021) (explain that LSA publications use independent sources for data and are essential in the legislative process). Many of these medical malpractice filings will require at least one certificate of merit affidavit. *Bazel v. Mabee*, 576 N.W.2d 385, 387 (Iowa Ct. App. 1998) ("Most medical malpractice lawsuits are so highly technical they may not be submitted to a fact finder without medical expert testimony supporting the claim."); *see also* Iowa Code § 147.140(1)(*c*) (requiring a separate certificate of merit affidavit for each defendant

healthcare provider). For the plaintiffs that have followed the unambiguous plain text of the statute, their experts are subjected to a potential penalty of perjury charge. *See Fahrmann,* 999 N.W.2d at 287; Iowa Code § 720.2. It would be extremely unfair for the potentially hundreds of experts, that have already signed proper affidavits in recent Iowa medical malpractice suits, to be subjected to potential criminal prosecution, while plaintiffs' expert in this case would not, for no justifiable reason, based on plaintiffs' interpretation of the statute. *See In re Foley*, No. 16-1676, 2017 Iowa App. LEXIS 848, at *6 (Iowa Ct. App. Aug. 16, 2017) (identifying the fundamental unfairness in excusing an individual for not signing under penalty of perjury when other litigants complied).[3]

Plaintiffs' interpretation would also warp the statute's purpose. For the strongest medical malpractice cases, most experts will not have an issue signing a certificate of merit under oath, affirmation, or penalty of perjury. But for the weakest cases, the cases that should not be filed, experts who may not be willing to give the equivalent of testimony early in litigation, may sign an expert report that

[3] Plaintiffs' interpretation also creates bad policy in other areas of law. For example, a party may no longer have to provide interrogatory responses under a proper oath or affirmation. *See* Iowa R. Civ. P.1.509(1)(*c*); *see also Kostic v. Music*, No. 01-1534, 2022 Iowa App. LEXIS 809, at *6 (Iowa Ct. App. July 31, 2022) (explaining that "A party requesting discovery has a right to substantial compliance."). Parties may no longer have to provide affidavits in other areas of law. *See, e.g.,* Iowa Code §§ 572.32 (requiring an affidavit in support of a mechanic's lien), 639.34 (requiring an affidavit for actions involving attachment), 649.2 (requiring a petition to be under oath for a quiet title action).

does not require the same "conscience binding" that comes with an affidavit. *Carter*, 618 N.W.2d at 378; *see Struck v. Mercy Health Servs.,* 973 N.W.2d 533, 541 (Iowa 2022) (explaining the goal of the Iowa Code section 147.140 is to deter frivolous actions).

This outcome would effectively allow a plaintiff to delay providing any expert testimony establishing a breach of the standard of care until an expert's deposition under oath. *Struck*, 973 N.W.2d at 541 (explaining "the legislative goal [is] to enable healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite expert *testimony*." (emphasis added)). This could occur months or perhaps a year after the defendants' answer to receive from an expert who may not have even signed the certificate of merit in the first place. *See* Iowa R. Civ. P. 1.508(1)(*a*) (explaining that an experts deposition cannot occur until a Rule 1.500(2)(*b*) report is produced); *see also Reyes v. Smith*, No. 21-0303, 2022 Iowa App. LEXIS 431, at *4 (Iowa Ct. App. May 25, 2022) (explaining that an expert who signs a certificate of merit affidavit does not necessarily mean that expert will be designated under section 668.11 or will testify at trial).

The State of Iowa is also deprived of a core deterrence mechanism against experts thinking about supporting cases that should not be pursued. *See* Iowa Code § 720.2. A perjury conviction would also be extremely relevant in deterring specific experts from testifying in other medical malpractice cases as well. *See State v. Roby*,

495 N.W.2d 773, 775 (Iowa Ct. App. 1992) (finding a perjury conviction highly relevant to credibility); *see also Kinseth v. Weil-Mclain*, 913 N.W.2d 55, 69 (Iowa 2018) (explaining that credibility is critical in battle of the expert cases).

Defendants are simply asking this Court to enforce the legislature's deliberate choice to require a plaintiff's expert to provide the necessary information under a properly conducted oath or affirmation, or signature under penalty of perjury. *See* Iowa Code § 147.140(1)(*b*). Requiring that the expert is properly under oath or affirmation before signing a certificate of merit ensures that the expert understand the gravity of the allegations that they are making, and that they truly believe the medical malpractice claim against Iowa healthcare providers has merit. *See State v. Shorter*, 945 N.W.2d 1, 11 (Iowa 2017). Plaintiffs' interpretation of substantial compliance would effectively eliminate a plainly articulated requirement and a key provision in the statute's goal to deter frivolous filings. [4]

CONCLUSION

This Court should hold that the certificates of merit were not proper affidavits, that the certificates do not substantially comply with the statute and reverse the District Court to enter a dismissal with prejudice pursuant to Iowa Code section 147.140(6).

[4] Defendants do not waive the second issue that is presented on appeal. However, defendants do not believe a reply brief is needed on this issue.

Dated March 6, 2024.

MERCY MEDICAL CENTER-CLINTON, INC., and AMARESHWAR CHIRUVELLA, M.D., Defendants-Appellants,

BY: /s/ Theodore T. Appel
Frederick T. Harris #AT0003198
Theodore T. Appel #AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: (515) 513-5003
Email: rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLANTS

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this final brief was electronically filed and served on the 6th day of March, 2024 upon the Clerk of Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

BY: /s/ Theodore T. Appel

Frederick T. Harris #AT0003198
Theodore T. Appel #AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: (515) 513-5003
Email: rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLANTS

Jon Specht
TRIAL LAWYERS FOR JUSTICE, P.C.
421 W. Water St., Third Floor
Decorah, IA 52101
Phone: (563) 382-5071
Email: jon@tl4j.com
ATTORNEY FOR PLAINTIFF

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 4,075 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theodore T. Appel — 3/06/24
Signature — Date

ATTORNEY COST CERTIFICATE

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

/s/ Theodore T. Appel
Signature

3/06/24
Date