IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 24-0027
Cerro Gordo County Case No. LACV072328

MARLENE BANWART AND RICHARD BANWART,
Plaintiffs-Appellants/Cross-Appellees,

v.

NEUROSURGERY OF NORTH IOWA P.C., DAVID BECK, M.D. AND THOMAS GETTA, M.D.,
Defendants-Appellees/Cross-Appellants

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CERRO GORDO COUNTY
HONORABLE JUDGE COLLEEN WEILAND

BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT THOMAS GETTA, M.D.

DESIRÉE A. KILBURG (AT0010265)
PAUL J. ESKER (AT0014874)
of
BRADLEY & RILEY PC
Chauncey Building
404 East College Street, Suite 400
Iowa City, IA 52240-3914
Phone: (319) 466-1511
dkilburg@bradleyriley.com
pesker@bradleyriley.com

Attorneys for Thomas Getta, M.D.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in granting summary judgment where Plaintiffs failed to file suit within the two years allowed after becoming aware of the injuries claimed.

II. Whether, even if the District Court erred regarding the statute of limitations, dismissal is proper because Plaintiffs have not filed a Certificate of Merit Affidavit, as required by Iowa Code § 147.140.

ROUTING STATEMENT

Defendant-Appellee/Cross-Appellant Thomas Getta, M.D. ("Dr. Getta") agrees that this case should be retained by the Iowa Supreme Court. *See* Iowa R. App. P. 6.1101(2).

Issue I involves review of the Iowa Supreme Court's COVID-19 Supervisory Orders. Specifically, Defendants request clarification on whether the Supreme Court had authority to toll the statute of limitations through the Court's Supervisory Orders, thereby allowing the Banwarts' claims to proceed. This issue was previously before the Court, *see Dickey v. Hoff*, No. 21-0859, 2022 WL 12127101 (Iowa Oct. 21, 2022) (affirmed by operation of law), and is again before the Court in the recently-retained case of *Estate of McVay v. Grinnell Reg'l Med. Ctr.*, Case No. 23–0243.

Issue II concerns the Certificate of Merit Affidavit requirement in Iowa Code § 147.140. Defendants contend that the Certificates of Merit filed by the Banwarts are not affidavits, and therefore do not comply with the Certificate of Merit Affidavit requirement. This issue is before the court in the retained case *Miller v. Catholic Health Initiatives*, Case No. 22-1574, and the pending case *Estate of Gomez v. Mercy Med. Ctr.-Clinton*, Case No. 23-0719.

Both issues are substantial matters of first impression, and concern fundamental and urgent issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(c-d, f).

NATURE OF THE CASE

This case concerns alleged medical malpractice, the statute of limitations, COVID-19 supervisory orders, and the Certificate of Merit Affidavit requirement. Plaintiff Marlene Banwart underwent a lumbar laminectomy on July 24, 2018. The procedure was performed by defendant David Beck, M.D. After surgery, Marlene[1] was transferred to skilled nursing care, where she was evaluated by Thomas Getta, M.D. on July 31, 2018.

Plaintiffs-Appellants/Cross-Appellees ("the Banwarts") filed their Petition on October 19, 2020. Defendants sought summary judgment on two grounds: (1) the claims are time-barred; and (2) the Certificates of Merit filed do not comply with the Certificate of Merit Affidavit requirement in Iowa Code § 147.140. On December 8, 2023, the District Court granted summary judgment in favor of Defendants. The District Court held that the Banwarts substantially complied with § 147.140 but dismissed the claims as time-barred.

The Banwarts appeal from the District Court's ruling granting Defendants' Motions for Summary Judgment and dismissing the action as time-barred under Iowa Code § 614.1(9). (*See generally* D0078, Summ. J. Ruling (12/08/2023)). This appeal is from a final order. *See* Iowa R. App. P. 6.103(1).

[1] Because this case involves multiple Plaintiffs with the same surname, Defendants occasionally refer to Plaintiff Marlene Banwart as "Marlene." This first-name reference is made for the sake of clarity. No disrespect or informality is intended.

Defendants-Appellees/Cross-Appellants ("Defendants") cross-appeal from the District Court's ruling that the Banwarts substantially complied with the Certificate of Merit Affidavit requirement contained in Iowa Code § 147.140. (*See* D0078 at 5–7). Defendants also cross-appeal on the issue of when the claims accrued. (*Id.* at 3).

The statute of limitations issue—"Issue I" of this appeal—presents three underlying questions:

Issue I(a): **The Constitutional Authority to Toll Statutes of Limitation:** Whether the Iowa Supreme Court had the constitutional authority to extend statutes of limitation in response to the coronavirus pandemic.

Issue I(b): **Equitable Tolling:** If the Supreme Court did not have constitutional authority to toll statutes of limitation, whether the Banwarts have met their burden to show that the Supervisory Orders issued by the Supreme Court in Spring 2020 equitably tolled their statute of limitations.

Issue I(c): **The "Discovery" of the Banwarts' Claims:** Whether the Banwarts' claims accrued before or after August 3, 2018. If the claims accrued prior to that date, the Petition was not timely—even if the Supervisory Orders tolled or equitably tolled the statute of limitations.

On the question of the Supreme Court's constitutional authority, the District Court held the following: "[T]he Court's rulemaking, supervisory, and administrative authority is limited by statutory pronouncements. The order extending the statute of limitations went past those limits." (D0078 at 5). Accordingly, the District Court dismissed the Banwarts' Petition, and did not reach the "claim discovery" issue.

The District Court did not address the Banwarts' alternative argument seeking equitable tolling. The Banwarts did not file a Motion to Enlarge, and therefore they did not preserve error on equitable tolling. Even if the Banwarts did preserve error on

equitable tolling, they have failed to meet their burden of proof. *See Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 302 (Iowa 2020) (explaining that the party invoking equitable tolling bears the burden of proof).

Dr. Getta respectfully requests that the Court affirm the District Court on the question of constitutional authority, and either (i) conclude that error was not preserved on the equitable tolling issue, or (ii) hold that the Banwarts have not met their burden to prove equitable tolling. In this circumstance, the Court can affirm the District Court's dismissal of the Petition without reaching the claim discovery issue, or Issue II (the certificates of merit).

If the Court reverses the District Court on the issue of constitutional authority, the Court may skip equitable tolling, but should consider the claim discovery cross-appeal: whether the Banwarts' claims accrued before or after August 3, 2018. Similarly, the claim discovery cross-appeal should be considered if the Court affirms on constitutional authority, but rules in the Banwarts' favor on equitable tolling.

If the Banwarts' claims were discovered prior to August 3, 2018—as the evidence suggests—the Petition was not timely, even if the Supervisory Orders tolled or equitably tolled the statute of limitations. This claim discovery issue is before the Court on Defendants' cross-appeals.

If the Court holds—in any fashion—that the Banwarts' claims are time-barred under Iowa Code § 614.1(9), the Court need not reach Issue II: Whether the Banwarts complied with the Certificate of Merit Affidavit requirement.

Issue II, which concerns the Certificate of Merit Affidavit, is before the Court on Defendants' Cross-Appeals. The District Court reached this issue below—although the case was nonetheless dismissed on statute of limitations grounds. The District Court held that "Defendants are not entitled to judgment as a matter of law on this issue [the certificates of merit]." (D0078 at 7). The District Court explained its rationale as follows:

> "Affidavit" is defined in Iowa Code §622.85 as "a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state." **The experts' affirmations here were not so made**.
> . . .
>
> As noted earlier, however, §147.140 does not require absolute compliance.
> . . .
>
> [T]his court is more convinced that the experts' certificates in this case do substantially comply than it is of the countervailing argument. The reference to the statute, the use of the word "affirm," and inclusion of the required substantive information carries out the purpose for which §147.140 is intended.

(D0078 at 6–7) (emphasis added).

The Banwarts filed a timely notice of appeal from the District Court's order. (D0082, Notice of Appeal (01/04/2024)). Defendants filed timely cross–appeals from the District Court order, including on the certificate of merit issue, and all other adverse inferences and orders therein. (*See* D0083, Def. Thomas Getta, M.D. Notice of Cross-Appeal (01/08/2024); *see also* D0079, Defs. Neurosurgery of N. Iowa and David Beck, M.D. Notice of Cross-Appeal (01/08/2024)).

STATEMENT OF THE FACTS

I. Statement of Facts Relevant to the Statute of Limitations Issue.

The Banwarts allege negligence by Neurosurgery of North Iowa P.C. and Dr. Beck in connection with a lumbar laminectomy that Dr. Beck performed on July 24, 2018. (D0063, Def. Thomas Getta M.D.'s Statement of Facts & Mem. of Authorities in Supp. of Summ. J., p. 1 at ¶ 1 (07/07/2023)). The Banwarts' claims against Dr. Getta, on the other hand, center on his evaluation of Marlene Banwart at West Bend Health and Rehabilitation, which took place on July 31, 2018. (*Id.*, p. 2 at ¶ 3).

Marlene's lumbar laminectomy occurred on July 24, 2018. (D0059, Defs. Neurosurgery of N. Iowa and David Beck, M.D. Statement of Facts in Supp. of Summ. J. on Statute of Limitations, p. 5 at ¶ 28 (07/07/2023)). Beginning on July 26, Marlene reported significant pain, as well as bilateral leg cramps, spasms, shooting pain, numbness, and tingling. (D0001, Pet. at Law and Jury Demand, p. 2, 6 at ¶¶ 9, 30 (10/19/2020). On July 27 Marlene "reported a change in feeling in her pelvic area and lower extremities with cramping in buttock to mid-thigh with movement, legs feeling like jelly, numbness, tingling, pain in bilateral lower back region that shoots down the right leg to knee and down left leg to ankle, pain at 8/10." (*Id.*, p. 2 at ¶ 10). On July 28, Marlene experienced "high levels of pain" and was unable to walk. (*Id.*, p. 3 at ¶ 13).

When Marlene saw Dr. Getta on July 31, he noted "significant pain," "spasms," and "difficult voiding." (*Id.*, p. 3 at ¶ 15). The Banwarts contend that Dr. Getta was

negligent because he failed to refer Marlene to neurosurgery on July 31—despite her "significant" post-operative complaints. (D0063, p. 2 at ¶ 3).

The Banwarts claim that due to this alleged negligence, Marlene "suffered a delay in diagnosis and treatment of an epidural hematoma and resulting permanent neurological damage and impairments." (*Id.*, p. 2 at ¶ 4). The Banwarts assert the hematoma was confirmed by imaging on August 15, 2018, and that Marlene underwent surgery that day for evacuation of the hematoma. (*Id.*, p. 2 at ¶ 5).

Pursuant to Iowa Code § 614.1(9), the Banwarts' statute of limitations deadline to file this action was two years after the action accrued. Dr. Getta contends that the claims against him accrued on July 31, 2018—the day that Plaintiffs allege that Dr. Getta should have referred Marlene to neurosurgery. (D0063 at 3–4). Conversely, the Banwarts appear to contend that their claims against Dr. Getta accrued on or about August 15, 2018—the day of Marlene's subsequent hematoma surgery. (*See* Brief for Appellants at 14 (03/21/2024)).

On May 22, 2020, the Iowa Supreme Court entered a Supervisory Order that ostensibly tolled all statutes of limitation for 76 days. *See* Iowa Sup. Ct. Supervisory Order, *In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services* (May 22, 2020).[2] The Banwarts filed their Petition on October 19, 2020—two

[2] The May 22, 2020 Supervisor Order followed two similar Orders. *See* Iowa Sup. Ct. Supervisory Order, *In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services* (April 2, 2020); Iowa Sup. Ct. Supervisory Order, *In the Matter of Ongoing Provisions for Coronavirus/COVID-19 Impact on Court Services* (May 8, 2020).

years and 80 days after Dr. Getta evaluated Marlene Banwart. (*See generally* D0001). Dr. Getta filed an answer on November 11, 2020. (*See generally* D0007, Answer of Def. Thomas Getta, M.D. (11/18/2024)). Dr. Getta asserted the affirmative defense of the statute of limitations. (*Id.* at 5).

Defendants filed statements of facts in support of summary judgment on the statute of limitations issue. (*See generally* D0059, D0063). The Banwarts did not resist any portion of the Defendants' statements of undisputed facts on the statute of limitations issue. (*See* D0068, Pls. Resp. to Defs. Statement of Facts on Statute of Limitations (07/24/2023)) (conceding all statement of facts related to the statute of limitations issue). The Banwarts did not provide an additional statement of facts, affidavits, or deposition testimony on this issue. (*See generally* Docket).

II. Statement of Facts Relevant to the Certificate of Merit Issue.

The Banwarts timely filed and served one purported certificate of merit related to the care provided by Dr. Getta. The certificate of merit from Dr. Kevin Ferentz alleges that Dr. Getta breached the post-operative standard of care on or about July 31. 2018. (D0010, Cert. of Merit Re. Def. Thomas Getta, M.D. at 2 (11/20/2020)) ("the Ferentz COM"). The Ferentz COM further states that he "affirm[s]" that Dr. Getta breached the standard of care. (*Id.*). But the Ferentz COM is not signed under penalty of perjury, nor does it contain the word "oath." (*Id.*). It also lacks a jurat showing that an oath or affirmation was undertaken with a designated officer at the time of signing. (*Id.*).

Defendants filed statements of facts in support of summary judgment on the certificate of merit issue. (*See generally* D0058, Neurosurgery of N. Iowa and Dr. Beck's Statement of Facts Related to the Certificate of Merit (07/07/2023); D0063). The Banwarts did not substantively contest defendants' statements of facts on the certificate of merit issue, and instead only identified typographical issues. (*See* D0064, Pls. Resp. to Defs. Statement of Facts Related to the Certificate of Merit (07/24/2023)). The Banwarts did not provide an additional statement of facts, affidavits, or deposition testimony on this issue. (*See generally* Docket).

ARGUMENT

I. The District Court Correctly Dismissed the Petition as Untimely Filed Under the Applicable Statute of Limitations.

The parties agree the Petition was filed outside the governing statute of limitations. *See* Iowa Code § 6.14(1)(9)(a). The fighting issue is whether the Iowa Supreme Court had the constitutional authority to extend the statute of limitations during the coronavirus pandemic. If the Court lacked this authority, the secondary issue is whether the Supervisory Orders issued in Spring 2020 equitably tolled the statute of limitations as to the Banwarts.

Separately, Defendants contend that the Banwarts "discovered" their claims against Dr. Getta on July 31, 2018. If the Court agrees, then the Petition was not timely—regardless of whether the Supervisory Orders tolled or equitably tolled the statute of limitations.

a. Preservation of issue.

Pursuant to Iowa R. App. P. 6.903(3), Dr. Getta generally concurs with the Banwarts' statements on issue preservation regarding the scope of the Iowa Supreme Court's rulemaking authority. (*See* Brief for Appellants at 17).

However, Dr. Getta disagrees that the Banwarts preserved their alternative equitable tolling argument. The District Court's order does not analyze, decide, or otherwise mention the issue of equitable tolling. (*See generally* D0078). This issue was ripe for decision—and potentially dispositive—in light of the District Court's ruling on the constitutional issue. But the District Court held that the constitutional issue alone decided the case. (*Id.* at 5) ("And if [the Supervisory Order is] constitutionally invalid, it cannot save Plaintiffs' otherwise tardy petition.").

> [Issue preservation] requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue. The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it.

Meier v. Senecaut, 641 N.W.2d 532, 540 (Iowa 2002) (internal citations omitted).

Since the District Court's ruling did not mention equitable tolling, the Banwarts needed to "request a ruling from the district court to preserve error" on equitable tolling. *Id.* at 539. This is generally accomplished through a Rule 1.904 Motion to Enlarge. *See* Iowa R. Civ. P. 1.904. The fact that the Banwarts raised the issue of equitable tolling in their briefing to the District Court does not, alone, preserve error

on this issue. This circumstance mirrors *Hill v. Fleetguard, Inc.*, 705 N.W.2d 665 (Iowa 2005). In *Hill*, an issue was raised in the briefs, but "[t]he district court's ruling did not mention" the issue. *Hill*, 705 N.W.2d at 670. This Court declined to consider the issue on appeal, noting that "We have repeatedly said a rule 1.904(2) motion is the proper method 'to preserve error when the district court fails to resolve an issue.'" *Id.* (quoting *Meier*, 641 N.W.2d at 539).[3]

Adherence to principles of issue preservation ensures that the Supreme Court decides cases with the benefit of analysis by the District Court. "A supreme court is 'a court of review, not of first view.'" *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)) (declining to reach issues not decided in district court's summary judgment ruling). Thus, this Court "generally will not decide an issue the district court did not decide first in the case on appeal." *UE Loc. 893/IUP v. State*, 928 N.W.2d 51, 60 (Iowa 2019). This Court should not make an exception to this general rule.

Conversely, the "discovery rule" cross-appeal issue (*see, infra,* Part I.f) was preserved for appeal. At the District Court, Dr. Getta argued that the Banwarts' claims against him accrued on July 31, 2018, and were thus time-barred regardless of the constitutionality of the COVID Supervisory Orders. (*See* D0073, Def. Thomas Getta, M.D.'s Reply in Supp. of Summ. J. at 4-5 (08/03/2023)). The Banwarts

[3] Recent amendments to Rule 1.904 do not change the applicability of *Meier* and *Hill.*

countered that their claims against Dr. Getta accrued on August 15, 2018. (*See* D0067, Pls. Mem. of Authorities in Resistance to Defs. Mot. for Summ. J. at 3 (07/24/2023)). The District Court ruled that there was a genuine issue of when the cause of action accrued. (D0078 at 3) ("The parties dispute the discovery date, and there exists a genuine issue of fact as to that issue."). But the District Court did not assign a specific "claim discovery" date because the specific date was "not material" in light of the court's holding on the constitutionality of the COVID Supervisory Orders. (*Id.* at 3 ("none of the possible discovery dates occur within the two years before the filing date of October 19, 2020")). Unlike the equitable tolling issue, the court considered and analyzed the claim discovery issue. Thus, error has been preserved on this issue. *See Lamasters v. State,* 821 N.W.2d 856, 864 (Iowa 2012) (explaining an issue is preserved if the "court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse'").

b. Scope and standard of appellate review.

Pursuant to Iowa R. App. P. 6.903(3), Dr. Getta generally concurs with the Banwarts' statements concerning the standard of review. (*See* Brief for Appellants at 16–17). In addition, Dr. Getta notes that the Court may "take judicial notice of events and conditions which are generally known and matters of common knowledge within [the Court's] jurisdiction" when considering a Motion for Summary Judgment. *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 835 (Iowa 1990).

c. Pursuant to the doctrine of separation of powers, the Supreme Court lacked the constitutional authority to extend statutes of limitation in response to the coronavirus pandemic.

The central question in this case is whether the power to amend statutes of limitation on a statewide basis is within the exclusive Article III province of the general assembly. This Court should hold that the answer is yes.

The general assembly has set the statute of limitations governing personal injury tort claims at two years. Iowa Code § 614.1(9)(A). The power to amend this statutory provision belongs exclusively to the general assembly. Thus, under the separation of powers doctrine, the Supreme Court did not have constitutional authority to amend statutes of limitation in the Spring of 2020—despite the global pandemic.

i. The Iowa Supreme Court may not issue rules contrary to legislative acts.

The Iowa Constitution reflects its framers' considered attention to the separation of powers among the legislative, executive, and judicial departments, explicitly stating that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted." Iowa Const., art. III, Departments of Government, § 1. The Iowa Constitution further vests exclusive legislative authority in the general assembly, *id.*, art. III, Legislative

Department, § 1, while judicial power is separately vested in this Court, district courts, and other courts established by the general assembly. *Id.*, art. V, § 1.

The division of the powers of government is critical to the democratic order of the state; it "lies at the very foundation of our constitutional system." *State v. Barker*, 89 N.W. 204, 208 (Iowa 1902). This Court has described the separation of powers as a "safeguard against tyranny." *Webster Cnty. Bd. of Supervisors v. Flattery,* 268 N.W.2d 869, 873 (Iowa 1978). "'The constitutional separation of powers serves as 'a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.'" *State v. Tucker*, 959 N.W.2d 140, 169 (Iowa 2021) (McDermott, J., concurring specially) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

However, "[t]he demarcation between a legitimate exercise of power and an unconstitutional exercise of power is context specific." *Tucker*, 959 N.W.2d at 148; *see also Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 260 (Iowa 2002) ("The separation-of-powers doctrine . . . has no rigid boundaries.").

The members of this Court have recently articulated multiple tests for determining whether an action by a particular division of government runs afoul of the separation of powers doctrine. *See Tucker*, 959 N.W.2d at 148; *see also Tucker*, 959 N.W.2d at 168 (McDermott, J., concurring specially) (joined by Christensen, C.J.). The 2020 Supervisory Orders violated the separation of powers doctrine under either analysis.

ii. The 2020 Supervisory Orders violated the separation of powers test articulated in *State v. Tucker*.

As this Court recently explained in *Tucker*, the separation of powers doctrine enshrines three prohibitions: it "[1] prohibits one department of the government from exercising powers that are clearly forbidden to it, [2] prohibits one department of the government from exercising powers granted by the constitution to another department of the government, and [3] prohibits one department of the government from impairing another in the performance of its constitutional duties." *Tucker*, 959 N.W.2d at 148 (citing *State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021)).

This case implicates the second prohibition.[4] The key question is whether the power to establish and amend limitations periods for civil claims on a statewide basis has been "granted by the constitution" to the legislature. *Id.* If it has, the judiciary and the executive are prohibited from exercising that power. *See Denny v. Des Moines Cnty.*, 121 N.W. 1066, 1068 (Iowa 1909) (explaining that if the constitution grants a power to one branch, other branches "shall not exercise" that power) (quoting *Houseman v. Kent Circuit Judge*, 25 N.W. 369, 370 (Mich. 1885)).

[4] The first prohibition is not at issue; the judiciary is not "clearly forbidden" from enacting a statewide extension of all civil statutes of limitation. The third prohibition also is not at issue; there is no allegation that the judiciary has impaired the performance of another branch.

The first step in answering this question is to look "to the constitution to determine whether there is a textual allocation of power to a particular department of the government." *Tucker*, 959 N.W.2d at 148 (citing *Thompson*, 954 N.W.2d at 410).

The text of the Constitution plainly allocates the power to enact statutes of limitation to the legislature. Article III of the Iowa Constitution vests exclusive legislative authority in the general assembly. *See* Iowa Const., art. III, § 17 ("No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly"); *see also Santo v. State*, 2 Iowa 165, 204 (Iowa 1855) ("The constitution prescribes the manner in which bills shall become laws, and acts or laws can be enacted in no other way.").

The next step is to review "historical practice" to see if there is a "constitutional settlement" in practice between the branches. "Historical practice is of particular importance . . . a history of deliberate practice among the different departments of the government can evidence a constitutional settlement among them regarding the constitutional division of powers." *Tucker*, 959 N.W.2d at 148. Here, precedent confirms that the branches of government have historically treated statutes of limitation as within the legislative domain.

In Iowa, the governing legislature has codified statutes of limitations since before statehood. *See, e.g., Sleeth v. Murphy*, Morris 321, 1844 WL 1297 at *1 (Supreme Court of the Territory of Iowa, January 1, 1844) ("The law in force at the time the suit was commenced limited the time within which such actions should be commenced to

five years. But the act of the 15th of February, 1843, and which took effect on the 4th of July following, extended such limitations to six years"). In fact, the origins of civil statutes of limitation can be found in the Limitation Act of 1623, which was a legislative act by the Parliament of England. *See Developments in the Law-Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1178 (1950) ("The Limitation Act of 1623 marks the beginning of the modern law of limitations on personal actions in the common law."); *see also* Harry B. Littell, *A Comparison of the Statutes of Limitations*, 21 Ind. L.J. 23, 23 (1945) (citing England's Limitation Act of 1623 as the genesis of statutes of limitations in civil cases).

This Court has confirmed that a statute of limitations falls within legislative authority. *See Schulte v. Wageman*, 465 N.W.2d 285, 287 (Iowa 1991) ("[Statutes of limitations] have come into the law not through the judicial process but through legislation."); *see also Montgomery v. Polk Cnty.*, 278 N.W.2d 911, 922 (Iowa 1979) (en banc) (McCormick, J., dissenting) (""The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one of legislative intent"") (quoting *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 426 (1965)).

In sum, the text of the Iowa Constitution, historical practice, and relevant precedent all indicate that the power to enact statutes of limitation is within the exclusive Article III province of Iowa's general assembly.

The next question is whether the judiciary has *any* authority to modify statutes of limitation. In some areas, the branches of government have joint or shared

authority. The doctrine of separation of powers acknowledges this opportunity for overlap; it does not require that each branch is hermetically sealed. Justice Robert Jackson described this dynamic in the federal context in *Youngstown Sheet & Tube Co. v. Sawyer*: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The judiciary does possess authority to equitably toll statutes pursuant to its inherent equitable powers. Equitable tolling is thus an acknowledgement that statutes of limitation are not entirely impervious to the power of the judiciary. But this case presents a much larger question: whether the judiciary has the power to enact a statewide modification of the statute of limitations for all civil claims. The Banwarts have not identified any authority that supports this proposition. If a statewide tolling of 76 days is within shared authority between the legislature and the judiciary, then it is difficult to identify a principle that would limit the judicial branch's powers over statutes of limitations.

The unprecedented circumstances of the coronavirus pandemic do not change this analysis because the Iowa legislature did not grant the judiciary additional powers over statutes of limitation. Conversely, in Kansas, the legislature passed a bill which provided the Chief Justice of the Kansas Supreme Court the authority to issue an order to extend or suspend any deadlines or time limitations established by statute

when the Chief Justice determines that such action is necessary to secure the health and safety of court users, staff and judicial officers during a state of disaster emergency. *See* Kansas House Substitute for Senate Bill No. 102 (2020). In Iowa, the legislature did not pass any similar grant of additional powers over statutes of limitations.

The fact that statutes of limitation are often characterized as "procedural" does not mean that they are the subject of joint or shared authority. Characterizations of statutes of limitation as procedural—rather than substantive—have arisen primarily in conflict of laws analysis. *See, e.g., Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 814 (Iowa 1985) ("Because statutes of limitation are usually viewed as being procedural rather than substantive, Iowa courts generally apply the Iowa statutes of limitation regardless of which state's substantive law will govern the case."). In the conflict of laws context, the procedural versus substantive distinction informs the choice about whether to apply a statute passed by the legislature of one state, or a statute passed by the legislature of another state. In effect, this involves weighing the authority of one duly elected legislature versus another. In the separation of powers context, on the other hand, the key question is which branch possesses a power in the first instance. These two questions may well produce different answers. In sum, an area of law can be "procedural" in nature, and can also be exclusively allocated to the legislature under a separation of power analysis.

The position that the judiciary has strictly limited authority over statutes of limitation is supported by this Court's precedent. This Court has specifically cautioned against the risks of the judiciary invading the exclusive domain of the legislature. "It is not the function of the courts to legislate and they are constitutionally prohibited from doing so." *Hansen v. Haugh*, 149 N.W.2d 169, 172 (Iowa 1967); *see also Webster Cty. Bd. of Supervisors*, 268 N.W.2d at 876 (Iowa 1978) (Uhlenhopp, J., concurring specially) ("[T]he judicial branch should take special care not to legislate or execute the laws.").

This Court took a similar approach when it abrogated a portion of a 2009 Supervisory Order. In 2009 the judiciary enacted austerity measures in response to a statewide revenue shortfall. One such measure was to close certain courthouses early on certain days. *See* Iowa Supreme Ct. Supervisory Order, *In the Matter of Actions Taken to Reduce Judicial Branch Operating Expenses* (Nov. 12, 2009). The Supervisory Order specifically stated that it was closing clerk's offices early, but that "the office is considered open for the whole day and Iowa Code section 4.1(34) is not triggered to extend any deadlines." *See id.* at ¶ 2.

In Howard County, one litigant filed a Notice of Appeal one day late because the local courthouse had closed at 2:30 p.m. on the due date. *See Root v. Toney*, 841 N.W.2d 83, 85 (Iowa 2013). The putative *Root* appellant argued that the Notice of Appeal was timely pursuant to Iowa Code § 4.1(34), because the legislature had specifically instructed that statutory deadlines be extended any time a deadline falls on

"a day on which the office of the clerk of the district court is closed in whole or in part pursuant to the authority of the supreme court." Iowa Code § 4.1(34).

On appeal, this Court held that this key provision of the Supervisory Order was not enforceable, and that the *Root* appeal was timely:

> We conclude the outcome is dictated by the plain language of the governing statute . . . Talton was otherwise entitled to the one-day extension to file his notice of appeal under section 4.1(34), and the rule change, as interpreted in our supervisory order, thus effectively shortened his time to appeal by one day. **We may not "change [statutory] terms under the guise of judicial construction."**

Root, 841 N.W.2d at 89 (quoting *Iowa Dep't of Transp. v. Soward*, 650 N.W.2d 569, 571 (Iowa 2002)) (emphasis added).

Thus, the *Root* Court recognized that it could not countermand the legislature's explicit statutory directive as to the timing of outcome-determinative filings. The *Root* decision emphasized that the lack of legislative approval was dispositive. "Specifically, the time allowed to file a notice of appeal cannot be reduced without legislative approval. *See* Iowa Code § 602.4201(3)(d) . . . [T]he supervisory order cannot trump the general assembly's authority to set the time to file a notice of appeal" *Root*, 841 N.W.2d at 90. So too here. The civil statutes of limitation cannot be extended statewide without legislative approval. The 2020 Supervisory Orders cannot trump the general assembly's authority to set statutes of limitation.

The 2020 Supervisory Orders provided a *carte blanche* extension of all civil statutes of limitation by more than two months. This extension had the practical

effect of amending dozens of statutes that had been passed by the general assembly. The Court's decision in *Root* lays out precisely the logic that applies here: where the legislature has spoken on a specific issue that is within its power to decide, the judiciary may not override that decision under the guise of rulemaking authority.

In sum, the 2020 Supervisory Orders violated the doctrine of separation of powers to the extent they modified statutes of limitation.

iii. The 2020 Supervisory Orders violated the separation of powers test articulated in the *State v. Tucker* Special Concurrence (McDermott, J.).

An alternative test for identifying a violation of the separation of powers doctrine is set forth in a *State v. Tucker* special concurrence. *See Tucker*, 959 N.W.2d at 168 (McDermott, J., concurring specially) (joined by Christensen, C.J.) (the "*Tucker* special concurrence"). This test is similar, but not identical, to the *Tucker* majority approach. Under either approach, the 2020 Supervisory Orders violated the separation of powers doctrine.

The *Tucker* special concurrence explains the doctrine as follows: "Stated simply, the separation-of-powers doctrine is violated if one branch of government seeks to use powers granted by the constitution to another branch." *Id.* (citing *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2000) (en banc)). The separation of powers test in the *Tucker* special concurrence "requires two basic inquiries: what type of power is being exercised, and which branch is exercising it." *Tucker*, 959 N.W.2d at 168; *see also State v. Thompson*, 954 N.W.2d 402, 421 (Iowa 2021) (McDermott, J., concurring in part and

dissenting in part) ("The 'three aspect' separation-of-powers analysis the majority stitches from some of our prior cases strikes me as overwrought.").

In *Tucker*, the special concurrence applied this test by examining the text of the Iowa constitution, as well as relevant statutes and case law. The *Tucker* special concurrence held: "In answering our two inquiries in this case, the particular 'power' exercised (and challenged) is the power to decide which avenue of appellate review is deemed appropriate for particular types of cases . . . . This power appropriately rests with the legislature." *Tucker*, 959 N.W.2d at 169 (internal citations omitted).

In this case, the power being exercised is the power to modify civil statutes of limitation. This is the "type of power" that appropriately rests with the legislature. As discussed at length above, the Iowa Constitution allocates the power to enact statutes to the Iowa legislature. Additionally, statutes of limitation have historically been passed by the Iowa legislature, as well as its predecessor in the Territory of Iowa and equivalent in English Parliament. Lastly, this Court's cases have characterized statutes of limitation as part of legislative authority.

Enacting and modifying statutes of limitation also requires policy determinations. This, too, indicates that it is the "type of power" that appropriately rests with the legislature. As this Court has noted, "it is difficult to fit [statutes of limitation] neatly into a completely logical and symmetrical system of law. They represent expedients, rather than principles." *Schulte*, 465 N.W.2d at 286; *see also Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitations "represent a

public policy about the privilege to litigate"); *Rathje v. Mercy Hosp.,* 745 N.W.2d 443, 448–56 (Iowa 2008) (identifying the public policy interests in changing medical malpractice statutes). Because statutes of limitation are quintessential matters of public policy, they are the "type of power" that firmly falls within the province of the legislature.

The second inquiry in the *Tucker* special concurrence is "which branch is exercising [the power at issue]." *Tucker*, 959 N.W.2d at 168. This case concerns the Supervisory Orders issued by the Iowa Supreme Court in Spring 2020. Thus, the judiciary is exercising the power at issue.

The power to modify statutes of limitation appropriately rests with the legislature, but the judiciary exercised that power in the Spring 2020 Supervisory Orders. Thus, under the *Tucker* special concurrence separation of powers analysis, the Supervisory Orders were unconstitutional to the extent they modified statutes of limitation.

d. The Banwarts cite no applicable authority in support of their position.

The parties appear to agree that the legislature has at least some authority over statutes of limitation, but the Banwarts also assert that the Spring 2020 Supervisory Orders were issued pursuant to "the authority granted to the judicial branch." (Brief for Appellants at 22). This assertion necessarily means that the Banwarts' position is that the legislature's authority to establish or modify statutes of limitation is non-

exclusive. No support for this position can be found in the text of the constitution, or any authority cited by the Banwarts.

For support, the Banwarts cite the following:

- Iowa Const. art. V, §§ 1 and 4;
- Iowa Code § 602.4201(1);
- *Webster County*, 268 N.W.2d at 874;
- *State v. Basquin*, 970 N.W.2d 643 (Iowa 2022); and
- *Root v. Toney*, 841 N.W.2d 83.

None of these authorities support the non-exclusivity of the legislature's authority over statutes of limitation. Instead, these authorities speak to the Iowa Supreme Court's administrative power and rulemaking authority in areas that are not textually or historically allocated to the legislature.

Article V grants the Iowa Supreme Court rulemaking authority and administrative control over Iowa courts. The Banwarts' brief quotes the following from Article V, § 4: "The supreme court . . . shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." (Brief for Appellants at 22) (quoting Iowa Const., art. V, § 4). But does "supervisory and administrative control" include amending civil limitation periods that have been set by the legislature? The plain meaning of the text suggests that it does not. Rather, this excerpt refers to the Supreme Court's authority to promulgate rules on matters that have not been allocated to the legislature—like those at issue in *State v. Basquin*, 970 N.W.2d 643 (Iowa 2022), as amended (Mar. 2, 2022) (discussed further below).

Iowa Code § 602.4201(1) and *Webster County*, 268 N.W.2d at 874 are similarly unavailing. § 602.4201(1) authorizes the judicial department to "prescribe all rules of pleading, practice, evidence, and procedure, and the forms of process, writs, and notices, for all proceedings in all courts of this state, for the purposes of simplifying the proceedings and promoting the speedy determination of litigation upon its merits." With regard to *Webster County*, the Banwarts rely on the following excerpt:

> [T]he judiciary is vested with inherent power to do whatever is essential to the performance of its constitutional functions . . . "It was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution."

Webster County, 268 N.W.2d at 874 (quoting *O'Coin's, Inc. v. Treasurer of County of Worcester,* 287 N.E.2d 608, 612 (Mass. 1972)); *see also* Brief for Appellants at 23.

Both of these excerpts are accurate statements of the law, but they merely describe powers of the judiciary in areas that are not exclusively assigned to another branch. This contention does not speak to the central issue: the scope of legislative and judicial authority over statutes of limitation.

In sum, the authorities cited by the Banwarts' do not advance the argument that a statute of limitations is not within the legislature's exclusive domain. What these authorities support, instead, is the uncontroversial claim that the Iowa Supreme Court has the authority to issue rules in areas that are not textually or historically allocated to the legislature. For example, the judiciary can issue appellate rules that remove the need for an appendix, or shorten the maximum length of briefs, or require docket

numbers in citations to the record. The legislature has not enacted legislation that speaks to these issues, so the judiciary has the authority to fill the gaps in order to facilitate "the performance of its constitutional functions." *Webster County*, 268 N.W.2d at 874. Even if this Court concludes that statutes of limitations are an area of joint authority between the judicial and legislative branches, the authorities cited by the Banwarts do not support the contention that this joint authority extends to substantial statewide extensions of civil statutes of limitation.

i. *State v. Basquin* does not control this case, and instead calls attention to the Court's inability to countermand a limitations period set by statute.

The Banwarts' Brief also relies heavily on *State v. Basquin*, 970 N.W.2d 643. *Basquin* does not control this case. In *Basquin*, the Iowa Supreme Court held that it had the constitutional authority to temporarily suspend rules of criminal procedure governing guilty pleas. *Id.* at 654. The Court specifically concluded that "[t]he constitution allows us to use our supervisory and administrative authority when necessary, which includes responding to a global pandemic." *Id.* at 655. But *Basquin* does not hold that the Iowa Supreme Court may exercise powers outside its "supervisory and administrative authority"—even during a global pandemic.

Basquin also specifically cabined its holding to non-statutory rules of court. As *Basquin* explained: the Supreme Court "may not change [statutory] terms under the guise of judicial construction." *Id.* at 655–56. As noted by the District Court, the statute of limitations here "is decidedly a statutory term"—unlike the criminal

procedure rules at issue in *Basquin*. (D0078 at 4). Thus, the Court's conclusion in *Basquin* does not control this case.

ii. The legislature has "acted" to set a statute of limitations applicable to the Banwarts' claims.

The Banwarts appear to contend that the Iowa Supreme Court had constitutional authority to toll the relevant statute of limitations because the Iowa Legislature had not "acted" to do so, claiming that the legislature "abdicated its responsibility" "[b]y doing nothing" and that this entitled the Iowa Supreme Court to "administer the judicial system" by unilaterally extending deadlines set by statute. (*See* Brief for Appellants at 33). This contention ignores the legislature's prior action to set the governing statute of limitations at two years.

The logical conclusion of the Banwarts' contention is that the judiciary can amend any statute, provided that the judiciary determines that the legislature *should* have done so in response to a particular circumstance. This would invite the very "tyranny" that separation of powers exists to prevent. *See Webster Cnty. Bd. of Supervisors*, 268 N.W.2d at 873.

The Banwart's position imposes a *de facto* duty on the legislature to take affirmative action to reaffirm its prior legislation in the face of changing circumstances. This position overlooks the possibility that the legislature was aware of the existing limitations period and intended to leave it in place—despite the pandemic. Implicit in the general assembly's power to legislate is also a power to not legislate.

During the 2024 legislative session, one leader of the general assembly noted the importance of the power to not legislate: "Senate Majority Leader Jack Whitver told reporters he believes 'Iowa is in a really good spot, and we don't need that many bills, in my opinion, to make Iowa strong and to keep Iowa strong.'" Robin Opsahl, *Which bills survived, which died as second 'funnel week' ends at the Iowa Capitol*, Iowa Capitol Dispatch, March 14, 2024 (https://iowacapitaldispatch.com/2024/03/14/which-bills-survived-which-died-as-second-funnel-week-ends-at-the-iowa-capitol/). In the Spring of 2020, the legislature could have reconvened at any time during its self-imposed suspension if it desired to modify civil statutes of limitation. Alternatively, the legislature could have passed a straightforward bill empowering the judiciary to toll statutes of limitation. The legislature did neither.

Notably, the Iowa Legislature in fact had the opportunity to toll the statute of limitations around the same time that the Supreme Court issued the controlling Supervisory Order. The controlling Supervisory Order was promulgated on May 22, 2020. The Iowa legislature reconvened on June 3, 2020. When the legislature reconvened, it passed numerous bills to address the functioning of government during the pandemic but declined to toll civil statutes of limitation. As this Court's own rules consider a legal proposition so "well established" that a citation to authority is not even required, "In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m). The same reasoning applies here: had the legislature

believed an adjustment to the statute of limitations was required, it would have acted to pass one. It declined to do so.

iii. The Supreme Court's authority to "open and close courthouses" is not controlling.

The Banwarts alternatively contend that the Supervisory Orders merely constituted a "closing of the courthouse," which is within the Iowa Supreme Court's constitutional authority:

> The Iowa Supreme Court has the authority to set the times when a clerk's office is open or closed. If the office is closed, that prevents filing with the clerk. If a statute of limitations expires when a clerk's office is closed, it is extended to when the clerk's office opens. See Iowa Code § 4.1(34).

(Brief for Appellants at 28–29).

For support, the Banwarts cite *Root v. Toney*, 841 N.W.2d 83, discussed above. The Banwarts contend that the *Root* case should be read—and expanded upon—to allow the Court to unilaterally extend statutory deadlines. Again: that decision runs directly counter to the Banwarts' argument. In *Root* the Iowa Supreme Court recognized, in an act of appropriate judicial modesty, that it could not countermand the legislature's explicit statutory directive as to the timing of outcome-determinative filings. The Banwarts suggest that if the court had power to close a clerk's office, then it should have the power to extend statutory deadlines; the Root court roundly rejected this argument.

As discussed above, the putative *Root* Appellant filed his Notice of Appeal one day late but pointed out that a Supervisory Order of the Supreme Court had closed

the clerk's office at 2:30 p.m. on the day his Notice of Appeal was due. The Court agreed that "section 4.1(34) requires a one-day extension when the public window of the clerk's office closed at 2:30 p.m." instead of 5:00 p.m.:

> We conclude the outcome is dictated by the plain language of the governing statute. Section 4.1(34) expressly allows an appellant a one-day extension to file if the thirty-day deadline falls on "a day on which the office of the clerk of the district court is closed in whole or in part pursuant to the authority of the supreme court." Iowa Code § 4.1(34). The accompanying legislative explanation confirms this provision was intended to provide extra time to file an appeal when our court has ordered a clerk of court office "to be open fewer hours." H.F. 113 explanation. The clerk's office effectively was "closed ... in part" for that two-hour period and was "open fewer hours."

Root, 841 N.W.2d at 89.

This narrow holding does not support the logical leap that the Banwarts try to make. Specifically, the Banwarts contend: "if the supreme court had the legal and constitutional authority to close a clerk's office, then it is logical that the supreme court also had the authority to extend statutes of limitation and other filing deadlines." (Brief for Appellants at 29).

Simply put, it is not "logical that the Supreme Court also had the authority to extend statutes of limitation." As discussed above and by the District Court, statutes of limitation are legislative in nature, whereas the operation of courthouses falls within the administrative and rulemaking authority of the Courts. The Supreme Court's power in these two areas—administrative and statutory—differs greatly. Although the

Supreme Court has substantial administrative and rulemaking authority, its power over statutory issues is limited by the separation of powers.

This Court's rationale in *Root* also counsels against the Banwarts' logical leap. A key factor in *Root*'s analysis was that the putative Appellant was unable to file his Notice of Appeal because the clerk's office was closed. This is because the underlying events in *Root* occurred before EDMS was implemented. If *Root* were before the Court today, it is not clear that it would be decided the same way, in light of the filing capabilities that EDMS provides.

Setting aside the existence of EDMS, the record does not show that the Banwarts faced circumstances analogous to *Root*. The Banwarts do not contend that they were unable to file their Petition during the 76-day ostensible tolling period. Nor do the Banwarts contend that courthouses were actually closed, as was the case in *Root*. The record does not contain any affidavit or other evidence that the Banwarts faced roadblocks to initiating their suit. Instead, the Banwarts seek to extend the narrow holding of *Root* to the groundbreaking proposition that the Courts can amend statutes.

Even if this Court were to hold, pursuant to *Root*, that this Court may extend statutes of limitation for 76 days by way of "closing the courthouse," it would not make the Banwart's Petition timely. *Root* emphasized that such an extension only lasts until the clerk's office reopens: "Section 4.1(34) only extends the deadline until the next day the clerk's office is 'open to receive the filing,' which can be for a period of

time short of a full business day." *Root*, 841 N.W.2d at 89. In this case, the Banwarts filed their Petition on October 19, 2020, instead of the 2-year statutory deadline of July 31, 2020.[5] But the Banwarts do not allege that the clerk's office was not "open to receive" their Petition between July 31 and October 19, 2020. Nor do any facts in the record suggest as much. Thus, the rationale of *Root*—which relies on § 4.1(34)—does not apply. In fact, under § 4.1(34), the Banwart's statute of limitations deadline is the first day that the clerk's office was "open to receive a filing" after the conclusion of the limitations period.

e. The Banwarts have not met their burden to "plead and prove" equitable tolling.

As noted above, the Banwarts did not preserve the equitable tolling issue for appeal. The equitable tolling argument also fails on the merits.

In limited circumstances, the Iowa Supreme Court recognizes the Court's authority to equitably toll the statute of limitations. In the mine-run case, equitable tolling is invoked when "the defendant engaged in conduct that it knew or should have known would reasonably deter the claimant from filing a timely . . . claim." *Mormann v. Iowa Workforce Dev.*, 913 N.W.2d 554, 570 (Iowa 2018). No such allegation is present in this case.

[5] As discussed below, Plaintiffs contend that the claims against Dr. Getta accrued on or about August 14, 2018. Dr. Getta contends that the claims accrued on July 31, 2018. For the sake of discussion in this section, July 31 will be used, but either date has the same practical impact on the constitutional analysis in this section.

Instead, the Banwarts allege generally that the statute of limitations should be tolled "as justice requires." (Brief for Appellants at 37). As relevant here, "the asserting party must show reasonable diligence in enforcing the claim" and "has the burden to plead and prove the exception" of equitable tolling. *Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 302 (Iowa 2020) (cleaned up).

The Banwarts have not met their burden to "plead and prove" that the equitable tolling exception should be applied to them. *Id.* The coronavirus pandemic presented unprecedented circumstances for everyone, including legal practitioners and litigants. *See, e.g., Askvig v. Snap-On Logistics Co.*, 967 N.W.2d 558, 561–62 (Iowa 2021). But the application of equitable tolling requires an individualized analysis. In this case, the Banwarts have not pled equitable tolling. Moreover, the record does not contain facts sufficient to satisfy any individualized equitable tolling analysis.

First, the Banwarts' pleadings do not satisfy the first prong: to "plead" this exception to the general rule. The petition does not assert that equitable tolling should apply or mention any Supervisory Order. (*See generally* D0001). The Banwarts' pleadings lack any assertion that resembles the arguments they now bring to this Court. (*See* Brief for Appellants, Part 3(C), at 37). The Banwarts declined to amend their pleadings to incorporate equitable tolling after Defendants asserted a statute of limitations defense. (*See, e.g.,* D0014, Neurosurgery of N. Iowa & David Beck, M.D.'s Answer, p. 5 at ¶ 3 (12/11/2020)). The Banwarts also declined to amend their

pleadings after the parties briefed the equitable tolling issue before the District Court. (*See* D0067 at 7–8).

The Banwarts baldly assert that they "filed their claim within the extended period permitted by the Supervisory Orders, thus they met their burden to 'plead[] an exception to the normal limitations period' by relying on the Supervisory Orders." (*See* Brief for Appellants at 38–39) (quoting *Benskin*, 952 N.W.2d at 302). But the act of filing of a pleading outside the limitations period, in and of itself, does not constitute "pleading an exception" to the statute of limitations. If it did, the requirement to plead equitable tolling would be meaningless.

Second, the Banwarts have not met their burden to "prove" that equitable tolling should apply to them. *Benskin,* 952 N.W.2d at 302; *see also Mormann*, 913 N.W.2d at 570–71 ("There is . . . general agreement in the caselaw that the burden of proof of showing equitable tolling is on the party asserting it."). "[W]hether tolling is available is often a fact-intensive inquiry," *id.* at 575, but the record below on this issue is almost non-existent. The Banwarts have not put any facts into evidence that demonstrate they exercised "reasonable diligence" in enforcing the claim. The Banwarts were aware of the claims by at least September 2018. The Banwarts do not demonstrate what diligence, if any, they exercised to try to enforce their claims in 2018, 2019, or the first few months of 2020. And with regard to March – August of 2020, the Banwarts only vaguely reference the tribulations of the coronavirus pandemic. The Banwarts have not provided any evidence demonstrating any

difficulties in obtaining legal counsel, preparing their complaint, or filing any legal documents as a result of the pandemic. Thus, the Banwarts have not shown what reliance—if any—they or their lawyers placed on the Supervisory Orders. *See* Iowa R. Civ. P. 1.981(3); *see also* Iowa R. App. P. 6.801 (defining the record); *see generally* Docket.

f. CROSS APPEAL: Even if the Supervisory Orders tolled—or equitably tolled—the statute of limitations, the Banwarts' Petition was not timely.

The Banwarts rely on the discovery rule to contend that the statute of limitations was extended to at least their filing date of October 19, 2020. Specifically, the Banwarts contend they did not discover their claims until at least August 3, 2018. The District Court considered this issue but did not establish a specific claim discovery date "because none of the possible discovery dates occur within the two years before the filing date of October 19, 2020." (D0078 at 3).

The District Court's summary judgment ruling summarized the claim discovery dispute as follows:

> [T]he Banwarts' claims arise from the July 24, 2018 surgery. This marks the earliest point at which she could have known of her injury. She had continuous pain and symptoms through diagnosis of the epidural hematoma on August 15. And the latest possible 'discovery' would have been Banwart's September 18, 2018 follow-up appointment with Beck. The parties dispute the discovery date, and there exists a genuine issue of fact as to that issue.

(*Id.* at 3).

The issue before the Court on Defendants' cross-appeals is when, precisely, the Banwarts "discovered" their claim between July 24 and September 18, 2018. If the Banwarts knew or should have known of their claims on or before August 3, 2018, their claims were untimely—even if the applicable limitations period was tolled or equitably tolled for 76 days. Dr. Getta contends that the Banwarts "discovered" their claims against him on July 31, 2018—the day Dr. Getta evaluated Marlene Banwart and declined to refer her to neurosurgery.

i. Under Iowa law, a claim is "discovered" once a Plaintiff has actual or imputed knowledge of both the injury and its cause in fact.

Iowa Code § 614.1 provides the statute of limitations for actions filed in Iowa. The statute of limitations specific to medical malpractice claims provides that claims may be filed "within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . the injury or death for which damages are sought in action." Iowa Code § 614.1(9)(A). This Court has held that § 614.1(9)(A) implicates either actual or imputed knowledge of two prongs: (1) the injury, and (2) its "cause in fact." *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008) ("[O]ur legislature intended the medical malpractice statute of limitations to commence upon actual or imputed knowledge of both the injury and its cause in fact."). "'Injury' within the context of the statute is the physical or mental harm incurred by the plaintiff." *Rock v. Warhank*, 757 N.W.2d 670, 673 (Iowa 2008).

ii. The Banwarts Petition was not timely as to Dr. Getta because the Banwarts had actual or imputed knowledge of their claims against Dr. Getta prior to August 3, 2018.

The undisputed facts make clear that the Banwarts' claims against Dr. Getta arose—and were "discovered"—on July 31, 2018.

The central allegation against Dr. Getta is that he failed to timely refer Marlene to neurosurgery when he evaluated her on July 31, 2018. The Banwarts specifically allege that this July 31 visit concerned "significant pain described as muscle spasms in the lateral aspect of her legs bilaterally as well as difficult voiding with significant post void residuals and constipation." (D0001, p. 3 at ¶ 15). The Banwarts' contention is, in essence, that Dr. Getta should have made an immediate referral in light of these symptoms. (D0001, p. 5 at ¶ 27).

As noted above, "discovery" of this claim requires knowledge of two items: the "injury" and the "cause in fact." Starting with the injury: the alleged injury was incurred by Plaintiff Marlene Banwart prior to her appointment with Dr. Getta July 31, and clearly known to the Banwarts by that date. In fact, the Neurosurgery Defendants contend that the Banwarts were aware of the alleged injuries no later than July 27, 2018. In support of this argument, the Neurosurgery Defendants identify four specific facts in evidence that suggest that the Banwarts were aware of Marlene's "injury" prior to her July 31 visit to Dr. Getta.[6]

[6] First, Marlene claimed to be in significant post-operative back pain after the July 24, 2018 surgery. (D0059, pp. 5–6 at ¶¶ 30-39). This qualifies as an injury i.e. physical

With regard to "cause," the only claim alleged against Dr. Getta is a failure to diagnose/refer, which occurred on July 31. The Banwarts were aware on July 31 that Dr. Getta was not making a referral to neurosurgery. (D0001, p. 3 at ¶ 17) Thus, Plaintiff had knowledge of Dr. Getta's alleged cause in fact on July 31.

In sum, by July 31, the Banwarts were aware that Marlene's post-operative recovery had not gone as expected, that she had been injured, and that Dr. Getta had not referred her to neurosurgery. Thus, the claims against Dr. Getta arose—and were "discovered"—on July 31, 2018.

II. CROSS APPEAL: Even if the District Court erred regarding the statute of limitations, dismissal is proper because the Banwarts have not filed a Certificate of Merit Affidavit, as required by § 147.140.

a. Preservation of Issue.

On this issue, Dr. Getta is Cross-Appellant. Pursuant to Iowa R. App. P. 6.903(2), Dr. Getta states that an issue is preserved if "the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse' the issue has been preserved." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002))

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harm. *Rock*, 757 N.W.2d at 673. Second, Marlene understood noted that her back pain in late July was unlike anything she had ever experienced from her previous back surgeries, (*Id.*, p. 4 at ¶ 23). Third, Marlene described her post-care transfer to West Bend Rehabilitation as "unusual" as it deviated from her initial care plan which was to go home after the surgery, (*Id.*, pp. 4, 6, 7 at ¶¶ 24–26, 39, 51). Fourth, Marlene was able to connect her post-operative back pain (which arose in late July) to the back surgery during her conversation with Dr. Beck in later September. (*Id.*, p. 7 at ¶ 46).

(emphasis original). Defendants moved for summary judgment on this issue. (D0060, Defs. Joint Mot. for Summ. J. at 2 (07/07/2023)). The Banwarts resisted on this issue. (D0065, Pls. Resistance to Defs. Mot. for Summ. J., p. 2 at ¶ 9 (07/24/2023)) Defendants replied on this issue. (*See generally* D0071, Defs. Joint Reply on Certificate of Merit Affidavit (07/31/2023)). The District Court ruled that the Banwarts had substantially complied with § 147.140 and denied Defendants' Motion on that issue, but separately granted summary judgment to Defendants on the statute of limitations issue. (D0078 at 7) This cross-appeal followed.

b. Scope and Standard of Appellate Review.

Pursuant to Iowa R. App. P. 6.903(2), Dr. Getta states that the Court reviews rulings on summary judgment for correction of errors at law. *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 806 (Iowa 2018). The Court reviews the record "in the light most favorable to the party opposing summary judgment." *Id.* Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Schoff v. Combined Ins. Co.*, 604 N.W.2d 43, 45 (Iowa 1999); *see* Iowa R. Civ. P. 1.981.

c. Section 147.140 requires an expert to sign an affidavit that is either conscience-bound or imposes risk of penalty for perjury.

Iowa Code § 147.140 requires the submission of a "Certificate of Merit Affidavit." (emphasis added). Subsection (1)(b) requires that the certificate "must be signed by the expert witness and certify the purpose for calling the expert witness"

and must attest to certain information "under the oath of the expert witness." § 147.140(1)(b) (emphasis added).

Subsection (6) of § 147.140 states that "[f]ailure to substantially comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert witness testimony is necessary to establish a prima facie case."

d. The certificates submitted by the Banwarts are not affidavits.

The Banwarts timely filed and served one certificate of merit related to the care provided by Dr. Getta. The certificate of merit from Dr. Kevin Ferentz ("the Ferentz COM") alleges that Dr. Getta breached the post-operative standard of care. (*See generally* D0010). The Ferentz COM was timely filed and appears to contain the required information. But it is not an "affidavit."

An "affidavit" is specifically defined as "a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths within or without the state." Iowa Code § 622.85. An "oath" is a "solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise[.]" *Oath*, Black's Law Dictionary (11th ed. 2019). Additionally, "[t]he word 'oath' includes affirmation in all cases where an affirmation may be substituted for an oath." Iowa Code § 4.1(19). An "affirmation" is a "solemn pledge equivalent to an oath but without reference to a supreme being or to swearing." *Affirmation*, Black's Law Dictionary (11th ed. 2019).

With this statutory backdrop, Iowa courts have concluded that a document is only an affidavit if a person is "conscience bound" to the document they are signing. This generally means that the signatory either: (1) signed in the presence of a qualified official who administered an oath; (2) signed in the presence of a qualified official who administered an affirmation; or (3) agreed in writing that they were signing "under penalty of perjury." *See* Iowa Code § 622.1; *see also State v. Carter,* 618 N.W.2d 374, 377 (Iowa 2000) (en banc) ("[O]ur prior cases revealed a common aspect of an oath [or affirmation] [is] the presence of an official to participate in the process in such a manner to assure the persons conscience is bound."); *City of Cedar Rapids v. Atsinger*, 617 N.W.2d 272, 276 (Iowa 2000) (en banc) ("We are convinced that the factor of binding one's conscience . . . is not to be accomplished alone in the oath-taking process. Some person must be present to assure that this occurs."); *Carter*, 618 N.W.2d at 378 ("Although our legislature permits a written attestation to be accomplished alone, it requires the certification to expressly impress upon the person that it is made under penalty of perjury. This is an important requirement because the under penalty of perjury language, like the administration of an oath by an official, acts to bind the conscience of the person and emphasizes the obligation to be truthful.").

The District Court held—and the parties do not appear to dispute—that the Ferentz COM is not an affidavit. The Ferentz COM begins: "In compliance with Iowa Code Section 147.140, [Dr. Ferentz] does hereby affirm and state . . . ." and goes

on to allege that Dr. Getta breached the relevant standard of care. (D0010 at 1–2). But the Ferentz COM is not signed under penalty of perjury, nor does it contain the word "oath." (*See generally id.*). It also lacks a jurat showing that an oath or affirmation was undertaken with a designated officer at the time of signing. (*Id.*).

The fact that Dr. Ferentz "affirm[ed]" the contents of the COM does not convert it into an "affidavit." *See 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 Matter of Estate of Entler*, 398 N.W.2d 848, 850 (Iowa 1987) (explaining that language stating "the undersigned, being duly sworn (or affirmed)" was insufficient under Iowa Code § 622.1). The Iowa Supreme Court recently confirmed that § 147.140 "unambiguously requires that the expert witness personally sign the certificate of merit under oath." *See Estate of Fahrmann v. ABCM Corp.*, 999 N.W.2d 283, 287 (Iowa 2023). As discussed above, an affirmation of a document differs markedly from signing a document "under oath."

This approach makes good sense, because a statement that someone "affirm[s]" something to be true does not provide the same indicia of credibility that a true affidavit provides. As described above, an affidavit is either signed in the presence of a qualified official who ensures that the signatory is "conscience bound" or, alternatively, affirmatively subjects the signatory to a charge of perjury. Each of these requirements lends critical credibility to the document.

This critical veneer of credibility is absent in the Ferentz COM. It is not "conscience-bound," and does not subject Dr. Ferentz to the risk of a perjury charge. Thus, it is not an affidavit, and does not comply with Iowa Code § 147.140.

e. The Banwarts have not substantially complied with § 147.140.

The Banwarts contend that the certificates of merit they submitted at least "substantially" comply with § 147.140. The Ferentz COM does not comply with the Certificate of Merit Affidavit requirement to a degree that assures that the essential purposes of § 147.140 have been accomplished. Thus, the Banwarts have not substantially complied with § 147.140 and dismissal is required—regardless of the Court's holding on the statute of limitations.

Substantial compliance exists when the essential purposes of a statute have been accomplished. *See Dix v. Casey's Gen. Stores, Inc.,* 961 N.W.2d 671, 682 (Iowa 2021) ("substantial" compliance is present when "the statute has been followed sufficiently so as to carry out the intent for which it was adopted."); *see also McHugh v. Smith*, 966 N.W.2d 285, 288–89 (Iowa Ct. App. 2021) ("Substantial compliance means compliance in respect to essential matters to assure the reasonable objective of the statute.") (internal quotations omitted).

The legislature adopted the § 147.140 affidavit requirement to "provide a mechanism for early dismissal with prejudice of professional liability claims against healthcare providers when supporting expert testimony is lacking." *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 539 (Iowa 2022). The goal is to "'identify

and weed non-meritorious malpractice claims from the judicial system efficiently and promptly.'" *Id.* at 542 (quoting *Womer v. Hilliker*, 908 A.2d 269, 275 (Pa. 2006)). "The new legislation imposes two extra burdens: (1) provide verified information about the medical malpractice allegations to the defendants and (2) do so earlier in litigation." *McHugh*, 966 N.W.2d at 289.

In sum, the essential purpose of § 147.140 is to ensure that defendants only have to substantively defend professional liability claims that have expert support that will not later be renounced.

The key mechanism through which the certificate of merit legislation accomplishes this goal is the affidavit requirement. The title of the statute suggests as much: "Expert Witness - Certificate of Merit *Affidavit*." *See* § 147.140 (emphasis added). The unique function of an affidavit—as opposed to any other attestation—is that it has special indicia of credibility. The affidavit requirement generally ensures that the opinions expressed therein are not tentative or subject to change. An affidavit is also highly unlikely to be renounced at a later date. For example, if an affidavit is signed pursuant to Iowa Code § 622.1, the signatory will be at risk of a perjury charge if they later renounce the affidavit. Similarly, requiring that the expert is under a properly conducted oath or affirmation while signing the certificate ensures that the expert understands the gravity of the allegations they make in their Certificate of Merit Affidavit. *See Carter*, 618 N.W.2d at 375.

It is also noteworthy that the affidavit requirement is the legislature's chosen mechanism. The legislature could have used any number of methods to "identify and weed non-meritorious malpractice claims from the judicial system efficiently." *Struck*, 973 N.W.2d at 542. Perhaps the legislature could have required medical malpractice plaintiffs to submit three non-affidavit certificates of merit for each case. Or the legislature could have set up a new administrative screening procedure for medical malpractice cases. Or the legislature could have required one certificate, but require only that it be signed—not that it necessarily be an affidavit. But the legislature took a different route: it specifically chose to require one expert opinion, submitted in the form of an affidavit. This choice suggests that the legislature viewed the affidavit requirement as "essential" to accomplishing the goals of § 147.140.

If this Court were to accept a non-affidavit certificate of merit as functionally equivalent to a Certificate of Merit Affidavit, it would undercut key elements of § 147.140 and hollow out the precise mechanism that the legislature chose for accomplishing the statute's goals. The fact that § 147.140 requires an expert to risk a perjury charge—or submit to an oath under the supervision of a qualified official—is precisely what "assure[s] the reasonable objective of the statute." *McHugh*, 966 N.W.2d at 288–89. In the case at bar, for example, the Ferentz COM does not subject Dr. Ferentz to the risk of a perjury charge—or any substantially similar risks. As a result, Dr. Ferentz could renounce the opinions in his Certificate of Merit without facing any substantive penalty in Iowa courts. Without the specter of a perjury

charge—or an assurance that a conscience-bound oath was administered—the Ferentz COM lacks the precise indicia of reliability that the legislature sought to require when it passed § 147.140. As such, the Ferentz COM fails to accomplish the essential purpose of § 147.140 and cannot be deemed to be substantially compliant.

Defendants seek straightforward enforcement of the affidavit requirement of § 147.140. The affidavit requirement ensures that expert opinions submitted in the early stages of medical malpractice litigation are credible, and will not later be renounced—as intended by the legislature when it passed § 147.140.

f. If the Banwarts' certificates are deemed to be "substantially compliant," the precedent could water down affidavit requirements elsewhere in Iowa law.

Iowa law is replete with affidavit requirements that mirror § 147.140. If the certificates in this case are deemed to be "substantially compliant" with the affidavit requirement of § 147.140, the other Iowa statutes requiring affidavits may be called into question.

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, 2002 WL 1758204, at *2 (Iowa Ct. App. July 31, 2022) (unpublished) (explaining that "A party requesting discovery has a right to substantial compliance."). Additionally, it could impact areas of Iowa law ranging from mechanic's liens (*see* Iowa Code § 572.32) (requiring an affidavit in support of a mechanic's lien), to attachment proceedings (*see* Iowa Code § 639.34) (requiring an

affidavit for actions involving attachment), to quiet title actions (*see* Iowa Code § 649.2) (requiring a petition to be under oath for a quiet title action).

III. Joinder.

Dr. Getta joins any applicable arguments made by Defendants Neurosurgery of North Iowa P.C., David Beck, M.D. as his own.

CONCLUSION

The District Court correctly dismissed the Petition as untimely under the applicable statute of limitations because the Iowa Supreme Court lacked the constitutional authority to extend statutes of limitation in response to the coronavirus pandemic, and because the Banwarts have failed to show that they are entitled to equitable tolling. Even if the Supervisory Orders tolled—or equitably tolled—the statute of limitations for 76 days, the Banwarts' Petition was not timely because the Banwarts knew or should have known about their claims prior to August 3, 2018.

If the District Court erred regarding the statute of limitations, dismissal is still proper because the Banwarts have not filed a Certificate of Merit Affidavit, as required by § 147.140, and have not otherwise "substantially complied" with § 147.140.

REQUEST FOR ORAL ARGUMENT

Dr. Getta respectfully requests oral argument. This case concerns complex issues of constitutional and statutory interpretation, which have previously been presented to the Court via oral argument in *Dickey v. Hoff*, Case No. 21-0859, *Estate of McVay v. Grinnell Reg'l Med. Ctr.*, Case No. 23–0243, and *Miller v. Catholic Health Initiatives*, Case No. 22-1574.

Date: May 6, 2024

/s/ Paul J. Esker

DESIRÉE A. KILBURG (#AT0010265)
PAUL J. ESKER (#AT0014874)
of
BRADLEY & RILEY PC
Chauncey Building
404 East College Street, Suite 400
Iowa City, IA 52240-3914
Phone: (319) 466-1511
dkilburg@bradleyriley.com
pesker@bradleyriley.com

Attorneys for Defendant-Appellee/Cross-Appellant Thomas Getta, M.D.

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Paul J. Esker

May 6, 2024
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CERTIFICATE OF SERVICE

I certify that on May 6, 2024, I served the foregoing Brief of Defendant-Appellee/Cross-Appellant, Thomas Getta, M.D. by electronically filing the document with EDMS, which will notify all parties of the electronic filing.

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