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

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

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. CROSS APPEAL: Whether the Banwarts have submitted a Certificate of Merit Affidavit that satisfies the requirements of Iowa Code section 147.140.

II. CROSS APPEAL: Whether the Banwarts' Petition was timely, even with the benefit of an extended statute of limitations.

ARGUMENT

I. CROSS APPEAL: Dismissal is Proper Because Plaintiffs Have Not Filed a Certificate of Merit Affidavit, as Required by Section 147.140.

a. This Court's recent rulings in *Miller* and *Shontz* control this case and require dismissal with prejudice.

Iowa law is now settled: this Court has held that Iowa's certificate of merit statute "'unambiguously requires that the expert witness personally sign the certificate of merit under oath within sixty days of the defendants' answer.'" *Miller v. Catholic Health Initiatives-Iowa, Corp.*, ___ N.W.3d ___, ___, 2024 WL 2484448, at *13 (Iowa May 24, 2024))[1] (quoting *Est. of Fahrmann by Fahrmann v. ABCM Corp.*, 999 N.W.2d 283, 287 (Iowa 2023)). The Banwarts submitted a certificate of merit that was "signed but unsworn." *Id.* at *2. Therefore, the Banwarts have not submitted a Certificate of Merit *Affidavit*, and have not satisfied the requirements of Iowa Code section 147.140.

The Banwarts' Reply attempts to distinguish the present case from *Miller* by noting their certificates included statements that each expert "does hereby affirm and state" that the expert was familiar with the standard of care and that defendants breached the standard of care. (Appellants' Reply Brief at 24 (4/21/2024)) (hereinafter, "Appellants' Reply"). This Court subsequently concluded that this too fails to satisfy the requirements of section 147.140. *Shontz v. Mercy Med. Ctr.-Clinton, Inc.*, No. 23-0719, 2024 WL 2868931, at *1 (Iowa June 7, 2024) (unpublished) (*per*

[1] *Miller* was released after Appellees filed their opening briefs.

curiam).[2] Because this very issue has now been decided, "*[s]tare decisis* dictates the same result here." *Id.* at *1.

To meet the requirements of an affidavit under Iowa law, the document must include a jurat, an indication that it was signed under oath, or a declaration that it was signed under penalty of perjury. *See Shontz,* 2024 WL 2868931, at *1; *see also Miller*, 2024 WL 2484448, at *5–6 ("The 'under penalty of perjury' language must be included."). That the statement is sworn under penalty of perjury "is necessary to ensure the reasonable objectives of section 147.140." *Miller*, 2024 WL 2484448, at *5. To omit this key language "would undermine many Iowa statutes requiring sworn statements or verifications." *Id.* at *6. The Banwarts' circular argument that merely referencing the applicable statute achieves compliance (*see* Appellants' Reply at 27) does not make it so: the certificate remains an unsworn statement. The Court simply is "not at liberty to eliminate the requirement that the expert sign the certificate of merit under oath when the governing statute uses the term 'affidavit' six times." *Id.*

The Banwarts also argue that "NNI's failure to raise this issue after over two and one-half years of litigation is *ipso facto* evidence that the Banwarts substantially complied" with § 147.140. (Appellants' Reply at 33). The timing of the Motion for Summary Judgment is irrelevant. Substantial compliance with § 147.140 turns on the

[2] *Shontz* was released after the Banwarts filed their Reply brief.

language of the statute and the precise certificate of merit at issue—the reaction of the defendant is irrelevant.

This Court previously rejected an argument that defendants waived any defects in the certificate of merit requirement by commencing discovery, finding that "dismissal was mandatory under the plain language of the statute." *Est. of Fahrmann*, 999 N.W.2d at 285. Put another way, a defendant's participation in discovery does not excuse a party's failure to comply with the statute. *See id.* Although "section 147.140's reasonable objective is to 'give[ ] the defending health professional a chance to arrest a baseless action early in the process,'" nothing in § 147.140 requires the defending health professional to bring a motion "early in the process." *See Est. of Fahrmann*, 999 N.W.2d at 287–88 (alteration in original) (quoting *Struck v. Mercy Health Servs.—Iowa Corp.*, 973 N.W.2d 533, 541 (Iowa 2022)).

Lastly, the Banwarts' Reply argues that *Miller* "required" an expert to sign the certificate of merit under penalty of perjury, and that this requirement is untenable because—according to the Banwarts' Reply—an expert's evaluation of the standard of care is a statement of opinion, which cannot "sustain a penalty of perjury." (Appellants' Reply at 35–36) (quoting *State v. Hawkins*, 620 N.W.2d 256, 262 (Iowa 2000)). The Banwarts appear to argue that *Miller* was wrongly decided. Thus, this court could dispense with this issue on the basis of *stare decisis* alone.

Moreover, Banwarts' argument entirely overlooks the 'fabricated opinion' exception to the opinion rule. Although a statement of *genuine* opinion cannot "sustain

a penalty of perjury," a fabricated opinion statement can. "[I]n general, to sustain a charge of perjury, the alleged false statement 'must be one of fact, and not of opinion or belief.' The rule is subject to qualification, however, when—as a matter of fact—the witness is alleged to have held no such opinion or belief." *Hawkins*, 620 N.W.2d at 262. Thus, the law governing perjury is entirely consistent with the fundamental goal of section 147.140: to prevent submission of spurious certificates of merit.

This Court has now held—and reaffirmed—that a Certificate of Merit that neither satisfies Iowa Code § 622.85 (defining an "affidavit"), nor contains the self-attestation outlined in Iowa Code § 622.1(2), does not substantially comply with section 147.140. The Banwarts' attempts to relitigate *Miller, Shontz*, and *Estate of Fahrmann*—and, alternatively, to distinguish the present case—should be rejected. This Court should hold that *Miller* controls the outcome of this case and need not reach other the other issues on appeal.

b. Section 147.140 is not unconstitutionally vague.

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits vague statutes." *State v. Wiederien*, 709 N.W.2d 538, 542 (Iowa 2006). A vagueness challenge can take two forms: (1) vague-as-applied, or (2) facially vague. *See State v. Musser*, 721 N.W.2d 734, 745 (Iowa 2006). The Banwarts appear to contend that § 147.140 is facially vague, *i.e.*—void-for-vagueness. (*See* Appellants' Reply at 38–42). This Court should hold that § 147.140 is consistent with the Due Process Clause.

As an initial matter, Dr. Getta does not agree that the Banwarts preserved a void-for-vagueness challenge pursuant to the Due Process Clause. On appeal, the Banwarts specific contention is that the "Due Process Clause prohibits enforcement of vague statutes under the void-for-vagueness doctrine. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). That doctrine applies here . . . ." (Appellants' Reply at 38).

The Banwarts contend that error was preserved on this issue because their "resistance to NNI's motion for summary judgment . . . raised the argument that the affidavit requirement in section 147.140 was unconstitutionally vague." (*Id.*). The Banwarts specifically point to pages 4–6 of their Resistance. (*Id.*) (citing D0066, Pls' Memo of Auth. Resist. Def. Mot. for Summ. J., at 4–6 (7-24-2023)). The Banwarts are correct that pages 4–6 of their Resistance argued that the affidavit requirement was "vague." But—crucially—the Banwarts did not argue to the District Court that section 147.140 was *unconstitutionally* vague.

The Banwarts' vagueness argument below relates to actual compliance with section 147.140—not the constitutionality of that statute. As the Banwarts' Resistance to Summary Judgment explained: "The vagueness of the oath requirement, necessitates [a] generous view of what constitutes an 'oath of the expert witness' under the terms of the statute." (D0066 at 5–6). Notably, the part of docket entry 0066 that the Banwarts cite for error preservation appears in a section with the following heading: "Drs. Koebbe and Dr. Ferentz complied with the 'oath' requirement of Iowa Code §147.140 by properly affirming the statements made in

their Certificates of Merit." (D0066 at 2). In essence, the Banwarts argued below that the vagueness of the statute requires a liberal interpretation, such that their certificates of merit complied with section 147.140—particularly when viewed in the context of various "oath" requirements throughout Iowa law. (*See* D0066 at 4–6). This argument is markedly different from the present argument that the Due Process Clause renders section 147.140 unconstitutional and unenforceable.

Although the key section of docket entry 0066 contains many points and phrases that re-appear in Appellants' Reply Brief, the argument is devoid of constitutional claims that the Banwarts now assert. For example, docket entry 0066 does not mention or cite the Due Process Clause of either the Iowa Constitution or the United States Constitution. Docket entry 0066 also does not contain any version of the word "unconstitutional." Thus, the Banwarts' due process challenge to § 147.140 has not been preserved.

The Banwarts also have not filed a notice to the Attorney General regarding their challenge to the constitutionality of a state statute, as required by the new Iowa Appellate Rules.[3] *See* Iowa R. App. P. 6.901(3) ("When the constitutionality of an act of the general assembly is drawn into question in an appeal . . . the party raising the constitutional issue must . . . provide the attorney general with written notice . . . An informational copy of the notice must be filed with the clerk . . . ").

[3] The parties agreed that this appeal is being presented under the new appellate rules. *See* Order Granting Motion to Proceed Under New Appellate Rules (02/19/2024).

If the court considers the void-for-vagueness challenge to section 147.140, the Court should hold that § 147.140 is consistent with the Due Process Clause. The void-for-vagueness doctrine prohibits enforcement of a statute that is, on its face, "so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited." *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). This prohibition arises from the due process clauses of both the Iowa and federal constitutions, which this Court has held to be "identical in scope, import, and purpose." *See id.* at 538–39 (quoting *In re Guardianship of Hedin*, 528 N.W.2d 567, 575 (Iowa 1995) (internal quotations omitted)); *see also* U.S. Const. amend. XIV, § 1 ("[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law"); Iowa Const. art. I, § 9 ("no person shall be deprived of life, liberty, or property, without due process of law").

The void-for-vagueness doctrine is subject to principles of constitutional avoidance. Thus, "challengers to a statute must refute every reasonable basis upon which a statute might be upheld. *Nail*, 743 N.W.2d at 539 (*quoting State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005)). The judicial branch is "obligated to presume statutes to be constitutional, and we are further obligated to give them any reasonable construction possible to make them constitutional." *State v. Wiederien*, 709 N.W.2d 538, 544 (Iowa 2006) (Cady, J., dissenting) (citing *State v. Millsap*, 704 N.W.2d 426, 436 (Iowa 2005)); *see also In re Hochmuth*, 251 N.W.2d 484, 488–89 (Iowa 1977) ("[A] statute otherwise unconstitutional because of vagueness may be salvaged by a limiting

interpretation which brings the application of the statute within constitutional bounds."). As a result, a party claiming a statute is void for vagueness "bears a heavy burden to show the statute clearly, palpably, and without a doubt, infringes the constitution." *State v. White*, 545 N.W.2d 552, 557 (Iowa 1996) (internal quotations omitted).

Moreover, in the civil context, the void-for-vagueness doctrine has less teeth than in the criminal realm. *See MRM, Inc. v. City of Davenport*, 290 N.W.2d 338, 344–45 (Iowa 1980) ("Ordinarily a 'significantly higher' standard of certainty is required when a vagueness challenge is made in the context of a criminal prosecution than in situations involving civil remedies.") (citing *Williams v. Osmundson*, 281 N.W.2d 622, 625 (Iowa 1979); *Knight v. Iowa Dist. Ct.*, 269 N.W.2d 430, 432 (Iowa 1978)); *see also State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 629 (Iowa 1971); *see also Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.").

When a statute is challenged as unconstitutionally vague, it "may be saved from constitutional deficiency . . . if its meaning is fairly ascertainable by reference to other similar statutes or other statutes related to the same subject matter." *Nail*, 743 N.W.2d at 540 (citing *Branch v. Smith*, 538 U.S. 254, 281 (2003); *State v. Iowa Dist. Ct.*, 616 N.W.2d 575, 581 (Iowa 2000)); *see also* 1A Norman J. Singer, Statutes and Statutory

Construction § 21.16, at 226–28 (6th ed. 2002); *accord Merritt v. Council Bluffs Civil Serv. Comm'n*, 458 N.W.2d 867, 869 (Iowa Ct. App. 1990).

This is precisely what this Court did in *Miller*. Although *Miller* did not involve a properly preserved void-for-vagueness challenge, this Court specifically ascertained the meaning of "affidavit" in section 147.140 by reference to other statutes involving an affidavit requirement. *See Miller* at *5 ("The Iowa Code defines an affidavit 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"); *see also Miller* at *6 ("Another statute, Iowa Code section 622.1(2), allows a requirement for a sworn statement to be satisfied through the signer's self-attestation". The *Miller* court also referenced various statutes, in other areas of law, that require a signed "affidavit." *See id.* ("If we held a signed but unsworn letter substantially complied with section 147.140's affidavit requirement, how could district courts enforce other statutes, such as Iowa Code section 598.13, requiring parties in marital dissolution cases to file financial affidavits?").

The Banwarts argue that section 147.140 is nonetheless vague by pointing to other "oath requirements" in Iowa law. (*See* Appellants' Reply at 39–41). "Oath requirements in other statutes in the Iowa Code demonstrate a wide variety of versions and approaches, which demonstrates that the 'oath' requirement in section 147.140 is vague and open to broad interpretation for execution." (*Id.*). Specifically, the Banwarts point to Iowa Code section 29B.43 and Iowa Rule of Evidence 5.603.

As an initial matter, the breadth of these citations betrays the weakness of the argument. Chapter 29B, for example, is the Iowa Code of Military Justice—which is generally applicable to only active-duty members of the Iowa National Guard.

Moreover, these citations do not reveal a "wide variety of versions and approaches," as the Banwarts contend. To the contrary, nothing in Iowa Code section 29B.43 or Iowa Rule of Evidence 5.603 is inconsistent with this Court's interpretation of section 147.140 in *Miller*. Instead, the "oath" provisions in section 29B.43 and Rule 5.603 simply add additional layers to the particular "oath" requirements in those statutes. The existence of additional detail in these other statutes does not muddy the requirements of section 147.140. Instead, the presence of these additional details elsewhere calls to attention the clarity of section 147.140; had the legislature wished to add alternative means of satisfying the statute's requirements, it would have done so. In fact, contrary to the Banwarts' contentions, the Code provides some details regarding the oath required by section 147.140. For example, the Banwarts assert that "Section 147.140 is silent as to the who, what, where, when, and how, regarding oaths." (Appellants' Reply at 39–40). That may be true as to section 147.140 itself, but Iowa Code section 63A.1—titled "Administration of Oaths"—specifically lists all the officers that are "empowered to administer oaths and to take affirmations."

Even more revealing are the Iowa statutes *not* cited in the Banwarts' brief. The Banwarts included a footnote stating the following: "A word search of the current Iowa Code using 'under the oath' or 'under the oath of' only turns up the language at

issue in section 147.140." (*See* Appellants' Reply at 41). But a tighter search for "oath" alone in Westlaw Edge returns 943 Iowa statutes and 115 Iowa court rules. Some of these statutes contain detail on the content or procedure required for a particular oath—similar to Iowa Code section 29B.43. *See, e.g.,* Iowa Code §§ 63.10 (providing a specific oath for "civil officers"). But many other statutes simply contain straightforward phrases synonymous with the "under the oath" phrasing contained in section 147.140. *See, e.g.,* Iowa Code § 326.13 ("The department shall require registrants to submit **under oath** any information deemed necessary by the department . . ."); Iowa Code § 165.3 (Chapter titled "Eradication of Bovine Tuberculosis" requires that appraisals of cash value of livestock "shall be **under oath or affirmation**") ; Iowa Code § 681.19 (providing that certain debtors "may be fully examined **under oath** as to the amount and situation of the debtor's estate"); Iowa Code § 720.2 (defining perjury as false statements made "while **under oath or affirmation**") (emphasis added in each of the preceding parentheticals).

All of these statutes lack the "who, what, where, when, why, and how for an oath" that the Banwarts argue is required for a statute to satisfy the Due Process Clause. (*See* Appellants' Reply at 41). The Banwarts' contention that "[w]hen the legislature intends to particularize the who, what, where, when, why, and how for an oath, it has done so . . . ." is simply untrue.

Moreover, the Banwarts' void-for-vagueness arguments would apply with equal force to each of these other "oath" statutes throughout the Iowa code. Thus, a

conclusion that the phrase "under the oath" in section 147.140 in unconstitutionally vague would undercut the constitutionality—and enforceability—of statutes ranging from livestock appraisal requirements to perjury charges.

II. CROSS APPEAL: The Banwarts' Petition Was Not Timely, Even With The Benefit of an Extended Statute of Limitations.

Notwithstanding the 2020 Supervisory Orders and the Certificate of Merit, summary judgment is proper because the Banwarts' Petition was not timely. Plaintiff Marlene Banwart underwent her initial surgery on July 24, 2018. The Plaintiffs' Petition was filed on October 19, 2020. The District Court held—and the Banwarts appear to concede—that the "latest possible 'discovery' would have been [a] September 18, 2018 follow-up appointment." (*See* D0078, Dist. Ct. Summ. J. Ruling (12/08/2023), at 3; *see also* Appellants' Reply at 11–18). The fighting issue on this cross-appeal is when, precisely, the Banwarts "discovered" their claims between July 24 and September 18, 2018. If the Banwarts knew or should have known of a claim on or before August 3, 2018, that claim was untimely—even if the applicable limitations period was tolled or equitably tolled for 76 days.

On this issue, the defendants are on slightly different footing. A reasonable fact finder could conclude that the Banwarts "discovered" their claims against NNI/Dr. Beck on one day, and Dr. Getta on a different day.

For the reasons outlined in Dr. Getta's Opening Brief, no reasonable fact finder could conclude that the Banwarts first learned of their claims against Dr. Getta

after August 3, 2018. In response, the Banwarts emphasize that the defendants have identified different discovery dates for their respective claims: "Getta . . . advocates that Marlene's cause of action accrued on July 31, 2018 . . . Defendants Beck and NNI argue that the Banwarts's (*sic*) cause of action accrued on July 27, 2018." (Appellants' Reply at 18) (citations omitted). Therefore, the Banwarts contend, a genuine issue of material fact exists as to the precise discovery date. This assertion misunderstands the fundamental question: Whether any reasonable fact finder could place any discovery date after August 3, 2018.

Furthermore, the fact that the Defendants identify different discovery dates before August 3, 2018 is the innocuous result of the fact that each defendant is a different provider, who had appointments with Plaintiff Marlene Banwart on different days. In fact, the reason Dr. Getta posits a discovery date of July 31, 2018 is that this was the date of his first evaluation of Marlene.[4] Dr. Getta cannot join Dr. Beck and NNI's claimed discovery date of July 27, 2018 because he had not treated Marlene prior to that date.

Dr. Getta joins Dr. Beck and NNI's argument that Plaintiffs were on actual or inquiry notice of at least some of their claims by July 27, 2018. "[A] plaintiff does not need to know the full extent of the injury before the statute of limitations begins to

[4] 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.

run . . . The statute begins to run only when the injured party's actual or imputed knowledge of the injury and its cause reasonably suggest an investigation is warranted" *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461–62 (Iowa 2008). The evidence shows that Marlene was in unique and debilitating pain by July 27, 2018—including numbness, tingling, and voiding issues—and further that she knew it was connected to her back surgery and related recovery. For example, Marlene Banwart's uncontroverted deposition testimony was that she knew what to expect in terms of "post-operative care" and yet this back surgery "was nothing like the other ones." (*See* D0059, Defs.' Neurosurgery of N. Iowa, P.C. and David Beck, M.D. Statement of Facts in Supp. of Mot. for Summ. J. on Statute of Limitations, p. 4 (07/07/23); *see also* D0001, Pet. at Law and Jury Demand, p. 2, at ¶ 10 (10/19/2020)). Thus, the Banwarts were on actual or inquiry notice of their claims against Dr. Beck and NNI on July 27. The essence of the claims against Dr. Getta, on the other hand, are that he should have referred Marlene to neurosurgery when he evaluated her on July 31 because her severe pain, muscle spasms, inability to walk, and ongoing voiding issues had continued and worsened. (*See* D0001, p. 3, at ¶ 15; *see also* D0063, Def. Thomas Getta M.D.'s Statement of Facts & Mem. of Authorities in Supp. of Summ. J., p. 2, at ¶ 3 (07/07/2023)).). Thus, the Banwarts were on notice of claims against Dr. Getta on the date he evaluated Marlene and declined to refer her to neurosurgery: July 31, 2018.

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

This Court has conclusively and correctly determined that an unsworn certificate of merit does not substantially comply with § 147.140, even if the expert signs that they "affirm" the statements contained therein. The district court's ruling that the Banwarts "substantially complied" with § 147.140 must be reversed under this Court's rulings in *Miller* and *Shontz*. Moreover, the argument that the entirety of § 147.140 is void-for-vagueness should be denied. This Court should reverse and remand with instructions to dismiss the Petition with prejudice.

Date: June 12, 2024

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/s/ Paul J. Esker
Paul J. Esker

June 12, 2024
Date

CERTIFICATE OF SERVICE

I certify that on June 12, 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.

/s/Paul J. Esker
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