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**IN THE SUPREME COURT OF IOWA**
**SUPREME COURT NO. 24-0027**
**Cerro Gordo County No. LACV072328**

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MARLENE BANWART AND RICHARD BANWART,

Plaintiffs-Appellants/Cross-Appellees,

vs.

NEUROSURGERY OF NORTH IOWA, P.C., DAVID BECK, M.D., and THOMAS GETTA, M.D.,

Defendants-Appellees/Cross-Appellants.

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**APPEAL FROM THE IOWA DISTRICT COURT**
**FOR CERRO GORDO COUNTY**

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# Final Amended Brief for Defendants-Appellees/Cross-Appellants Neurosurgery of North Iowa, P.C. and David Beck, M.D.

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## STATEMENT OF ISSUES

**I. The Banwarts' Petition is Untimely as the Supervisory Order Extending the Statute of Limitations was Unconstitutional under the Separation of Powers Doctrine.**

**II. CROSS–APPEAL: The Banwarts' Petition is Untimely Irrespective of the Supervisory Order's Extension.**

**III. CROSS–APPEAL: The Banwarts' Certificates of Merit were not Affidavits. They were Not Signed Under a Properly Conducted Oath, Affirmation or Under Penalty of Perjury as Required by Iowa Code section 147.140. Substantial Compliance Does Not Save This Deficiency and Dismissal with Prejudice of the Entire Action Was Required Pursuant to Iowa Code section 147.140(6)**

**IV. The Neurosurgery Defendants Joins Any Applicable Arguments Made by Defendant Getta's Appellate Brief as their Own.**

## ROUTING STATEMENT

Defendants–Appellees/Cross–Appellants Neurosurgery of North Iowa, P.C. and David Beck, M.D. [hereinafter Neurosurgery Defendants] agree that this appeal/cross–appeal should be retained by the Iowa Supreme Court. The Neurosurgery Defendants further note that the Iowa Supreme Court has pending appeals that involve the same or similar legal issues that this appeal/cross–appeal present. *See Est. of Larry Joe McVay et. al. v. Grinnell Reg'l Med. Ctr. et. al.*, No. 23–0243 (Iowa retained Feb. 27, 2024) (involving the constitutionality of the supervisory orders extending the statute of limitations); *see also Miller et. al. v. Catholic Health Initiatives – Iowa Corp. et, al.*, 22–1574 (Iowa submitted Mar. 21, 2024) (involving whether the failure to provide a certificate of merit in affidavit form fails to substantially comply with the statute).

## NATURE OF THE CASE

The Banwarts filed a medical malpractice case against Thomas Getta, M.D. and the Neurosurgery Defendants on October 19, 2020. *See generally* D0001, Pet. at L. and Jury Demand (10/19/20). Specifically, plaintiff Marlene Banwart claims that the Neurosurgery defendants failed to prevent an epidural

hematoma[1] after a L3/l4 and L4/L5 laminectomy with L3–L5 posterolateral fusion surgery on July 24, 2018. *Id.* at ¶¶ 8, 20–25. The epidural hematoma was removed on August 15, 2018. *Id.* at ¶¶ 20–21.

The Banwarts filed and served a certificate of merit, signed by Dr. Christopher J. Koebbe, M.D., against Defendant Beck on December 1, 2020. *See generally* D0011, Certificate of Merit Aff. Re: Def. David Beck, M.D. (12/01/20). Dr. Koebbe's certificate of merit states that he "affirm[s]" that Dr. Beck breached the standard of care. *Id.*

The Neurosurgery Defendants answered on December 11, 2020. *See generally* D0014, Neurosurgery of North Iowa, P.C. and David Beck, M.D.'s Answer and Jury Demand (12/11/20). The Neurosurgery Defendants pled the statute of limitations as an affirmative defense. *Id.* at ¶ 3 (Affirmative Defenses Section).

On July 7, 2023, the Neurosurgery Defendants filed a joint motion for summary judgment with co-Defendant Getta. *See generally* D0060, Defs.' Joint Mot. for Summ. J.: Oral Arg. Requested (07/07/23). The motion for summary judgment provided two grounds for dismissal. *Id.* First, that the

[1] "An epidural hematoma occurs when a mass of blood forms on or outside of the dura matter (the outer most membrane enveloping the brain and spinal cord)." *Smith v. St. Joseph's Hosp.*, No. A-0526-18T4, 2019 N.J. Super. Unpub. LEXIS 618, at *3 n.4 (N.J. Super. Ct. App. Div. Mar. 19, 2019).

Banwarts' petition was barred by the applicable statute of limitations. *Id.* at ¶ 4. Second, that the Banwarts failed to provide a proper certificate of merit in affidavit form as required under Iowa Code section 147.140. *Id.* at ¶ 5.

The Neurosurgery Defendants' motion for summary judgment on the statute of limitations issue involved two distinct arguments. First, the Banwarts' claim began to accrue in late July 2018 after Marlene's July 24 surgery, making the Banwarts' petition untimely even May 20th COVID-19 Supervisory Order [hereinafter Supervisory Order] extending the statute of limitations. *See* D0062, Defs.' Neurosurgery of N. Iowa, P.C. and David Beck, M.D. Mem. of Authorities in Supp. of Their Mot. for Summ. J. on Statute of Limitations at 6–8, 7 n.3 (07/07/23); *see also* D0072, Defs.' Neurosurgery of N. Iowa, P.C. and David Beck, M.D. Reply to Pls.' Resistance to Their Mot. for Summ. J. on Statute of Limitations at 2–4 (07/07/23). Second, the Banwarts' petition was untimely under any accrual date because the Supervisory Order was unconstitutional under the separation of powers doctrine. *See* D0062 at 11–12; *see also* D0072 at 4–6.

The Neurosurgery Defendants' motion for summary judgment on the certificate of merit issue argued that the Banwarts failed to provide their certificate of merit as an affidavit, and thus did not substantially comply with Iowa Code section 147.140(1). *See generally* D0061, Defs.' Joint Mem. of

Authorities in Supp. of Their Mot. for Summ. J. on Certificate of Merit Aff. (07/07/23). Specifically, the Neurosurgery Defendants argued that Dr. Koebbe "affirm[ed] and states as follows" was inadequate to consciencely bind him to his certificate of merit that a proper oath, affirmation, or signature under penalty of perjury would have as required by the Iowa Code section 147.140(1)(*b*). *Id.* at 5–7. The Banwarts failure to ensure Dr. Koebbe was "conscience bound" to his certificate of merit could not establish substantial compliance and required dismissal with prejudice under Iowa Code section 147.140(6). *Id.* at 8–16.

The District Court issued a ruling on both summary judgment issues. *See generally* D0078, Summ. J. Ruling (12/08/23). On the statute of limitations issue, the District Court determined that while there was a genuine issue as to the accrual date of the Banwarts' cause of action, it was not material because the Supervisory Order extending the statute of limitations deadline was an unconstitutional violation of the separation of powers doctrine and could not save any date of accrual. *Id.* at 3–5. On the certificate of merit issue, the District Court found that the certificates were not affidavits as required by the statute, but held that the certificates substantially complied with the statute because they "reference to the statute, . . . use . . . the word 'affirm,' and inclu[de] . . . the required substantive information." *Id.* at 5–7.

The Banwarts filed a timely notice of appeal from this order. D0082, Notice of Appeal (01/04/24). The Neurosurgery Defendants filed a timely cross–appeal from this order, including on the certificate of merit issue, and all other adverse inferences and orders therein. D0079, Defs.' Neurosurgery of North Iowa, P.C., David Beck, M.D. Notice of Cross-Appeal (01/08/24).

## STATEMENT OF THE FACTS

The Neurosurgery Defendants filed a separate statement of facts relevant to the statute of limitations issue and another for the certificate of merit issue. *See generally* D0059, Defs.' Neurosurgery of N. Iowa, P.C. and David Beck, M.D. in Supp. of Their Mot. for Summ. J. on Statute of Limitations (07/07/23); D0058, Defs.' Joint Statement of Undisputed Facts in Supp. of Their Mot. for Summ. J. Related to the Certificate of Merit (07/07/23). The Banwarts did not resist any portion of the statement of undisputed facts on the statute of limitations issue. *See* D0067, Pls.' Resp. to Defs.' Statement of Undisputed Facts Related to Statute of Limitations (07/24/23) (conceding all statement of facts related to the statute of limitations issue). The Banwarts provided clarifications to the statement of facts on the certificate of merit issue, which the Neurosurgery Defendants agreed with. D0064, Pls.' Resp. to Defs.' Neurosurgery of N. Iowa, P.C. and David Beck, M.D. Statement of Undisputed Facts in Supp. of Their Mot. for Summ. J.

Related to the Certificate of Merit (07/24/23); *see also* D0071, Defs.' Joint Reply in Supp. of Their Mot. for Summ. J. Related to the Certificate of Merit Aff. at 2 n.1 (07/31/23) (agreeing with plaintiffs to correct typographical errors). The Banwarts did not provide an additional statement of facts, affidavits, or deposition testimony on either issue. *See generally* Docket.

## I. Statement of Facts Relevant to the Statute of Limitation Issue.

Marlene Banwart has had several back surgeries; one in 1985 and two around 1990. D0059 at ¶¶ 17–20. In late June and/or early July 2018, Marlene and Dr. Beck began discussing a fusion surgery on her back to take place in late July. *Id.* at ¶¶ 21–22. Based on her previous back surgeries, Marlene "knew what to expect" for the upcoming surgery. *Id.* at ¶ 23.

Marlene anticipated or created a post-operative care plan after her fusion surgery. *Id.* at ¶¶ 23–26. Her plan was to stay at the hospital for a few days before heading home. *Id.* at ¶ 24. Her co-plaintiff husband, Richard, and her cousin were going to take care of her after the surgery. *Id.* at ¶ 25. She did not anticipate on going to a rehabilitation facility after the July 24 surgery. *Id.* at ¶ 26.

The fusion surgery proceeded on July 24. *Id.* at ¶¶ 27–28. On her second post-operative day, July 26, she began experiencing significant pain in her back. *Id.* at ¶ 30. Marlene noted several unusual aspects of her post-operative

care beyond what she believed was typical of after a back surgery, including needing more pain medication, trouble using a commode, and discussing her unusual back pain with other healthcare providers. *Id.* at ¶¶ 31–39. She concluded that this back surgery "was nothing like all the other ones." *Id.* at ¶ 23.

She was later transferred to West Bend Rehabilitation on July 27. *Id.* at ¶ 35. She described that this transfer "unusual" as it deviated from her initial care plan which was to go home after the surgery. *Id.* at ¶¶ 24–26, 39, 51. She explained that the difficulty with the transport to this facility from the hospital due to her back pain. *Id.* at ¶¶ 35–36. She later questioned Dr. Beck at a follow up appointment occurring September of 2018 as to whether it was appropriate to send her to a rehabilitation facility considering her previous back surgery experience and back pain after the post-operation. *Id.* at ¶¶ 48, 51.

The Banwarts filed a medical malpractice lawsuit stemming from her July 24 surgery and the reslting epidural hematoma on October 19, 2020. *Id* at ¶ 1.

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

The Banwarts served a certificate of merit on December 1, 2020, directed to Dr. Beck, signed by Dr. Koebbe. D0058 at ¶ 3. This certificate of merit does not contain a jurat. *Id.* at ¶ 6. The certificate of merit does not

contain a signature under penalty of perjury. *Id.* at ¶ 7. The certificate of merit solely states that Dr. Koebbe "affirms and states as follows" to the contents of the certificate of merit. D0064 at ¶ 5. No other certificates of merit directed to the Neurosurgery Defendants were served within 60 days of the Neurosurgery Defendants' answer. D0058 at ¶ 2.

## ARGUMENT

### I. The Banwarts' Petition is Untimely as the Supervisory Order Extending the Statute of Limitations was Unconstitutional under the Separation of Powers Doctrine.

#### A. Error Preservation.

The Neurosurgery Defendants generally agree with the Banwarts that error was preserved on whether the Supervisory Order extending the statute of limitations deadline was unconstitutional. *See generally* D0060, D0078; *see also 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' the issue has been preserved." (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)).

However, the Neurosurgery Defendants disagree that the Banwarts adequately preserved their alternative equitable tolling argument. *See Sorci v. Iowa Dist. Ct.*, 671 N.W.2d 482, 489 (Iowa 2003) ("[I]t is unfair to allow a

party to choose to remain silent in the trial court in face of error, taking a chance on a favorable outcome, and subsequent assert error on appeal if the outcome of the trial court was unfavorable.”). Specifically, the order is devoid of analysis as to whether equitable tolling should be applied, notwithstanding whether the Supervisory Order was unconstitutional. *See* D0078 at 3–5; *id.* at 5 (“And if constitutionally invalid, it cannot save Plaintiffs’ otherwise tardy petition.”). The Banwarts were required to file a Rule 1.904 motion to adequately preserve whether the District Court should have considered equitable tolling notwithstanding the unconstitutionality of the Supervisory Order. *See Meier*, 641 N.W.2d at 539 (explaining that a party “must still request a ruling from the district court to preserve error for appeal on an issue presented but not decided”). They did not. *See generally* Docket. The Appellate Court should disregard the equitable tolling argument as unpreserved.

**B. Standard of Review.**

A summary judgment is reviewed for correction for errors at law. *See Kostoglanis v. Yates*, 956 N.W.2d 157, 158–59 (Iowa 2021). “Summary judgment is proper when the movant establishes that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.” *Id.* (quoting *Goodpaster v. Schwan’s Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014)). “A

fact is material if it will affect the outcome of the suit, given the applicable law. An issue of fact is 'genuine' if the evidence is such that a reasonable finder of fact could return a verdict or decision for the nonmoving party." *Parish v. ICON Health & Fitness, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006) (internal citations omitted).

A constitutional challenge on separation of powers is reviewed de novo. *See State v. Basquin*, 970 N.W.2d 643, 651 (Iowa 2023).

### C. The Supervisory Order Extending the Statute of Limitations is an Unconstitutional Encroachment of Legislative Power.

The heart of this appeal is whether a provision of the Supervisory Order extending the statute of limitations for seventy-six (76) days encroached on the legislature's power to enact legislation. The text of the Iowa Constitution, the historical responsibility of the Iowa legislature to enact statutes of limitations, and prior Iowa caselaw demonstrating the divide between legislative power and judicial power establishes the answer is yes.

"In this state, division of powers of government into three separate departments is not a matter of political philosophy, or theoretical merely. It is accomplished by the fundamental law." *Appeal of Beasley Bros.*, 220 N.W. 306, 308 (Iowa 1928). Article III, section 1 of the Iowa Constitution delineates this fundamental law:

> The powers of the government of Iowa shall be divided into three separate departments – the Legislative, the executive, and the Judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either the others, expect in cases hereinafter expressly directed or permitted.

Iowa Const. art. III, § 1.

The purpose of this provision "is that each of the three branches of the government shall be kept, so far as practicable, separate and that one of the departments shall not exercise the powers confided by that instrument to either of the others." *Denny v. Des Moines Cty.*, 121 N.W. 1066, 1068 (Iowa 1909) (quoting *Houseman v. Kent Circuit Judge*, 25 N.W. 369, 370 (Mich. 1885)). "The separation-of-powers doctrine prohibits one department of the government from exercising powers that are clearly forbidden to it, prohibits one department of the government from exercising powers granted by the constitution to another department of the government, and prohibits one department of the government from impairing another in the performance of its constitutional duties." *State v. Tucker*, 959 N.W.2d 140, 148 (Iowa 2021); *but see id.* at 168 (McDermott, J., concurring specially) ("The [separation of powers] analysis thus requires two basic inquires: what type of power is being exercised, and which branch is exercising it.").

The Iowa Constitution further delineates the responsibilities between the Iowa legislature and the Iowa judiciary. *See Tucker*, 959 N.W.2d at 158

(McDonald, J., majority) (explaining Iowa courts "look first to the constitution to determine whether there is a textual allocation of power to a particular department of the government."). The Iowa legislature is responsible for the passage of laws. *See* Iowa Const. art. III, § 17; *see also* *Santo v. State*, 2 Iowa 165, 204 (1855) (The constitution prescribes the manner in which bills shall become laws, and acts or laws can be enacted in no other way."). This legislation can be used to "regulate the practice and procedure in all Iowa courts." *State v. Thompson*, 954 N.W.2d 402, 411 (Iowa 2021) (citing Iowa Const. art. V, § 14).

From the text of the Iowa Constitution, it is clear that "[l]egislative power is the power to make, alter, and repeal laws and to formulate legislative policy." *In re C.S.*, 516 N.W.2d 851, 859 (Iowa 1994). On the other hand, "[j]udicial power vested in the courts by the Iowa Constitution is the power to decide and pronounce a judgment and carry it into effect." *Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 260 (Iowa 2002). Thus, "[t]he judicial department's constitutional, statutory, inherent, and common law authority to regulate practice and procedure in its courts thus must give way where the legislative department has acted." *See Thompson*, 954 N.W.2d at 411.

A statute of limitations is decidedly within the ambit of legislative power. Statutes of limitations "have come into the law not through the judicial process but through legislation." *Schulte v. Wageman*, 465 N.W.2d 285, 287 (Iowa 1991) (quoting *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945))); *see also* Steven L. Serck, Comment, Taylor v. Wiebold *and Rules of Civil Procedure 48 and 55: Do Statutes of Limitations Still Matter in Iowa?*, 73 Iowa L. Rev. 975, 977 (Iowa 1988) ("The common law fixed no time limit for bringing civil actions."). The Iowa legislature has long codified statutes of limitations, even before the adoption of Iowa's first constitution in 1846. *See* Iowa Stat. Laws, Limitations of Actions (Terr. 1839); *see also Tucker*, 959 N.W.2d at 148 (identifying that "historical practice is of particular important in resolving separation-of-powers questions"), *id.* at 149–50 (reviewing the Iowa Code to determine historical practice). More specifically, the Iowa legislature has codified a personal injury statute of limitations since the mid-Nineteenth Century. *See* Iowa Code § 1659(1) (1851) ("Actions for slander, libel, malicious prosecution, injuries to the person, or for a statute penalty, within two years." (emphasis added)); *see also Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 448 (Iowa 2008). Indeed, the Iowa legislature has been quite active in formulating the appropriate statute of limitations for medical

malpractice actions based on changes in public policy. *See Rathje*, 745 N.W.2d at 448–56.

The long-standing legislative determinations on appropriate timeframes for filing certain cause of actions make sense when considering the underlying rationale for statute of limitations. *See Thompson*, 954 N.W.2d at 418 (identifying the legislature's rationale for specific legislation in separation of powers analysis). Among these considerations include 1) preventing stale claims that defendants would have to defend and the court to spend resources on, 2) freeing defendants from the worry produced by the fear of litigation, and 3) removing unsettled claims from the marketplace. *Est. of Kuhns v. Marco*, 620 N.W.2d 488, 491 n.1 (Iowa 2000). Based on these policy rationales, the Iowa legislature has made critical decisions as to the appropriate length of statute of limitations for certain cause of actions, including medical malpractice actions. *See Schulte*, 465 N.W.2d at 287 (explaining statutes of limitations "represent a public policy about the privilege to litigate" (quoting *Donaldson*, 325 U.S. at 314); *see also Rathje*, 745 N.W.2d at 448–56.

The Supervisory Order encroached onto a well-established historical practice of the Iowa legislature to decide when certain types of lawsuits should be filed. The Iowa legislature was "created for [the purpose of passing laws],

and no other has the smallest authority in that respect." *Santo*, 2 Iowa at 204; *State v. Barker*, 89 N.W. 204, 208 (Iowa 1902) ("[P]owers not in themselves judicial, and that are not to be exercised in the discharge of the functions of the judicial department, cannot be conferred on courts or judges designated by the constitution as part of the judicial department of the state."). "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); *Webster Cty. Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 876 (Iowa 1978) (Uhlenhopp, J., concurring specially) ("[T]he judicial branch should take especial care not to legislate or execute the laws."). By extending the statute of limitations, the Supervisory Order made a *de jure* exception that was reserved to the Iowa legislature to make. *See Schulte*, 465 N.W.2d at 287 ("[T]he history of the pleas of limitation shows them to be good only by legislative grace." (quoting *Donaldson*, 325 U.S. at 314)).

*Root v. Toney* supports this dichotomy of responsibility between the legislative branch and the judicial branch. 841 N.W.2d 83 (Iowa 2013). In *Root*, the Iowa Supreme Court considered whether a supervisory order closing a clerk of court's public window early triggered Iowa Code section 4.1(34)'s extension of time to file a notice of appeal, even though this supervisory order advised litigants that an early closure did <u>not</u> trigger Iowa Code section

4.1(34)'s extension of a deadline. *Id.* at 84, 89. The Iowa Supreme Court identified that it had the authority to determine "the power to set the hours of operation of the clerks of court" under Article V, Section IV of the Iowa Constitution. *Id.* at 87. However, the Iowa Supreme Court concluded that it did not have the power to alter or change the plain language of Iowa Code section 4.1(34) to determine when an appeal was timely filed or not filed. *See id.* at 89–90.

Similar to a notice of appeal, Iowa Code section 4.1(34) reflects the legislature's intention to control when a uniform extension for filing an action is appropriate. Specifically, this section provides extensions regarding "the last day for the *commencement of an action* or proceedings, the *filing of a pleading* . . . in a pending action." *Id.* (emphasis added). The only way this uniform extension could be triggered is if the Iowa Supreme Court invoked its authority to close the office of the clerk of the district court "in whole or in part." *Id.*; *see also Root*, 841 N.W.2d at 88 (explaining that the legislative intent of "in part" refers to the district court clerk's office being "open fewer hours" rather than what activities could be done with that office). Yet, none of the Iowa Supreme Court's Supervisory Orders determined that the COVID-19 pandemic warranted closure, in whole or in part, of the clerk's office of district court in its duty to ensure Iowans could still conduct business as

necessary within the judicial system. So, just like a notice of appeal in *Root*, the Iowa Supreme Court's supervisory order "cannot trump the general assembly's authority to set the time to file a" petition. *Root*, 841 N.W.2d at 90.

It is for this reason that the *State v. Basquin* does not control the outcome of this case. *Basquin* involved a constitutional challenge of the Supervisory Order altering Iowa Rule of Criminal Procedure 2.8. 970 N.W.2d at 652. Specifically, Supervisory Order allowed for written guilty pleas despite Rule 2.8(b)'s requirement for in-person proceedings for guilty pleas to class "C" felonies. *Id.* The Iowa Supreme Court determined that it had authority to modify this rule of criminal procedure because there was no "statute prohibiting written guilty pleas to felonies." *Id.* at 656; *see also id.* at 657 ("Where the legislature has not acted, courts possess a residuum of inherent common-law power to adopt rules to enable them to meet their independent constitutional and statutory responsibilities." (quoting *Iowa C.L. Union v. Criterlli*, 244 N.W.2d 546, 569 (Iowa 1976)).

The issue here is drastically different. The legislature *has acted* regarding the appropriate timeframe to file a medical malpractice action, and for when a uniform extension of that timeframe is appropriate, and decided not to change it in wake of COVID-19. *See* Iowa Code § 614.1(9)(*a*); *see also*

Iowa Code § 4.1(34). The legislature also clearly understands how to implement the tolling of certain provisions. *See Carreras v. Iowa Dep't of Transp.*, 977 N.W.2d 438, 457 (Iowa 2022) (McDermott, J., concurring in part and dissenting in part) ("The legislature included a specific start date . . . without providing for any tolling of that period."). Whatever common law power the Iowa Supreme Court had to unilaterally control when <u>any</u> suit may be filed was abrogated nearly two centuries ago. *See Schutle*, 465 N.W.2d at 287.

The Banwarts identify various potential policy considerations for extending the statute of limitations such as expense to the judicial branch and access to justice. But those policy decisions were best addressed by the Iowa legislature. *See Schulte*, 465 N.W.2d at 287; *see also Wallace v. Wildensee*, 990 N.W.2d 637, 646 (Iowa 2023) ("More to the point, we cannot reuse to follow Iowa statutes for the sake of public policy because we sit on a court of law, not a court of public policy."). Contrary to the Banwarts' vague claims of due process to have the courts hear their claims, the time for filing an action "has never been regarded as what is now called a 'fundamental' right or what used to be called a 'natural' right of the individual." *See Schulte*, 465 N.W.2d at 287 (quoting *Donaldson*, 325 U.S. at 314). The Iowa legislature's decision to not act on COVID-19's effect on the judicial system was well within its

purview when it adjourned the session, particularly when it had a comprehensive framework to deal with uniform extensions on filings and declarations for public health emergencies.[2] *See* Iowa Code §§ 4.1(34), 29C.6.

The Iowa Constitution is "the supreme law of the state, and any law inconsistent therewith, shall be void." Iowa Const. art. XII, § 1. "Any law" includes the Supervisory Order. *See State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021). And as the Supervisory Order encroached on the legislative power embraced in Article 3 Section 1 of the Iowa Constitution, it must be void. The Appellate Court should affirm the District Court.

**D. Equitable Tolling Does Not Apply.**

The Banwarts alternatively argue that the Appellate Court should consider equitable tolling to excuse their untimely petition. Again, this argument was not adequately preserved. Notwithstanding, the Banwarts have not met their burden to invoke the limited doctrine of equitable tolling.

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[2] The Banwarts cite no authority for the proposition that 1) the legislature had a duty to make legislation responsive to COVID-19 issues, 2) that it "abdicat[ed] its responsibility" under the Iowa Constitution Article III, section 17, by not enacting responsive legislation or 3) that such an alleged abdication of this responsibility allows the Iowa Supreme Court to gain the power to pass or alter statutes. *See State v. Davis*, 971 N.W.2d 546, 554 (Iowa 2022) ("Counsel's failure to cite authority permits an appellate court to deem the issue waived.").

First, the Banwarts have a significant problem demonstrating the factual basis for equitable tolling. *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); *see also Mormann v. Iowa Workforce Dev.*, 913 N.W.2d 554, 575 (Iowa 2018) (recognizing that application of equitable tolling is often a "fact-intensive inquiry"). The record contains no statement of disputed facts supported by an affidavit or deposition testimony that demonstrated the Banwarts, or their attorneys, ever relied on the Supervisory Order at the time they filed the petition. *See* Iowa R. Civ. P. 1.981(3); *see also* Iowa R. App. P. 6.801 (defining the record); *see generally* Docket. And perhaps more importantly, the Banwarts, and their attorneys, have not explained why they could not electronically file their petition within the appropriate statute of limitations, due to COVID-19 or otherwise. *See* Iowa R. Elec. P. 16.302(1) (requiring mandatory filings over EDMS). As such, the Banwarts cannot meet their factual burden to justify equitable tolling.[3]

Second, the Banwarts have also failed to demonstrate that they sufficiently plead an exception to the statute of limitation to consider equitable

[3] The Banwarts' references to reliance on the Supervisory Order in their Appellate Briefing should be disregarded as unsupported by the record. At best, the record can only infer that the Banwarts relied on the Supervisory Order as an argument to avoid summary judgment rather than demonstrating that they relied on it by filing their petition.

tolling. *See Benskin, Inc.*, 952 N.W.2d at 302; *see also KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W. 746, 750 (Texas 1999) (explaining that the party has the "burden to both plead the defense [to the statute of limitations] and support it with summary judgment evidence"). The Banwarts' petition is devoid of any reference to the Supervisory Order. *See generally* D0001. This absence is particularly troubling for the Banwarts when they were placed on notice that the Neurosurgery Defendants may assert a statute of limitations defense. *See* D0014 at ¶ 3 (Affirmative Defenses Section); *see also* 51 Am. Jur. 2d. Limitation of Actions § 399 (2024) ("A reply to an answer in which the defendant pleads the statute of limitations, must allege specifically a particular exception to the statute or other matter in avoidance."). Nor did the Banwarts amend their pleading after arguing for equitable tolling in the District Court. *See* D0067 at 7–8; *see generally* Docket. The Banwarts have failed to adequately plead equitable tolling was applicable in this matter.

Despite significant error preservation, factual, and pleading issues, the equitable tolling doctrine is legally inapplicable to the Banwarts. "Generally, a litigating seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S.

408, 418 (2005). The Banwarts have not explained how they could not file their petition within the two years of when they claimed it accrued: August 15, 2018. Nor did the Supervisory Order prevent the Banwarts from filing it within two years of their alleged accrual date. *See Roche v. Mendelson*, No. 357099, 2022 Mich. App. LEXIS 4420, at *14 (Mich. Ct. App. July 28, 2022) ("Plaintiffs have not demonstrated that there was anything about the relevant executive or administrative orders that prevented them from timely filing this action."). Simply put, the mere fact that a Supervisory Order existed does not demonstrate the level of an "extraordinary circumstance" that is specifically linked to the Banwarts to justify the extraordinary remedy of equitable tolling to save their untimely petition. *See, e.g.*, *United States v. Melara*, No. 15-10338, 2022 U.S. Dist. LEXIS 71398, at *6 (D. Mass. Apr. 19, 2022) ("But the COVID-19 pandemic is not an adequate excuse for an untimely filing if a petitioner has not sought an extension or shown a specific difficulty to submit a timely filing."); *Gomez v. Henry St. Settlement*, No. 20-cv-5585, 2021 U.S. Dist. LEXIS 140324, at *15 (S.D.N.Y. Jul 27, 2021) ("Similarly, the disruption caused by the COVID-19 pandemic – which of course affected all New Yorkers in the spring of 2020, not just plaintiff – is not standing alone, 'sufficient to warrant equitable tolling' absent a more specific personal showing.").

## II. CROSS–APPEAL: The Banwarts' Petition is Untimely Irrespective of the Supervisory Order's Extension.

### A. Error Preservation.

The Neurosurgery Defendants argued that the Banwarts' cause of action accrued on July 27, 2018, and was untimely even with the Supervisory Order's extension. *See* D0060 at 6–7; D0072 at 2–4. The Banwarts argued that their cause of action accrued on August 15. *See* D0067 at 2. The District Court ruled that there was a genuine issue of when the Banwarts' cause of action accrued. *See* D0078 at 3. Error has been preserved on when the cause of action accrued. *see also Lamasters*, 821 N.W.2d at 864.

### B. Standard of Review.

The Neurosurgery Defendants incorporate their previous analysis from Argument Section I.B.

### C. The Banwarts' Cause of Action Accrued in late July 2020 Rendering the Petition Untimely Irrespective of the Supervisory Order's Extension to the Statute of Limitations.

The Banwarts claim that their clock on their claim began to run on August 15, 2018, when Marlene had her emergent surgery to remove the epidural hematoma. The Neurosurgery Defendants argue that the Banwarts claim against them began when Marlene was transferred from her post-operative care on July 27, 2018, to West Bend Rehabilitation. The appropriate application of the discovery rule demonstrates that the Banwarts had sufficient

information of the injury and its cause to begin investigating their potential claim against the Neurosurgery Defendants in late July of 2018.

As previously identified, the statute of limitations specific to medical malpractice claims is outlined in subsection 9(*a*):

> Those founded on injuries to the person or wrongful death against any physician and surgeon, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, *within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death* for which damages are sought in action, whichever of the dates occurs first.

Iowa Code § 614.1(9)(*a*) (emphasis added).

"[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." *Rathje*, 745 N.W.2d at 461. *Rathje*'s reference to the term "imputed knowledge" refers to "the use of reasonable diligence" language in Iowa Code section 614.1(9)(a). "[T]he 'reasonable diligence' component adds an objective standard of knowledge to the statute to prevent a plaintiff from benefiting from willful or reckless ignorance." *Rock v. Warhank*, 757 N.W.2d 670, 676–77 (Iowa 2008). A person has imputed knowledge when they "gain[] information sufficient to alert a reasonable person of the need to investigate 'the injury.' " *Rathje*, 745 N.W.2d at 461.

Under this standard "a plaintiff does not need to know the full extent of the injury before the statute of limitations begins to run." *Id.* Nor does the plaintiff "need to discover that the doctor was negligent." *Id.*

"In many medical malpractice cases, the injury for which damages are sought is immediately apparent." *Murtha v. Cahalan*, 745 N.W.2d 711, 715 (Iowa 2008). "In those cases, it is relatively simple to determine what the injury is, when it occurred, its cause in fact, and when the plaintiff knew or should have known, of it – all of which occurred at the same time." *Id.*

The Banwarts had actual knowledge of the injury in late July. *Rock,* 757 N.W.2d at 673 (" 'Injury' within the context of the statute is the physical or mental harm incurred by the plaintiff."). Specifically, Marlene claimed to be in significant post-operative back pain that contained several abnormal pain during the three days following the July 24, 2018, surgery. D0059 at ¶¶ 30–39. This qualifies as the injury, *i.e.* the physical harm, stemming from the July 24 surgery, which the Banwarts plead as when the alleged medical malpractice occurred. *Rock*, 757 N.W.2d at 673; *see also* D0001 at ¶ 20.

The Banwarts were also on sufficient notice that Marlene's alleged pain was caused by the July 24 surgery. First, Marlene claimed to be in significant and unusual post-operative back pain, pain that she claimed was unlike anything she had ever experienced from her previous three back surgeries.

D0059 at ¶ 23. Second, Marlene described her post-care transfer to West Bend Rehabilitation on July 27 as "unusual" as it significantly deviated from her initial care plan of going home after the surgery. *Id.* at ¶¶ 24–26, 39, 51. Third, Marlene demonstrated her ability to connect the July post-operative back pain to the back surgery during her conversation with Dr. Beck in late September of 2018. *Id.* at ¶¶ 46–51. Notably, this conversation did not connect the emergency surgery on August 15, 2018 to the July 24, 2018 surgery. *Cf. id.* Each of these uncontested facts demonstrate that the Banwarts had sufficient information in late July of 2018 to connect the injury (Marlene's post-operative back pain) to the July 24, 2018 back surgery.

If the cause of action accrued on July 27, 2018, when Marlene was transferred to West Bend Rehabilitation, the tolling provision under the Supervisory Order does not save the Banwarts' untimely petition. Seventy-six (76) days from July 27, 2018, would be October 11, 2018, making the last date to file on October 12, 2020.[4] But Plaintiffs filed their petition in this matter a week later – October 19, 2020. *See generally* D0001. As a result, the action is untimely even with the benefit of the Supervisory Order.

**III. CROSS–APPEAL: The Banwarts' Certificates of Merit were not Affidavits. They were Not Signed Under a Properly Conducted Oath, Affirmation or Under Penalty of Perjury as Required by Iowa Code section 147.140. Substantial Compliance Does Not Save This Deficiency**

[4] Extended by one day due to Iowa Code § 4.1(34).

**and Dismissal with Prejudice of the Entire Action Was Required Pursuant to Iowa Code section 147.140(6).**

**A. Error Preservation.**

The Neurosurgery Defendants raised the issue of whether Dr. Koebbe's certificate of merit, that was not in affidavit form, substantially complied with Iowa Code section 147.140(1). *See generally* D0061. The District Court ruled that even though Dr. Koebbe's certificate of merit was not a proper affidavit, the certificate of merit substantially complied with the statute. *See* D0078 at 7. Error was preserved. *See Lamasters*, 821 N.W.2d at 864.

**B. Standard of Review.**

A summary judgment and statutory interpretation is reviewed for errors at law. *See Jorgensen v. Smith*, 2 N.W.3d 868, 873 (Iowa 2024).

**C. Iowa Code section 147.140 and its Requirements.**

In 2017, the Iowa legislature enacted additional safeguards for healthcare providers in medical malpractice suits. *See generally* 2017 Iowa Acts ch. 107. These revisions included a non-economic damages cap, strengthened expert testimony requirements, and a new certificate of merit affidavit statute. *Id.* (codified at Iowa Code § 147.136A, .139, .140).

The new certificate of merit affidavit statute requires a plaintiff to file an affidavit by a medical expert within sixty days of the defendant's answer against each healthcare provider. *See* Iowa Code § 147.140(1). Failure to

substantially comply with the statute's requirements requires dismissal of "each cause of action as to which expert witness testimony is necessary to establish a prima facie case" with prejudice. *Id.* § 147.140(6).

Iowa Code section 147.140 contains several provisions to ensure the plaintiff is providing "verified information" to the court. *McHugh v. Smith*, 966 N.W.2d 285, 290 (Iowa Ct. App. 2021). Of relevance to this cross-appeal, is that the "certificate of merit affidavit must be signed by the expert witness and certify the purpose for calling the expert witness by providing under the oath of the expert witness all of the following:" Iowa Code § 147.140(1)(*b*) (emphasis added). As recently explained by the Iowa Supreme Court, this provision "*unambiguously* requires that the expert witness personally sign the certificate of merit *under oath*." *See Est. of Fahrmann v. ABCM Corp.*, 999 N.W.2d 283, 287 (Iowa 2023) (emphasis added). Or explained otherwise, the certificate of merit needs to be a proper affidavit. *Id.*

**D. The Banwarts' Certificates of Merit were not Affidavits.**

Affidavit is defined by Iowa Code. *See* Iowa Code § 622.85. An affidavit is "a written declaration made under oath, without notice to the adverse party, before any person authorized to administer oaths[5] within or

[5] Iowa Code section 4.1(19) provides that "The word 'oath' includes affirmation in all cases where an affirmation may be substituted for an oath, and in like cases the word 'swear' includes 'affirm.' "

without the state." *Id.*; *see State v. Ross,* 941 N.W.2d 341, 347 (Iowa 2020) ("The legislature is, of course, entitled to act as its own lexicographer, and in this case it did so." (quoting *Porter v. Harden*, 891 N.W.2d 420, 427 (Iowa 2017)).

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); *see State v. Middlekauff*, 974 N.W.2d 781, 793 (Iowa 2022) (explaining that the court can utilize dictionary definitions in statutory interpretation). An "affirmation" is the "[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).

The purpose of an oath or affirmation is to ensure that an individual is conscience bound when they provide information to another party. *State v. Carter*, 618 N.W.2d 374, 376 (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." *Id.* at 377.[6] "Thus, it is essential that a person appear before a designated officer to satisfy the oath or affirmation requirement." *Id.*

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

Notwithstanding, "the only [Iowa] statute which eliminates the presence of another requirement for an oath or affirmation is found in section 622.1." *Carter*, 618 N.W.2d at 377. Section 622.1 provides:

> When the laws of this state or any lawful requirement made under them requires or permits a matter to be supported by a sworn statement written by the person attesting to the matter, the

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[6] *See, e.g., 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."); *Dalbey Bros. Lumber Co. v. Crispin*, 12 N.W.2d 277, 289 (Iowa 1943) ("Hence, to make a valid oath, there must be in some from, in the presence of an office authorized to administer it, an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath."). American Jurisprudence on oaths and affirmations similarly agrees. Am. Jur. 2d Oath and Affirmation § 17 (1989) ("To make a valid oath, the declarant must take upon him-or herself the obligations of an oath in the presence of an officer authorized to administer it.").

> person may attest the matter by an unsworn statement if that statement recites that the person certifies the matter to be true under penalty of perjury under the laws of this state, states the date of the statement's execution and is subscribed by that person.

Iowa Code § 622.1.

"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." *Carter*, 618 N.W.2d at 378. "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." *Id.*

Essentially, a proper affidavit requires that the expert witness to be "conscience bound" to the document that they are signing. Based on aforementioned Iowa caselaw, this process to "conscience bind" the signer requires either: 1) a qualified official to administer an oath; 2) a qualified official to administer an affirmation; or 3) a signature by the signer consistent with Iowa Code section 622.1's "under penalty of perjury" language.

It is undisputed that Dr. Koebbe's certificate of merit was not an affidavit. There is no jurat that evidenced an oath or affirmation was properly administered. *See* D0078 at 5 ("Neither [certificate] contains a jurat"). The Banwarts did not provide any independent evidence showing an oath or

affirmation was properly administered to Dr. Koebbe by a qualified official. *See generally* Docket. The certificates do not contain the important "under penalty of perjury" language under Iowa Code section 622.1. *See* D0078 at 6 ("The certificates here do not recite this language.").

The simple statement that Dr. Koebbe "affirms" the content of the certificate does not save this deficiency. The Iowa Supreme Court has already rejected this language as sufficient to establish that a proper affirmation was administered to the signer. *See* 398 N.W.2d at 849 (explaining that the standalone statement that the signer was "duly sworn (or affirmed)" was insufficient to establish that a proper oath or affirmation was administered). And the statement does not come close to the necessary certification language under Iowa Code section 622.1. *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 Entler*, 398 N.W.2d at 850 (explaining that "the undersigned, being duly sworn (or affirmed)," language was insufficient under Iowa Code section 622.1).

In short, Dr. Koebbe was not "conscience bound" to his certificate of merit in the manner that is contemplated by our caselaw on affidavits and affirmations. This failure violated Iowa Code section 147.140(1)(*b*)'s unambiguous requirement that the expert be under oath when signing the

certificate of merit. The next question for the Appellate Court is to determine plaintiffs' failure to meet an unambiguous requirement substantially complies with the statute.

**E. An Affidavit is Necessary to Substantial Comply with the Certificate of Merit Affidavit Statute.**

The District Court was incorrect that a certificate of merit, that is not a proper affidavit, is substantially compliant with Iowa Code section 147.140. The main thrust of "substantial compliance" is to ensure "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Superior/Ideal, Inc. v. Board of Review of City of Oskaloosa*, 419 N.W.2d 405, 406 (Iowa 1988). The reasonable objectives of the certificate of merit affidavit statute are to "(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.

The absence of a certificate of merit that is an affidavit goes to both prongs, but particularly the "verified information" prong. *Id.* The Neurosurgery Defendants arguments are supported by 1) the plain text of Iowa Code section 147.140, 2) the statute's relationship to our rules of civil procedure, 3) overall purpose of the statute, and 4) other similar state statutes and caselaw which conclusively show that the failure to provide an affidavit is a serious deficiency.

*1. The plain text of the Iowa Code section 147.140 shows an affidavit is an essential matter.*

There are several textual cues that help demonstrate the importance of an affidavit within Iowa Code section 147.140. The legislature would not have included “affidavit,” a specific code-defined term that it is presumed to know, in the title of the statute had it not been important. *See State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004) (“Although the title of a statute cannot limit the plain meaning of the text, it can be considered in determining legislative intent.” (quoting *T & K Roofing Co. v. Iowa Dep’t of Educ.*, 593 N.W.2d 159, 163 (Iowa 1999)); *see also Ronnfeldt v. Shelby Cnty.*, 984 N.W.2d 418, 426 (Iowa 2023) (“We assume ‘when a legislature enacts statutes it is aware of the state of the law.”). The legislature also would not have repeatedly used the term “affidavit” throughout the statute if it did not believe an affidavit was essential element under the statute. Furthermore, the legislature explicitly teased out that an oath must be administered in 147.140(1)(*b*) particularly when the term “affidavit” is already referenced several times within the statute. *Ronnfeldt*, 984 N.W.2d at 426; *see also Middlekauff*, 974 N.W.2d at 801 (explaining the legislature does not add language “for no reason”). Lastly, if the legislature did not believe the oath provision was essential, then they would not have utilized the “must” language preceding section 147.140(1)(*b*). Iowa Code § 4.1(30)(*b*) (“The word ‘must’ states a requirement.”). The plain

text easily supports the notion that a properly conducted affidavit is an essential matter to the certificate of merit affidavit statute.

*2. Iowa Code section 147.140's reference to the rules of civil procedure indicates that an affidavit is an essential matter.*

Iowa Code section 147.140's reference to our rules of civil procedure provides further evidence that the legislature's intent to require the certificate of merit to be in affidavit form. *See* Iowa Code § 147.140; *see also Ronnfeldt*, 984 N.W.2d at 426 (noting that our legislature was aware of our rules of civil procedure when drafting the statute).

First, Iowa Code section 147.140 contains distinctly different requirements from retained expert reports required under Iowa Rule of Civil Procedure 1.500(2)(*b*). *See Jud. Branch v. Iowa Dist. Ct.*, 800 N.W.2d 569, 576 (Iowa 2011) ("When construing a statute, we 'must be mindful of the state of the law when it was enacted and seek to harmonize the statute, if possible, with other statutes on the same subject matter.' " (quoting *State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999)). Expert reports are required when the expert is "retained for litigation purposes" much like a certificate of merit affidavit. *McGrew v. Otoadese*, 969 N.W.2d 311, 321 (Iowa 2022). But the expert report under our rules of civil procedure only must be "prepared and signed by the witness." Iowa R. Civ. P. 1.500(2)(*b*). Noticeably absent, is a requirement that this expert report be an affidavit, unlike what the certificate of merit affidavit

statute explicitly lays out. *Compare id. with* Iowa Code § 147.140(1)(*b*). This diversion shows the legislature's intent was to have a distinct requirement for the certificate of merit affidavit as compared to a retained expert report under Iowa Rule of Civil Procedure 1.500(2)(*b*).

Second, pro se plaintiffs are also subject to the same strictures of ensuring their expert is "conscience bound". Iowa Code section 147.140(5) allows a pro se plaintiff to provide "answers to interrogatories" in lieu of a certificate of merit affidavit. Answers to interrogatories are governed by Iowa Rule of Civil Procedure 1.509. Specifically, "each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Iowa R. Civ. P. 1.509(1)(*c*) (emphasis added); *see also id.* r. 1.501(4) ("A rule requiring a matter to be under oath may be satisfied by an unsworn written statement in substantially the following form: 'I certify under penalty of perjury and pursuant to the laws of the state of Iowa that the proceeding is true and correct.' "). So, even pro se plaintiffs must provide information regarding qualified experts that is the same quality as an affidavit.

*3. The purpose of Iowa Code section 147.140 indicates an affidavit serves is an essential matter.*

"[T]he certificate of merit requirement serves to 'identify and weed non-meritorious malpractice claims from the judicial system efficiently and promptly.' " *Struck v. Mercy Health Servs.*, 973 N.W.2d 533, 541 (Iowa 2022)

(quoting *Womer v. Hilliker*, 908 A.2d 269, 275 (Pa. 2006)). Requiring that the expert is under a properly conducted oath or affirmation while signing the certificate or is signing under penalty of perjury, *i.e.* signing to an affidavit, ensures that the expert understands the gravity of the allegations they make in their certificate of merit affidavit. *Carter*, 618 N.W.2d at 375. Such a requirement works in tandem with deterring frivolous actions by making the plaintiff's expert think long and hard about the allegations they will be substantiating. *See Struck*, 973 N.W.2d at 539. Without being adequately conscience bound, the plaintiff's expert may not properly acknowledge or weigh which allegations in the petition have merit in signing the certificate of merit.

A holding otherwise creates severe consequences for medical malpractice litigation. *See* Iowa Code § 4.6(5). Iowa averages around 160 medical malpractice filings per year. *See* Jennifer Acton, Fiscal Note, Legislative Services Agency, at 2 https://www.legis.iowa.gov/docs/publications/FN/1368141.pdf. (identifying Iowa Judicial Branch data from 2017 to 2022); *see also Sothman v. State*, 967 N.W.2d 512, 524–25 (Iowa 2021) (explaining that LSA publications use independent sources for data and are essential in the legislative process). Many of these medical malpractice filings will require at least one certificate

of merit affidavit. *Bazel v. Mabee*, 576 N.W.2d 385, 387 (Iowa Ct. App. 1998) ("Most medical malpractice lawsuits are so highly technical they may not be submitted to a fact finder without medical expert testimony supporting the claim."); *see also* Iowa Code § 147.140(1)(*c*) (requiring a separate certificate of merit affidavit for each defendant healthcare provider).

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

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

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

An outcome excusing an affidavit would also effectively allow a plaintiff to delay providing any expert testimony establishing a breach of the standard of care until an expert's deposition under oath. *Struck*, 973 N.W.2d at 541 (explaining "the legislative goal [is] to enable healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite *expert testimony*." (emphasis added)); *see also* Iowa R. Evid. 5.603 ("Before testifying, a witness must give an oath or affirmatio not testify truthfully."). That process could occur months or perhaps a year after a defendants' answer to get "verified information" from a qualified expert who may not have even signed the certificate of merit in the first place. *See* Iowa R. Civ. P. 1.508(1)(*a*) (explaining that an experts deposition cannot occur until a Rule 1.500(2)(*b*) report is produced); *see also Reyes v. Smith*, No. 21-0303, 2022 Iowa App. LEXIS 431, at *4 (Iowa Ct. App. May 25, 2022) (explaining that an expert who signs a certificate of merit affidavit does not necessarily mean that expert will be designated under section 668.11 or will testify at trial).

The State of Iowa is also deprived of a core deterrence mechanism against experts thinking about supporting cases that should not be pursued. *See* Iowa Code § 720.2. A perjury conviction would be extremely relevant in deterring specific experts from testifying in other medical malpractice cases as well. *See State v. Roby*, 495 N.W.2d 773, 775 (Iowa Ct. App. 1992) (finding a perjury conviction highly relevant to credibility); *see also Kinseth v. Weil-Mclain*, 913 N.W.2d 55, 69 (Iowa 2018) (explaining that credibility is critical in battle of the expert cases). The purpose and the policy consequences strongly support the notion that an affidavit is an essential matter to the certificate of merit affidavit statute.

*4. Similar state tort reform statutes and cases support the notion that an affidavit is an essential matter.*

The Neurosurgery Defendants' argument for requiring an affidavit pursuant to the text of the statute is nothing new in the national tort reform context. *Est. of Butterfield v. Chautauqua Guest Homes, Inc.*, 987 N.W.2d 834, 841 (Iowa 2023) (comparing other state tort reform statutes to interpret Iowa Code section 147.140). Many similar state tort reform statutes require such supporting documents to be in affidavit form. *See, e.g.*, Ariz. Rev. Stat. § 12-2603(b) (requiring "a preliminary expert opinion **affidavit**"); Ark. Rev. Stat. § 16-114- 209(b)(2) (requiring that "[t]he **affidavit shall be executed under oath**"); Del. Code Ann. Tit. 18, § 6853 (requiring "[a]n **affidavit** as to

each defendant signed by an expert witness"); Ga. Code Ann. § 9-11-9.1(a) (requiring that "the plaintiff shall be required to file with the complaint an **affidavit** of an expert competent to testify"); 735 Ill. Comp. Stat. § 5/2-622 ("In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an **affidavit**, attached to the original and all copies of the complaint."); Ky. Rev. Stat. Ann. § 411.167(2) ("Certificate of merit means an **affidavit** or declaration."); 24 Me. Stat. tilt. 24, § 2903 (1977) (requiring a pre-suit notice of claim "setting forth **under oath** the nature and circumstances of the injuries); Mich. Comp. Laws Ann. § 600.2912d (requiring an "**affidavit** of merit signed by a health professional"); Minn. Stat. § 145.682 subd. 2 (requiring the plaintiff to serve "an **affidavit** as provided in subdivision 3"); Mo. Rev. Stat. § 538.225 (requiring plaintiffs to "file an **affidavit** with the court stating he or she has obtained the written opinion of a legally qualified health care provider"); Nev. Rev. Stat. Ann. § 41A.071 ("If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an **affidavit**"); N.J. Stat. Ann. § 2A:53A-27 ("[P]rovide each defendant with an **affidavit** of an appropriate licensed person that there exists a reasonable

probability that the care . . . fell outside acceptable professional or occupational standards or treatment practices."); N.D. Cent. Code § 28-01-46 (requiring "an **affidavit** containing an admissible expert opinion to support a prima facie case of professional negligence"); Ohio R. Civ. P. 10(D)(2)(a) ("[A] complaint that contains a medical claim . . . shall be accompanied by one or more **affidavits** of merit . . . .").

The caselaw interpreting these statutes would agree an affidavit serves a significant purpose. *Dishmon v. Fucci*, 32 A.3d 338, 342 (Del. 2011) ("In order to satisfy the prima facie burden, an Affidavit of Merit must only contain an expert's sworn statement that medical negligence occurred, along with confirmation that he or she is qualified to proffer a medical opinion. By signing an affidavit, an affiant is under the penalty of perjury for any false assertion."); *Sood v. Smeigh*, 578 S.E.2d 158, 161 (Ga. Ct. App. 2003) ("However, this affidavit was not sworn to and executed in the presence of a notary public prior to filing the compliant, which rendered the affidavit fatally defective ab initio for absence of a notary public swearing the witness in person."); *Essig v. Advocate BroMenn Med. Ctr.*, 33 N.E.3d 288, 299 (Ill. App. Ct. 2015) ("The most obvious fatal deficiency is that Copeland's written report was not an affidavit, meaning it was not sworn to, notarized, or otherwise made under oath."); *Paradis v. Webber Hosp.*, 409 A.2d 672, 675

(Me. 1979) ("The oath provision in a statute is more than a mere technicality. Its function is both to make clear the significance of filing the document itself and to provide a basis for a perjury action upon proof of falsification."); *Holmes v. Michigan Capital Med. Ctr.*, 620 N.W.2d 319, 324 (Mich. Ct. App. 2000) ("Because no indication exists that the doctor confirmed the document's contents by oath or affirmation before a person authorized to issue the oath or affirmation, the document does not qualify as a proper affidavit."); *Tschakert v. Fairview Health Servs.*, No. A10-611, 2011 Minn. App. Unpub. LEXIS 79, at *8 (Minn. Ct. App. Jan. 25, 2011) ("Here, appellant submitted an unsworn letter signed by Dr. Lopez; as it was not sworn to by Dr. Lopez 'before an officer authorized to administer oaths,' the letter does not constitute an affidavit. . . . As such, the district court properly rejected appellants' letter of November 8, 2009, because it was technically deficient."); *MountainView Hosp., Inc. v. Eighth Jud. Dist. Ct.*, 273 P.3d 861, 866 (Nev. 2012) ("The acknowledgment does not contain any statement that Dr. McNamara swore to or affirmed that the statements in the document are true. Thus, based upon the record, we cannot conclude that Dr. McNamara's opinion letter constitutes an affidavit."); *Tunia v. St. Francis Hosp.*, 832 A.2d 936, 939 (N.J. Super. Ct. App. Div. 2003) ("Failure to place a declarant under oath is not a mere 'technical' deficiency. In our view, it goes to the very nature of what an

affidavit is."); *Bride v. Trinity Hosp.*, 927 N.W.2d 416, 420 (N.D. 2019) ("Although Bride stated in her complaint that an admissible expert opinion supporting her allegations had been obtained, this does not satisfy the affidavit requirement. . . . Bride contends she substantially complied with the affidavit requirement . . . [but] the letter of a clear and unambiguous statute cannot be disregarded under the pretext of pursuing its spirit.").

The Iowa Supreme Court recently recognized this body of caselaw in *Fahrmann*. 999 N.W.2d at 287. Specifically, the Iowa Supreme Court affirmatively quoted *Tunia v. Saint Francis Hospital*. *Id.* at 288 (citing 832 A.2d at 939). New Jersey has a similar certificate of merit affidavit statute that requires the plaintiff to "provide each defendant with an affidavit" explaining that a breach in the standard of care occurred. N.J. Stat. § 2A:53A-27. In *Tunia*, the New Jersey Appellate Division of Superior Court was faced with a certificate of merit, much like the certificates of merit in this appeal, that provided the following:

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

> Francis Hospital, and John Does 1-5 upon the Plaintiff Laura Tunia fell outside professional treatment standards.

832 A.2d at 938; *compare id. with* D0011. A notary also completed an acknowledgement on this certificate of merit. *Tunia*, 832 A.2d at 939. However, there was no jurat "evidencing that the notary placed the doctor under oath at the time the document was executed." *Id.*

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

*Fahrmann* strongly suggests that a certificate of merit that is not an affidavit cannot substantially comply with the statute. This reading would be consistent with what the Iowa Court of Appeals identified in *Schmitt v. Floyd Valley Healthcare*. No. 20-0985, 2021 Iowa App. LEXIS 560 (Iowa Ct. App. July 21, 2021) (explaining that medical records failed to substantially comply with the certificate of merit statute as they were not "in affidavit form or otherwise submitted under oath.").

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

## IV. The Neurosurgery Defendants Joins Any Applicable Arguments Made by Defendant Getta's Appellate Brief as their Own.

## CONCLUSION

The Neurosurgery Defendants respectfully request that the Appellate Court affirm the District Court's summary judgment order that the Supervisory Order extending the statute of limitations was unconstitutional.

Alternatively, the Neurosurgery Defendants request that the Appellate Court reverse the District Court's summary judgment order based on their cross-appeal on either: 1) the Banwarts' cause of action accrued in late July of 2018 so that their petition was untimely irrespective of the Supervisory Order's extension, or 2) the Banwarts' failure to provide a certificate of merit

in affidavit form requires dismissal with prejudice pursuant to Iowa Code section 147.140(6).

## REQUEST FOR ORAL ARGUMENT

The Neurosurgery Defendants respectfully request to be heard in oral argument upon submission of this case.

NEUROSURGERY OF NORTH IOWA,
P.C. AND DAVID BECK, M.D.,
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**CERTIFICATE OF FILING AND SERVICE**

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

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point type and contains 10,764 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theodore T. Appel        March 6th, 2024
Signature        Date