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

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.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY

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

Frederick T. Harris #AT0003198
Theodore T. Appel #AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: 515-513-5003
Fax: 515 298-6536
Email: rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLEES/CROSS-APPELLANTS NEUROSURGERY OF NORTH IOWA, P.C. and DAVID BECK, M.D.

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ARGUMENT

I. CROSS-APPEAL: The Banwarts' Cause of Action Accrued in Late July 2018 and is Untimely Irrespective of the COVID Supervisory Order.

The Banwarts argue that their "injury" did not occur until an MRI was conducted on August 15, 2018 when the epidural hematoma was diagnosed and reviewed. Reply Brief for Appellant/Cross-Appellees and Request for Oral Argument at 16 (05/29/24) [hereinafter Banwart Reply Br.]. The Banwarts appear to concede the causation inquiry *i.e.* that if she imputed knowledge of her "injury" by July 27, 2018, then she would have understood that it was caused by the July 24, 2018 surgery.

The Banwarts appear to contend that an individual does not have sufficient knowledge of their "injury" to trigger the statute of limitations until they received a specific diagnosis. Banwart Reply Br. at 16. The Banwarts misinterpret Iowa caselaw defining what an "injury" constitutes.

An "injury" under Iowa law is defined as "is the physical or mental harm incurred by the plaintiff." *Rock v. Warhank*, 757 N.W.2d 670, 673 (Iowa 2008). More specifically, "a plaintiff *does not need to know the full extent of the injury* before the statute of limitations begins to run." *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008) (emphasis added). What logically follows from *Rathje* is that a plaintiff does not need to have a formal diagnosis to be charged with inquiry notice of an "injury" to begin the clock on the

statute of limitations. Rather, "[t]he symptoms, [such as extreme back pain in this case] experienced by a patient can be sufficient to alert a reasonable person to the existence of the injury." *Id.* at 462.[1]

Marlene's uncontroverted deposition testimony was that she knew had an "injury." She knew what to expect in terms of "post-operative care" and, yet, this back surgery "was nothing like the other ones." 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 at ¶ 24 (07/07/23). She explained that she was in significant pain and discussed her concerns with a physician and a nurse. *Id.* at ¶¶ 30–34, 37. Most importantly, her care plan significantly deviated or was "unusual" when she was sent to a rehabilitation facility, rather than going back to her home to recovery. *Id.* at ¶¶ 35–36, 38–39.

Other courts have concluded held that when a plaintiff raises issues with treatment, this is sufficient to trigger the statute of limitations. *Smith v. Smith*, 354 S.E.2d 36, 39–40 (S.C. 1987) (explaining that raising concerns and questions about potential malpractice constituted discovery). Additionally, any objective person would understand that an "injury" had occurred to

[1] Take, for example, an individual consistently suffering from migraines and double vision after a car accident but not receiving a formal diagnosis of a concussion until two days after the accident. Under Iowa caselaw, one would be hard pressed to hold that an injury for purposes the discovery rule would be triggered after a formal diagnosis of a concussion.

"require[] more extensive treatment" if their care plan deviated so substantially, such as going to a rehabilitation facility rather going home. *Rock*, 757 N.W.2d at 674.

The Banwarts also argue that there is a genuine issue of material fact regarding the statute of limitations date because the cause of action against the Neurosurgery Defendants and Dr. Getta have different dates on when the cause of action against them accrued. Banwart Reply Br. at 17–18. This is a red herring. First, it is unsurprising that a plaintiff will have a different accrual date against multiple healthcare providers that provided care to the plaintiff at different times. *See Smith v. St. Joseph's Hosp. & Med. Ctr.*, No. A-0526-18T4, 2019 N.J. Super. Unpub. LEXIS 618, at *10 (N.J. Super. Ct. Mar. 19, 2019) ("The Court applies the discovery rule, recognizing that the statute of limitations for a medical malpractice case can run at different times for different defendants."). And second, it is immaterial because under either late July accrual date proposed by the defendants, the supervisory order would not save the Banwarts' untimely filing.

The Appellate Court can affirm on the grounds that the Banwarts' cause of action accrued in late July, rendering it unnecessary to address whether the COVID Supervisory Order is constitutional.

II. CROSS-APPEAL: The Banwarts' Certificates of Merit are not Substantially Complaint as Explained in *Miller* and *Shontz*.

The Iowa Supreme Court has recently released two opinions regarding the certificate of merit affidavit statute since the Neurosurgery Defendants filed their appellee brief. In *Miller v. Catholic Health Initiatives – Iowa Corp.*, the Iowa Supreme Court held that a certificate of merit affidavit must be a proper oath or signed under penalty of perjury to substantially comply with Iowa Code section 147.140(1). No. 22-1574, 2024 Iowa Sup. LEXIS 57, at *15–17 (Iowa May 24, 2024). The Iowa Supreme Court made this decision based on many of the same arguments raised by the Neurosurgery Defendants such as the plain text of Iowa Code section 147.140, the impact on other verification statutes, the recent *Estate of Fahrmann v. ABCM Corp.*, 999 N.W.2d 283, 288 (Iowa 2023) decision, and other published sister state caselaw. *Miller*, 2024 Iowa Sup. LEXIS 57 at *13–17.

The Iowa Supreme Court further released *Shontz v. Mercy Med. Ctr.-Clinton, Inc.* on June 7, 2024.[2] No. 23-0719, 2024 Iowa Sup. LEXIS 64, at *2 (Iowa June 7, 2024) (per curiam). In *Shontz*, the Iowa Supreme Court dealt with the same type of certificate of merit affidavit as in this case: one that states the expert "affirms and states as follows" but did not contain a jurat demonstrating an oath or affirmation was properly conducted or was signed

[2] The Banwarts did not have the benefit of this opinion prior to filing their reply brief.

under penalty of perjury. *Id.* The Iowa Supreme Court reviewed the arguments in *Shontz*, many of which are similar to what the Banwarts argue in their reply brief, and rejected them. *Id.* at *3–4. The Iowa Supreme Court concluded that "[s]tare decisis [from *Miller*] dictates the same result here" and proceeded to dismiss the case with prejudice. *Id.* at *4. The Banwarts' attempts to distinguish *Miller* should be rejected based on *Shontz*. *See Book v. Doublestar Dongfeny Tyre Co.*, 860 N.W.2d 576, 594 (Iowa 2015) ("Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law.").

The Banwarts attempt to make two other points than what was presented in *Miller* and *Shontz*. First, is that the plaintiffs substantially complied with Iowa Code section 147.140(6) because the Neurosurgery Defendants did not file the motion quick enough in litigation. Banwart Reply Br. at 32–35. Second, the expert signing an affidavit will not need be subject to a perjury charge as the content needed to be sworn to is in the form of an opinion. *Id.* at 35–38. Neither argument should deter the Appellate Court from applying recent precedent.

A. No Timeframe is set for when a Defendant Healthcare Provider Must File a Motion under Iowa Code section 147.140(6).

The Banwarts argue that because the summary judgment was not raised "early enough" in litigation, this constitutes "ipso facto" evidence of their

substantial compliance. Banwart Reply Br. at 33 Specifically, they argue that because the Neurosurgery Defendants engaged in discovery and spent time and money on it[3] "proves substantial compliance." *Id.* at 35.

The Banwarts fundamentally misunderstand the substantial compliance test. The substantial compliance test looks at what a plaintiff did to comply with the statute. *Miller*, 2024 Iowa Sup. LEXIS 57 at *13 ("Substantial compliance means compliance in respect to essential matters necessary to assure the reasonable objectives of the statute" (quoting *Hummel v. Smith*, 999 N.W.2d 301, 309 (Iowa 2023)). Those reasonable objectives are for the plaintiff to provide the verified information, described in Iowa Code section 147.140 subsection 1, early in the litigation. *See McHugh v. Smith*, 966 N.W.2d 285, 290 (Iowa Ct. App. 2021). Subsection 1 is devoid of any reference to the defendants' actions in a case. *See* Iowa Code § 147.140(1) (containing a timeliness requirement, content requirement under oath, and a separate affidavit requirement).

[3] Much like their equitable tolling argument, the Banwarts have not provided a specific factual record demonstrating what discovery had been conducted, and how much time and expense the Neurosurgery Defendants spent in litigation. *See* 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). Their argument can be disregarded on this ground.

The Iowa legislature understood how to place time restrictions on when a motion could be filed in Iowa Code section 147.140. *State v. Hensley*, 911 N.W.2d 678, 682 (Iowa 2018) ("We glean [legislative] intent by 'assess[ing] the statute as a whole, not just isolated words or phrases.' " (quoting *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011)). For example, subsection 4 of the statute provides that a plaintiff must file a motion establishing good cause for an extension of the service deadline prior to the deadline for when a certificate of merit affidavit must be served. *See* Iowa Code § 147.140(4). Yet, subsection 6 simply states that "Failure to comply with subsection 1 shall result, upon motion, in dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case." *Id.* at § .140(6). These contrasting provisions demonstrate that the legislature understood how to cabin in, or set a timeframe, for when a defendant healthcare provider must file a motion testing the substantial compliance of the certificate of merit affidavit. The legislature chose not to.

For example, the Banwarts mainly argue that engaging in discovery demonstrates their substantial compliance. The Iowa legislature recognized that discovery would occur after a certificate of merit affidavit was filed by the plain terms of the certificate of merit affidavit statute. *See Ronnfeldt v. Shelby Cty.*, 984 N.W.2d 418, 426 (Iowa 2023) ("We assume 'when a

legislature enacts statutes it is aware of the state of the law.' " (quoting *Simon Seeding & Sod., Inc. v. Dubuque Hum. Rts. Comm'n*, 895 N.W.2d 446, 467 (Iowa 2017)); *see, e.g.*, Iowa Code § 147.140(1)(*a*) (requiring a certificate of merit affidavit to be served prior to discovery), *id.* at .140(2) (explaining how the certificate of merit affidavit does not preclude additional discovery), *id.* .140(3) (stating that compliance with the disclosure of expert witnesses under Iowa Rule of Civil Procedure 1.500, .508 must be complied with independently of this statute) *id.* .140(5) (acknowledging interrogatories as an alternative to an affidavit).

Yet, the Iowa legislature decided not to place a specific timeframe on when the defendant healthcare provider must file a dispositive motion in relationship to engaging discovery despite this deep understanding of discovery within the statute. As several Iowa Court of Appeals have explained, a defendant engaging in discovery does not waive the plaintiff's requirement to substantial comply with the statute. *See, e.g.*, *McHugh*, 966 N.W.2d at 291 ("McHugh asserts Dr. Smith 'implicitly agreed' he did not need the information to be relayed in the certificate of merit affidavit and was not prejudiced by the delay. Nothing in the statutory language supports McHugh's proposition that Dr. Smith constructively waived the requirement that she timely filed the certificate of merit affidavit."); *Est. of Butterfield v.*

Chautauqua Guest Home, Inc., No. 22-0101, 2022 Iowa App. LEXIS 620, at *7 (Iowa Ct. App. Aug. 17, 2022) *overruled on other grounds* 987 N.W.2d 834 (Iowa 2023) ("[E]ngagment in discovery while the certificate of merit affidavit remains absent from the parties' discovery plan does not constitute a definite offer to refrain from filing a motion to dismiss on this ground."); *Butler v. Iyer*, No. 21-0796, 2022 Iowa App. LEXIS 291, at *12 (Iowa Ct. App. Apr. 13, 2022) ("At bottom, we reject Butler's argument that the discovery reference is an oblique route for defendants to waive their opportunity to receive an expert affidavit from the plaintiff.").

There is merit in waiting until later in litigation to challenge the substantial compliance of the certificate of merit affidavit. From a general perspective, a defendant can "package" a summary judgment involving two different issues, like what occurred here involving the statute of limitations and the certificate of merit statute. This is judicially efficient for the parties and the district court to address both issues at the same time, and allows a defendant to file an application for interlocutory appeal on both issues, rather than piecemeal.

From a specific perspective, a defendant may strategically wait until the plaintiff designate and disclose an expert under Iowa Code section 668.11 and

Iowa Rules of Civil Procedure 1.500, 1.508.[4] Under Iowa's rules of civil procedure, a party may only depose a disclosed retained expert only be after a rule 1.500(2)(*b*) report is provided. Iowa R. Civ. P. 1.508(1)(*a*). Taking that expert's deposition may create inconsistencies subject to the "contradictory affidavit rule" against the expert's previous certificate of merit affidavit. *See Susie v. Family Health Care of the Siouxland, P.L.C.*, 942 N.W.2d 333, 339 (Iowa 2020) (explaining the rule). In this case, the apparent contradiction could have been that the expert was not administered a proper oath or affirmation from an individual qualified under Iowa Code section 63A.1. Other useful avenues could include what medical records established a breach in the standard of care claimed in their certificate of merit affidavit, whether they are actively licensed, whether their board certification is current, etc. *See* D0011, Certificate of Merit Aff. Re: Def. David Beck, M.D. (12/01/20).

What the Banwarts are ultimately asking for is for the Appellate Courts to superimpose a "good cause" analysis into the statute that allows the Court to look at the defendants' action or inaction to determine whether dismissal with prejudice is appropriate. *See Hantsbarger v. Coffin*, 501 N.W.2d 501,

[4] Notably, this is something that had not occurred yet in this case to the extent this is relevant to the substantial compliance inquiry. *See* D0036, Trial Scheduling and Discovery Plan, at ¶ 8 (02/07/22) (delineating when expert designations and disclosures were to occur).

505 (Iowa 1993) (en banc) (observing the defendants' actions in determining good cause under Iowa Code section 668.11). The legislature, again, presumably understood the Iowa Appellate Court's section 668.11 jurisprudence when it created the certificate of merit affidavit statute. *Ronnfeldt*, 984 N.W.2d at 426. Yet, the Iowa legislature decided to limit the good cause only for when an extension of the certificate of merit deadline is proper, not for whether dismissal for prejudice should occur.

To conclude, the Neurosurgery Defendants filed a dispositive motion on a statute that contains no explicit timeframe and solely directs Iowa Courts to limit its substantial compliance inquiry to the four corners of a plaintiff's certificate of merit affidavit. The Banwarts failed to substantially comply with this statute pursuant to the decisions in *Miller* and *Shontz*. A correct decision on this issue could have saved the Neurosurgery Defendants time and resources on other miscellaneous motion practice, experts, and trial.

B. An Expert Signing a Certificate of Merit Affidavit can be Subject to a Perjury Charge.

The Banwarts attempt to argue that the experts cannot be subject to a penalty of perjury charge because the content requirements are "opinions" rather than "material facts." Banwart Reply Br. at 35. The Banwarts concede their argument is contradicted by *Miller*, and later *Shontz*. *Id.* And their argument is facially inconsistent with many published opinions from other

jurisdictions. *See Miller*, 2024 Iowa Sup. LEXIS 57, at *14, 19–20 (collecting opinions from other jurisdictions).[5]

More importantly, the Banwarts' argument fails to address the notable exception to the opinion rule for perjury conviction: "when-as a matter of fact-the witness is alleged to have held no such opinion or belief." *State v. Hawkins*, 620 N.W.2d 256, 262 (Iowa 2000). A real possibility exists that an expert could sign an opinion on the standard of care and breach that they do not believe exists, something that the legislature sought to avoid by requiring the certificate of merit to be in the form of an affidavit. *See* Iowa Code § 147.140(1)(*b*). Such a situation would be sufficient to garner a perjury conviction. *Hawkins*, 620 N.W.2d at 262; *see also State v. Sullivan*, 130 A.2d 610, 615–616 (N.J. 1957) (rejecting an opinion defense from a medical doctor). Moreover, as explained above, the penalty of perjury issue can apply in other aspects: such as stating they have active license when they do not, or stating that they do not have reviewed medical records in reaching their opinion. *See generally* D0011. The Banwarts' argument regarding expert

[5] The Banwarts also make an argument that because a pro se individual can do interrogatories instead, that makes the affidavit requirement immaterial. But those interrogatories must be signed under penalty of perjury as explained in the Neurosurgery Defendants' briefing. *See* Final Amended Brief of Defendants-Appellees/Cross-Appellants Neurosurgery of North Iowa, P.C. and David Beck, M.D. at 48 (05/07/24) (citing Iowa Rules of Civil Procedure 1.509(1)(*c*) and 1.501(4)).

opinions not being subject to a penalty of perjury charge should easily be rejected as irrelevant.

Binding Iowa caselaw now holds that the certificates of merit filed by the Banwarts did not substantially comply with the statute. When the Neurosurgery Defendants filed their motion pursuant to Iowa Code section 147.140(6) is legally irrelevant to the substantial compliance analysis. The Appellate Court should dismiss this case as required by Iowa Code section 147.140(6) for the reasons expressed by the Iowa Supreme Court in *Estate of Fahrmann, Miller,* and *Shontz*.

III. CROSS-APPEAL: The Under Oath Provision is not Unconstitutionally Vague.

The Banwarts make their final stand on how the oath provision is unconstitutionally vague, an issue not sufficiently raised in *Miller*.[6] Banwart Reply Br. at 38–42; *see also* 2024 Iowa Sup. LEXIS 57, at *13 n.2. The Iowa

[6] It is arguable that error is preserved on this claim. The Banwarts' district court briefing does not cite the United States or Iowa Constitution, or even state that the under oath provision is unconstitutional generally. *See generally* D0066, Pls.' Mem. of Authorities in Resistance to Defs.' Mot. for Summ J. on Certificate of Merit (07/24/23). Rather, the Banwarts' argument seemed to be that "[t]he vagueness of the oath requirement, necessitates . . . a generous view of what constitutes an 'oath of the expert witness' under the terms of the statute." *Id.* at 5–6. The Banwarts' failure to sufficiently elaborate that their argument was a constitutional argument is grounds to decline a ruling on error preservation grounds. *State v. Middlekauff*, 974 N.W.2d 781, 793 n.3 (Iowa 2022); *cf. State v. Juste*, 939 N.W.2d 664, 667 (Iowa Ct. App. 2019).

Supreme Court has now issued three opinions explaining that the oath requirement is "unambiguous." *See, e.g., Est. of Fahrmann*, 999 N.W.2d at 288 ("The statute unambiguously requires that the expert witness personally sign the certificate of merit under oath."); *Miller*, 2024 Iowa Sup. LEXIS at *13 ("We reiterate that section 147.140 'unambiguously requires that the expert witness personally sign the certificate of merit under oath.' " (quoting *Est. of Fahrmann*, 999 N.W.2d at 288)); *Shontz*, 2024 Iowa Sup. LEXIS 64 at *1 ("We held that this statute unambiguously requires the expert to timely sign the certificate under oath and that her unsworn signature did not substantially comply with the affidavit requirement."). It is hard to imagine that this provision is unconstitutionally vague after three different opinions have held this requirement is "unambiguous."

Notwithstanding the unambiguous binding Iowa Supreme Court caselaw on this topic, "[i]n determining whether a statute is unconstitutionally vague, this court presumes the statute is constitutional and gives 'any reasonable construction' to uphold it." *State v. Middlekauff*, 974 N.W.2d 781, 801 (Iowa 2022) (quoting *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007)). To determine reasonable constructions, the Court looks at pertinent caselaw and references to similar statutes of the same subject matter. *Id.*

Miller walked through the pertinent Iowa caselaw and statutes that existed at the time the Banwarts filed their certificate of merit. This includes Iowa Code section 622.85 which defines what an affidavit is, *State v. Carter*, 618 N.W.2d 374 (Iowa) (en banc) explaining what a necessary element of an oath or affirmation requires a proper individual to bind the conscious of the signer, and Iowa Code section 622.1 which provides how self-attestations under penalty of perjury can occur. *Miller*, 2024 Iowa Sup. LEXIS at *15–17. Furthermore, Iowa Code section 63A.1 provides the types of individuals empowered to administer an oath or affirmation. And the Iowa Supreme Court opinion of *In re Estate of Entler* holds that a document which solely states the signer is under oath or affirms its content, without a jurat, is insufficient to establish that a proper oath or affirmation was conducted. 398 N.W.2d 848, 850 (Iowa 1987).

Much like in *Middlekauff*, "a reasonably intelligent person could understand what" a proper oath or affirmation requires by reviewing Iowa Code and binding Iowa caselaw. 974 N.W.2d at 802 (holding that a reasonable person could determine that an out-of-state marijuana medical card would not constitute a permissible "order" under the Iowa Controlled Substances Act). The Appellate Court should reject the Banwarts' argument that the under oath provision is unconstitutionally vague.

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

CONCLUSION

The District Court's decisions can be affirmed on several alternative grounds. First, the uncontested summary judgment record establishes that the Banwarts had sufficient knowledge to understand that they had an "injury" by late July of 2018. Second, the Banwarts' failed to substantially comply with the certificate of merit affidavit statute when they failed to provide a certificate of merit in affidavit form. The under-oath provision is unambiguous and not unconstitutionally vague.

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

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

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this brief was electronically filed and served on the 12th day of June, 2024 upon the Clerk of Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

BY: /s/ *Theodore T. Appel*
Frederick T. Harris #AT0003198
Theodore T. Appel #AT0014941
LAMSON DUGAN & MURRAY LLP
1045 76th Street, Suite 3000
West Des Moines, IA 50266
Phone: (515) 513-5003
Email: rharris@ldmlaw.com
tappel@ldmlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLEES/CROSS-APPELLANTS NEUROSURGERY OF NORTH IOWA, P.C. AND DAVID BECK, M.D.

Brian P. Galligan
Amber J. Haberl
Galligan Law P.C.
13375 University Avenue, Ste 302
Des Moines, IA 50325
bgalligan@galliganlaw.com
ahaberl@galliganlaw.com

Andrew B. Howie
Shindler, Anderson, Goplerud & Weese, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, IA 50265
howie@sagwlaw.com
ATTORNEYS FOR APPELLANTS/ CROSS-APPELLEES

Desirée A. Kilburg
Paul J. Esker

Bradley & Riley PC
Chauncy Building
404 East College Street, Suite 400
Iowa City, IA 52240-3914
dkilburg@bradleyriley.com
ATTORNEYS FOR APPELLEE/
CROSS-APPELLANT THOMAS
GETTA, M.D.

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 3,645 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theodore T. Appel	06/12/24
Signature	Date