IN THE SUPREME COURT OF IOWA
Supreme Court No. 24-1704

RICHARD RARICK and TERESA RARICK,
Appellants,

vs.

WESLEY R. SMIDT, M.D. and
DES MOINES ORTHOPAEDIC SURGEONS, P.C,
Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE COLEMAN J. MCALLISTER

APPELLANTS' BRIEF AND REQUEST FOR ORAL ARGUMENT

SCOTT M. WADDING
SEASE & WADDING
The Rumely Building
104 Southwest Fourth Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
swadding@seasewadding.com

Attorneys for Appellants
Richard Rarick and Teresa Rarick

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STATEMENT OF THE ISSUES

1. Under Iowa Code section 147.140, a defendant waives an unsworn certificate-of-merit challenge when the defendant engages in litigation conduct inconsistent with the right of pre-discovery dismissal and the nonmoving party suffers prejudice. For fifteen months, the defendants fully investigated the merits of the case in discovery and pursued a merits-based resolution in mediation. During that time, the plaintiffs' statute of limitations expired and they incurred substantial litigation costs. Did the defendants waive their certificate-of-merit challenge?

2. The plaintiffs' certificate of merit subjects the expert to prosecution for fraudulent practices, Iowa Code section 714.8(3), because it is a "certificate [ ] required by law," an affidavit, and an unsworn declaration under penalty of perjury. The expert reasonably believed his signature was made under oath and subjected him to criminal punishment. Did the plaintiffs substantially comply with section 147.140?

3. Is the defendants' proposed application of section 147.140 unconstitutional?

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents substantial issues of first impression and urgent issues of broad public importance requiring prompt and ultimate determination by the Iowa Supreme Court. *See* Iowa R. App. P. 6.1101(2)(*b*)–(*d*), (*f*).

STATEMENT OF THE CASE

Nature of the case. This is a medical malpractice case involving a belated certificate-of-merit challenge under Iowa Code section 147.140.

Course of Proceedings. On January 31, 2023, Richard and Teresa Rarick (the "Raricks") filed this medical malpractice action against Dr. Wesley Smidt of Des Moines Orthopedic Surgeons, P.C. ("DMOS").[1] DMOS filed its Answer on March 14, and the Raricks served their certificate of merit affidavit on the same day. On June 17, 2024, DMOS filed a motion to dismiss pursuant to Iowa Code section 147.140.

Disposition of the Case in District Court. The district court granted DMOS's motion and entered an order dismissing the Raricks' suit with prejudice on September 9, 2024. On September 20, the Raricks' filed a timely motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which

[1] Smidt and DMOS are collectively referred to hereafter as "DMOS."

the district court denied on October 18. The Raricks filed a timely notice of appeal on October 21.

STATEMENT OF THE FACTS

This is a simple medical malpractice case. On March 11, 2022, Richard Rarick went to the hospital for knee surgery. During surgery, a DMOS orthopedic surgeon, Dr. Wesley Smidt, inadvertently transected Mr. Rarick's popliteal artery. Attempts to save Mr. Rarick's leg were unsuccessful, so his right leg was amputated. Within months, the Raricks retained an expert who concluded Smidt's surgical technique breached the standard of care and caused Mr. Rarick to lose his leg. The Raricks promptly filed suit on January 31, 2023 with fourteen months to spare before their statute of limitations expired.

The Raricks' standard of care expert is Dr. Tad Gerlinger. D0038, M.T.D. Res. App. at 6 (7/19/24). On July 26, 2022, there was a telephone conference between the Raricks' counsel and Gerlinger, and Gerlinger stated Smidt's surgical technique breached the standard of care. *Id.* On August 13, Gerlinger and the Raricks' counsel communicated back and forth via multiple emails using electronic devices capable of real-time audio and visual communication. *Id.* That morning, Gerlinger executed and

presented his signed report to the Raricks' counsel—who is notary public and an officer of the court. *Id.* at 6–7. Counsel immediately reviewed the report that morning and confirmed Gerlinger's signature, certification, and testimony. *Id.* Gerlinger's executed report concludes by stating,

> *I hereby certify* that this report conveys an *accurate statement of my opinions* to which I will *testify under oath*.

Id. at 7, 29 (emphasis added). Gerlinger knew he was under oath and subject to criminal penalties when he executed his certified report. *Id.* at 18–22.

The Raricks filed this lawsuit on January 31, 2023. D001, Petition (1/31/23). The Raricks' counsel informed Gerlinger that Iowa law requires the plaintiff in a medical malpractice action to provide the defendants a signed certificate of merit comprising the expert's testimony within sixty days of the defendant's answer. D0038 App. 7. On February 11, Gerlinger and the Raricks' counsel again communicated back and forth via multiple emails using electronic devices capable of audio and visual communication. *Id.* Gerlinger's certificate of merit affidavit uses the certificate-of-merit form recommended by the Iowa Practice Series. It is entitled, "Certificate of Merit Affidavit," and begins:

> The undersigned, being first *duly sworn on oath, deposes* and states as follows:

Id. at 8, 25 (emphasis added). Gerlinger's certificate of merit incorporated by reference his certified expert report. *Id.* Gerlinger signed the certificate of merit affidavit and immediately presented it by email to the Raricks' counsel, who, again, is notary public. *Id.* at 7, 25. The Raricks' counsel received the executed copy and immediately reviewed the certificate of merit affidavit. *Id.* at 7.

Gerlinger knew that his signed certificate would be presented to DMOS and, if necessary, the district court as evidence in the pending legal proceeding. *Id.* at 18–22. Based on the prior oral and written communications between counsel and Gerlinger and Gerlinger's prior experience providing expert testimony under oath and subject to the penalty of perjury, Gerlinger knew that he was signing the certificate of merit affidavit under oath and subject to the penalty of perjury under the laws of the State of Iowa. *Id.*

DMOS filed its Answer on March 14, 2023. The same day, the Raricks served Gerlinger's certificate of merit and certified report. *Id.* at 8. For the next fifteen months, DMOS did not assert a certificate-of-merit defense in its Answer, did not object to the certificate of merit, did not

identify any defects in the certificate of merit, did not seek leave of Court to supplement their Answer at any time, did not seek any discovery on the certificate of merit, and did not otherwise challenge the certificate of merit in any way. *Id.* at 7–16. Instead, DMOS fully and completely participated in fact and expert discovery on the merits, which was wholly unrelated to the certificate of merit. *Id.* As a result, the Raricks incurred litigation costs in the amount of approximately $$39,882.40. *Id.* at 10.

Crucially, on March 11, 2024—and in the midst of DMOS's fifteen-month delay in challenging the certificate of merit—the Raricks' two-year statute of limitations on March 11, 2024. *Id.* at 15. Before then, DMOS had not objected to otherwise challenged the certificate of merit in any way. *Id.* at 7–16.

DMOS participated in a full-day mediation on May 22, 2024. *Id.* at 12–13. While mediation did not result in settlement that day, DMOS's last offer remained open to allow the Raricks to consult with financial advisors and other family members. *Id.* at 13–14. Meanwhile, the Raricks negotiated with the subrogation lienholder for a reduction of the lien, which resulted in a settlement agreement of the lien as a compromise in

view of Iowa Code section 147.136 prohibiting recovery of medical costs paid for by insurance. *Id.* at 14.

On June 7, counsel for DMOS indicated for the first time DMOS was evaluating the Raricks' certificate of merit for a potential challenge under section 147.140. *Id.* at 15–16. This was the first time the Raricks had been made aware of any potential challenge or objection to the certificate of merit. *Id.* Throughout the case up to and including the evening of June 7, neither DMOS nor its counsel objected to or voiced any concerns about the certificate of merit and they did not otherwise challenge the certificate in any way. *Id.*

On June 17, DMOS filed a motion challenging the certificate of merit, asserting the certificate was facially invalid because it was unsworn as evidenced by the lack a notarial jurat. D0032, M.T.D. 4–14 (6/17/24). The district court granted DMOS's motion and entered an order dismissing the Raricks' suit with prejudice on September 9. D0053, Order Granting M.T.D. 24 (9/9/24). The Raricks' filed a timely motion pursuant to Iowa Rule of Civil Procedure 1.904(2), D0057, 1.904(2) Motion (9/20/24), which the district court denied on October 18. D0060, Order Denying 1.904(2) Motion (10/18/24). This appeal follows.

ARGUMENT

Iowa Code section 147.140 requires the plaintiff in a medical malpractice case to serve a certificate of merit affidavit before discovery commences and within sixty days of the defendant's answer. A certificate of merit is a *pre*-discovery screening tool meant to weed out frivolous medical malpractice cases early (sixty days after the defendant's answer). In this case, DMOS received the Raricks' certificate of merit the same day it filed its answer. DMOS did not object, did not supplement its answer to assert a certificate-of-merit defense, and did not otherwise challenge the certificate of merit in any way. Instead, DMOS initiated discovery, and for the next fifteen months it completed fact and expert discovery and sought resolution on the merits at mediation as the trial date approached. During that time, the Raricks' two-year statute of limitations expired. The district court erred in granting DMOS's belated motion to dismiss for three reasons:

First, DMOS waived its unsworn certificate of merit challenge. Shortly after the district court granted DMOS's motion to dismiss, a majority of the Iowa Supreme Court approved waiver by litigation conduct for certificate-of-merit challenges under section 147.140. DMOS waited

until after discovery was completed and following mediation to challenge the Raricks' certificate of merit for the first time at the summary judgment deadline. DMOS's extensive inconsistent litigation conduct frustrated the early dismissal and cost savings purpose of the statute and caused the Raricks to suffer substantial prejudice.

Second, the Raricks substantially complied with section 147.140. When he signed his certified report and certificate of merit, Gerlinger reasonably believed he was under oath and subject to criminal penalties if his testimony was false. This, alone, satisfies the substantial compliance doctrine because it achieves the objectives of the oath requirement by binding the expert's conscience. In addition, Gerlinger subjected himself to prosecution for fraudulent practices because his certified expert report and certificate of merit constitute a "certificate [ ] required by law" under Iowa Code section 714.8(3) and the circumstances surrounding the execution of the certified expert report and certificate of merit establish both documents constitute "affidavits" under section 622.85 and unsworn certifications under penalty of perjury under section 622.1.

Third, DMOS's proposed application of the certificate of merit statute is unconstitutional.

I. DMOS Waived the Unsworn Certificate-Of-Merit Issue.

Shortly after the district court granted DMOS's motion to dismiss, a majority of the Iowa Supreme Court recognized waiver by litigation conduct for certificate-of-merit challenges under Iowa Code section 147.140. *See S.K. ex rel. Tarbox v. Obstetric & Gynecologic Assocs.*, 2024 WL 4714425, at ** 18–22 (Iowa Nov. 8, 2024) (Waterman, J., concurring opinion for the majority).[2] Specifically, the majority held a party waives an unsworn certificate-of-merit challenge when the party, in lieu of filing a motion to dismiss under section 147.140, participates in litigation activity or conduct inconsistent with the right of dismissal under section 147.140 that prejudices the nonmoving party. *Id.* This framework—which is derived from the Court's precedent governing waiver of mandatory arbitration under Iowa Code section 679A.2—is the same framework the Raricks proposed in the district court. D0038 at 66–69; *see also* D0057 at 11–12. Without the benefit of *S.K.*, the district court incorrectly rejected waiver by litigation conduct for challenges under section 147.140. D0053 at 18–19.

[2] All references in this brief to *S.K.* refer to Justice Waterman's concurring opinion for the majority of the Court.

In view of *S.K.*, this appeal may efficiently be resolved on the waiver issue alone. DMOS engaged in substantial litigation conduct inconsistent with the absolute statutory right of dismissal. DMOS waited until after discovery to file a challenge under section 147.140 at the Court's (second) summary judgment deadline. DMOS's conduct prejudiced the Raricks because their statute of limitations expired during the delay and they incurred substantial litigation expenses.

A. Standard of Review.

Whether DMOS 'waived its statutory right by its inconsistent litigation conduct can be a question of law 'for the court to decide.' " *S.K.*, 2024 WL 4714425, at *21 (quoting *Mod. Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 620 (Iowa 1998)).

B. Preservation of Error.

The Raricks argued DMOS's inconsistent litigation conduct waived the statutory right of dismissal under section 147.140, which the district court denied. D0038 at 66–69; D0057 at 11–12; D0053 at 18–19; Error is preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

C. Discussion.

" 'Defer no time, delays have dangerous ends.' Delays in a legal action indeed have perilous consequences"[3]

Under *S.K.*, the test for waiver of a certificate-of-merit challenge requires "conduct or activity inconsistent with the right to arbitration *and* prejudice to the party claiming waiver." 2024 WL 4714425, at *18–21; *Mod. Piping*, 581 N.W.2d at 250. In addition, " 'when defendants have so engaged the judicial process that a certificate of merit ceases to serve its intended function, the requirement of its filing is waived.' " *S.K.*, 2024 WL 4714425, at *18–21 (quoting *LaLonde v. Gosnell*, 593 S.W.3d 212, 229 (Tex. 2019)); *Mod. Piping*, 581 N.W.2d at 621–22 ("Conduct which allows an action to proceed to a point where the purpose of arbitration—to obtain a speedy, inexpensive and final resolution of disputes—is frustrated is conduct that estops a party from claiming a right to a stay of the proceedings and referral for contractual arbitration."). In this case, DMOS's prolonged and extensive inconsistent litigation conduct waived any statutory right of dismissal under section 147.140.

1. After the sixty-day deadline, any discovery or other litigation conduct unrelated to the certificate of merit is

[3] *Brendeland v. Iowa Dep't of Transp.*, 2024 WL 4862386, at *1 (Iowa Nov. 22, 2024) (quoting William Shakespeare, *Henry VI* act 3, sc. 2, l. 33).

inconsistent with a defendant's right of dismissal under section 147.140.

A certificate of merit is a screening tool. It is designed to end frivolous medical malpractice cases early, *before* discovery. Not after. Section 1471.140 states the certificate of merit requirement must be satisifed "prior to the *commencement* of discovery," not at the *conclusion* of discovery. Iowa Code § 147.140(1) (emphasis added). DMOS's assertion to the contrary invites the Court to revise by judicial interpretation the unambiguous text and plain meaning of the statute. As this Court has held, the statute "is meant to end cases *early* (sixty days after the answer), when expert testimony is required," and "serves to identify and weed out non-meritorious malpractice claims from the judicial system efficiently and promptly." *Struck v. Mercy Health Services-Iowa Corp.*, 973 N.W.2d 533, 542 (Iowa 2022) (emphasis in original); *Est. of Fahrmann v. ABCM Corp.*, 999 N.W.2d 283, 287–88 (Iowa 2023); *see Est. of Butterfield v. Chautauqua Guest Home, Inc.*, 987 N.W.2d 834, 840 (Iowa 2023) (similar). It is the purpose of *summary judgment* (not section 147.140) to

obtain *post*-discovery dismissal for non-meritorious cases.[4] *See* Iowa R. Civ. P. 1.981.

In addition to its text, the legislative history of section 147.140 confirms the legislature intended the certificate-of-merit requirement as a *pre*-discovery screening tool, not a *post*-discovery trap door to doom meritorious cases after the parties thoroughly reviewed and investigated the merits through fact and expert discovery. *See Butterfield*, 987 N.W.2d at 840 ("Legislative history that shows a bill's changes over the course of its enactment can be especially revealing."). "There were three drafts of bills that contained the certificate of merit requirement: two study bills and a house file bill." *Id.* The text of each of the three bills required the plaintiff to serve the certificate of merit "within ninety days of the defendant's answer," and they *did not* state the certificate-of-merit process was to be completed before the commencement of discovery. S.S.B. 1087, 87th G.A., 2d sess., § 5(1)(*a*) (Iowa 2017); H.S.B. 105, 87th G.A., 2d sess., § 5(1)(*a*) (Iowa 2017); H.F. 487, 87th G.A. sess., § 3(1)(*a*) (Iowa 2017). Indeed, the

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[4] DMOS did not move for summary judgment and has never claimed the Raricks case is meritless. This is confirmed by the fact that DMOS did not intend to call a retained standard of care expert to testify at trial. D0050 at 1.

bills contemplated limited discovery by allowing answers to interrogatories to be used in lieu of a certificate of merit. *Id.*

The enacted language, however, added text stating that the certificate-of-merit requirement must be satisfied "*prior to the commencement of discovery*." 2017 Acts ch. 107, § 4 (codified at Iowa Code § 147.140 (2018) (emphasis added)). It also reduced the deadline from ninety days to sixty and eliminated the provision allowing answers to interrogatories to be used in lieu of a certificate of merit affidavit (at least for represented parties, as here). *Id.* These amendments made certain section 147.140 is a *pre*-discovery screening tool.[5] *See id.*; *Struck*, 973 N.W.2d at 542; *see also Fahrmann*, 999 N.W.2d at 287–88; *Butterfield*, 987 N.W.2d at 840.

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[5] The legislative debates emphasized the bill created a pre-discovery screening tool. The Senate floor manager of the bill, Senator Schneider, explained: "In an effort to try to weed out frivolous cases, plaintiffs' lawyers find an expert who can certify these things *before the discovery phase even begins*." *Senate Video S.F. 465*, at 3:45:15 P.M. (March 20, 2017) (emphasis added). He continued: "Regarding the certificate of merit, *the amendment clarifies* that the purpose of the certificate of merit is to serve as *a screening tool* and not to supplant the discovery process or prevent a thorough review of the facts of the case. It also shifts the timeline for filing the *screening*, certificate of merit, to align with the current procedural rules and practices, so as *to avoid with unnecessary delays in the discovery process*." *Id.* at 3:48:05–3:48:30 P.M. (emphasis added). The House floor manager of the bill, Representative Hinson, similarly explained the certificate-of-merit "process would all happen before discovery." *House Video H1222* at 5:15:30 P.M. (April 12, 2017).

After discovery, meritless cases are dismissed by summary judgment, which are final judgments on the merits triggering res judicata. *See* Iowa R. Civ. P. 1.981; *Peppmeier v. Murphy*, 708 N.W.2d 57, 66 (Iowa 2005).

Moreover, section 147.140 creates an absolute procedural right to dismissal *with* prejudice. *See* Iowa Code § 147.140(6). The district court lacks discretion, so discovery is not needed to garner evidence to convince the trial court to fashion an appropriate remedy (*e.g.*, dismissal *with* prejudice as opposed to *without* prejudice). *See LaLonde*, 593 S.W.3d at 224. And because the defendant need not show prejudice, *Fahrmann*, 999 N.W.2d at 289, on day sixty-one the defendant has an immediate, absolute procedural right to dismissal with prejudice. *See* Iowa Code § 147.140. So, when—as here—a plaintiff only brings claims of professional negligence, any litigation conduct unrelated to the certificate of merit occurring after the sixty-day deadline is, by definition, "inconsistent with the statutory right of dismissal." *See S.K.*, 2024 WL 4714425, at *18–21.

2. DMOS engaged in extensive litigation conduct inconsistent with the statutory right of dismissal.

> *"[E]very day a defendant has an absolute procedural right to dismissal yet does not exercise it is another small but cumulative indication of the defendant's intent to waive that*

right."[6]

As the district court observed, "[t]he parties agree that [the Raricks] were required to serve a certificate of merit affidavit in this case because they have brought claims based on professional negligence against a health care provider." D0053 at 3. In this case, DMOS asserts the certificate of merit is facially invalid because it lacks a notarial jurat showing it was signed under oath. D0032 at 4–14. This alleged defect was "open and obvious" and "existed from day one," *LaLonde*, 593 S.W.3d at 227, and DMOS does not deny that it would have had a pre-discovery, absolute statutory right to dismissal with prejudice on May 15, 2023. *See* Iowa Code § 147.140(6).

In lieu of filing a motion to dismiss under section 147.140, however, DMOS itself commenced discovery on the merits. D0038 App. 10–16. This occurred no later than May 17, 2024—*two days after* the certificate of merit deadline. *Id.* at 10. Just as "filing a claim in district court" is "in itself inconsistent with asserting a right to arbitration.," *Mod. Piping*, 581 N.W.2d at 621, litigation conduct that triggers the "commencement of discovery" in lieu of filing a motion to dismiss is "in itself inconsistent

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6 *LaLonde*, 593 S.W.3d at 224–25.

with asserting a right" to dismissal with prejudice under section 147.140. *See* Iowa Code § 147.140(1), (6); Iowa R. Civ. P. 1.503(6) (counsel's signature on discovery certifies that discovery is necessary "considering the needs of the case" and is not interposed to "needlessly increase the cost of litigation"); *Struck*, 973 N.W.2d at 542; *Fahrmann*, 999 N.W.2d at 287–88; *Butterfield*, 987 N.W.2d at 840; *Converse v. Warren*, 4 Iowa 158, 171–72 (1857); *see also Hinchman v. Gillette*, 618 S.E.2d 387, 395 (W. Va. 2005) (requiring the defendant to request a more definite statement to a certificate of merit to preserve objections); 5A Charles Alan Wright et al., *Federal Practice and Procedure* § 1339, West (database updated June 2024) ("The law is well settled that any objection to a failure to comply with a verification requirement must be raised immediately or not at all.").

After DMOS commenced discovery, DMOS thoroughly reviewed and investigated the merits of the case through the completion of discovery. D0038 App. 8–11, 15–16. As the district court observed, "discovery is complete and it is now on the eve of trial." D0053 at 14. Here is a brief discovery timeline:

Mar. 11, 2022	**Smidt cut Mr. Rarick's popliteal artery during knee surgery. D0038 App. 28.**
January 31, 2023 *(410 days to SOL)*	The Raricks filed their lawsuit. D001 at 3–6.
Mar. 14, 2023 ***(363 days to SOL)***	**DMOS filed its Answer. The Raricks served their certificate of merit. D008, Answer (3/13/23); D0038 App. 8.**
April 14, 2023	The parties conferred regarding discovery, and DMOS agreed to a joint Trial Scheduling and Discovery Plan. Iowa R. Civ. P. 1.505, 1.507. D0013, T.S.D.P. (4/14/23).
April 17, 2023	DMOS served its initial disclosures. D0014, Not. of Initial Disclosure. (4/17/23).
May 15, 2023 ***(301 days to SOL)***	**The Raricks' deadline to serve a legally sufficient certificate of merit expired. Iowa Code 147.140(1).**
May 17, 2023	DMOS commences discovery, propounding interrogatories and serving requests for production of documents. D0016, Notice of Serving Discovery Requests (5/17/23); D0038 App. 110.
June 1, 2023	The Raricks served initial disclosures, served requests for admission separately on Smidt and DMOS, served requests for production of documents, and propounded separate interrogatories to Smidt and DMOS. D0038 App. 10–11. The Raricks requested depositions. *Id.* at 122. In the email to opposing counsel, the Raricks' counsel stated, "To keep things moving along, if you have any concerns or objections about any of the discovery, feel free to give me a call to discuss." *Id.* at 112.

June 29, 2023	DMOS and Smidt served their responses to the Raricks' requests for admission. *Id.* at 10–11, 115.
June 30, 2023	DMOS served supplemental initial disclosures, including thousands of pages of additional medical records. *Id.* at 116.
Aug. 2, 2023	DMOS and Smidt each served their answers to the Raricks' interrogatories and DMOS responded to the Raricks' requests for production of documents. *Id.* at 118.
Aug. 5, 2023	DMOS requests Mr. Rarick's deposition. *Id.* at 127. The Raricks also served their answers to DMOS's interrogatories and responses to requests for production. D0022, Notice of Discovery Reponses (8/5/23); *Id.* at 121.
Aug. 8, 2023	DMOS again requests the depositions of Mr. and Mrs. Rarick. *Id.* at 120.
Sept. 5, 2023	DMOS stipulated to an extension of expert witness disclosure deadlines, D023, Stip. to Tr. Sched. Order, which the district court granted, D0024, Order Granting M. to Amend (9/6/23); *see* D0038 App. 126–27 (requesting extension so that fact depositions are done before the expert report deadline).
Sept. 8, 2023	DMOS filed notice of depositions for Mr. and Mrs. Rarick. D0025, Notice of Depositions (9/8/23).
Sept. 15, 2023	The Raricks filed their notice of deposition of Smidt. D0026, Notice of Depositions (9/15/23).
Sept. 20, 2023	Smidt and DMOS submitted to the deposition of Smidt. *Id.* DMOS also deposed Mr. and Mrs. Rarick. D0025 at 1.

Sept. 21, 2023	DMOS sends a deficiency letter seeking handwritten and typed notes made by the Raricks and "all photos and videos from [the Raricks'] mobile devices where 'information' or 'properties' for each photo/video can be discerned." D0038 App. 181.
Oct. 9, 2023	DMOS stipulated to a one-week extension of the deadline for the expert report of the Raricks' certificated physician life care planner. D0050, Res. to Plf. M.I.L. at 3 (8/14/24).
Oct. 11, 2023	The Raricks served their certification of expert witnesses. *See* Iowa Code § 668.11. D0027, Plf. Expert Cert. (10/11/23).[7] The Raricks served expert

[7] A defendant's delay in challenging a certificate of merit until after the plaintiff's expert certification and report deadline is powerful (if not dispositive) evidence of waiver. Iowa Code section 668.11 requires plaintiffs to "certify to the court expert's name, qualifications and the purpose for calling the expert within . . . within one hundred eighty days of the defendant's answer . . . ." Rule 1.500(2)(b) requires the plaintiff to provide a written report from each retained expert containing a complete statement of the expert's opinions and the facts and data supporting them. The Raricks' expert report deadline was the same as their expert certification deadline. D0013 at 3; D0023 at 1; D0024 at 1.

Unlike section 147.140, section 668.11 and Rule 1.500(2)(b) contemplate discovery to allow the plaintiff to develop the record sufficient to certify the plaintiff's experts and prepare written reports. So, when the action is not quickly dismissed under section 147.140 and proceeds into discovery and beyond the certification and report deadlines, the sufficiency of the plaintiff's prima facie case is determined by the plaintiff's expert certifications and reports. *See Hantsbarger v. Coffin*, 501 N.W.2d 501, 504 (Iowa 1993) (the purpose of section 668.11 is to ensure the plaintiff has "his or her proof prepared" 180 days after the answer is filed). Once the certification and report deadline pass, the purpose of section 147.140 is moot because section 147.140 is no longer needed to end the case. *Struck*, 973 N.W.2d at 542. Instead, if the certifications and reports

	reports of two retained experts, namely, Gerlinger and Dr. Tejas Shah. *Id.*; D0028, Notice of Discovery Response (10/18/23).
Oct. 18, 2023	The Raricks served an expert report from Dr. Stuart Kahn, a certified physician life care planner. D00028 at 1.
Nov. 20, 2023	In response to DMOS's September 21 deficiency letter, the Raricks supplement their requests for production. After incurring the cost of a cell phone extraction by a forensic expert in the amount of $4,150, they provide their forensic report from the extraction of Mr. and Mrs. Rarick's cell phones and Google photo accounts. D0038 App. 12, 184.
Feb. 7, 2024	DMOS requests depositions of Gerlinger and Shah. *Id.* at 191.
Mar. 11, 2024	**The Raricks' two-year statute of limitations expires. Iowa Code § 614.1(9).**

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fail to establish a prima facie case, summary judgment terminates the case. *See Donovan v. State*, 445 N.W.2d 763, 767 (Iowa 1989).

In any case, where, as here, a medical malpractice plaintiff has served a certificate of merit in good faith within sixty days of the answer and the case progresses, without objection, beyond the expert certification and report deadlines, the plaintiff "has been placed upon his proof in trial of the claim" and therefore the certificate of merit requirement "is not essential to accomplishing the principal purpose of the statute." *See In re Estate of Entler*, 398 N.W.2d 848, 850 (Iowa 1987) (holding mandatory affidavit requirement becomes directory once the case proceeds to the point where the plaintiff "has been placed upon his proof in the trial of the claim."); *Taylor v. Dep't of Transp.*, 260 N.W.2d 521, 522–23 (Iowa 1977). By definition, the requirement is directory (as opposed to mandatory) at that phase of the litigation, and therefore any alleged defect in the certificate of merit at that point will not affect the proceedings unless prejudice is shown. *Entler*, 398 N.W.2d at 850; *Save Our Stadiums v. Des Moines Indep. Community Sch. Dist.*, 982 N.W.2d 139, 149 (Iowa 2022).

Apr. 10, 2024	DMOS requests an additional 45 days to designate experts while the parties explore settlement. D0038 App. 206. The parties cancel the scheduled depositions of Gerlinger and Shah due to settlement discussions. *Id.* at 207.
Apr. 29, 2024	DMOS requests independent medical examination (IME) of Mr. Rarick. *Id.* at 224.
May 22, 2024	The parties participate in a full-day mediation, which "resulted in a substantial settlement offer." D0050 at 4.
May 24, 2024	DMOS again requested an IME of Mr. Rarick, noting "[w]e held off on IME and expert reports hoping to settle." *Id.* at 234.
May 28, 2024	DMOS serves its designation of expert witness. *Id.* at 229. In subsequent filings, DMOS admitted it did not intend to call a retained expert on the issue of the standard of care at trial to challenge Gerlinger's standard of care opinion. D0050 at 1.
June 7, 2024	DMOS withdraws its policy-limits offer of settlement and informs the Raricks it would be evaluating the certificate of merit for a potential challenge under section 147.140. D0038 App. at 14–15.
June 15, 2024	DMOS has Mr. Rarick undergo an in-person IME performed by its retained expert, Dr. Joseph Chen. *Id.* at 15–16.
June 17, 2024	**DMOS files a motion to dismiss pursuant to Iowa Code section 147.140. D0032.**
Sept. 23, 2024	Jury trial scheduled to begin. D0015, Order Setting Trial (5/4/23).

By completing discovery over the course of fifteen months, seeking a merits-based resolution in mediation, and waiting until the Court's

second summary judgment deadline to challenge the certificate of merit, DMOS undoubtedly engaged in substantial litigation conduct and activity inconsistent with its alleged statutory right of dismissal with prejudice.[8] *See S.K.*, 2024 WL 4714425, at **19–22; *Mod. Piping*, 581 N.W.2d at 619–20; *see also LaLonde*, 593 S.W.3d at 229 (defendant waived right of dismissal based on failure to provide certificate of merit because defendant waited "nearly two years after the [defendants] answered, and long after the limitations period had expired on plaintiffs' claims" and " had participated in discovery and participated in mediation, rather than

[8] Under Iowa law, a challenge to a certificate of merit is an affirmative defense. *See Henschel v. Hawkeye-Security Ins. Co.*, 178 N.W.2d 409, 420 (Iowa 1970) ("[A]n affirmative defense is defined as 'one resting on facts not necessary to support plaintiffs' case."); *Struck,* 973 N.W.2d at 539; s*ee also Bacsenko v. CFG Health Sys., LLC*, 2018 WL 513206, at *3 (D.N.J. 2018) ("[A] deficient affidavit of merit is an affirmative defense"); *Barbara v. U.S.*, 2020 WL 5658724, at *4 (E.D.N.Y. Sept. 23, 2020) (same); *Wood v. Bediako*, 727 N.W.2d 654, 656 (Mich. App. 2006); *Koukos v. Chester Cnty.*, 2017 WL 549150, at *3 (E.D. Pa. 2017); *Sykes v. United States*, 2014 WL 2532494, at *1 (N.D. W. Va. 2014); *Harbec v. N. Country Hosp. & Health Practices*, 2021 WL 6331842, at *3 (D. Vt. Nov. 17, 2021); *Humboldt Waste Mgt. Auth. v. GHD Inc.*, 2021 WL 2349361, at *3 (Cal. App. 2021); *but see Giudicy v. Mercy Hosps. Communities*, 645 S.W.3d 492, 500–01 (Mo. 2022); *Certain Underwriters v. Mayse & Associates, Inc.*, 635 S.W.3d 276, 285 (Tex. App. 2021). DMOS failed to plead a certificate-of-merit defense, Iowa R. Civ. P. 1.419, and by June 2024 it was too late for DMOS to amend or supplement its answer to add the defense, Iowa R. Civ. P. 1.402(4), 1.414.

invoking the right to dismissal under Texas law."); *In re Pawn Am. Consumer Data Breach Litig.*, 108 F.4th 610, 615 (8th Cir. 2024) (party "substantially invoke[d] the litigation process" when it waited three months to seek arbitration and "participated in an hour-long motion-to-dismiss hearing, stipulated to a discovery plan, and scheduled a mediation, which are hardly the actions of [litigants] trying to move promptly for arbitration"); *Se. Stud & Components v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 969 (8th Cir. 2009) (defendant waived arbitration by, among other things, participating in discovery and waiting thirteen months to assert its right to arbitrate); *Tjeerdsma v. Glob. Steel Bldgs., Inc.*, 466 N.W.2d 643, 645 (S.D. 1991) (cited with approval in *Modern Piping* and holding six-month delay waived right to arbitration because defendants "answered the complaint (and did not assert their right to arbitrate), a deposition was taken, interrogatories and answers were filed, requests for admissions and answers thereto were filed, and finally a certificate of readiness for trial was filed by Tjeerdsma."); *Joba Const. Co. v. Monroe Cnty. Drain Comm'r*, 388 N.W.2d 251, 254 (Mich. Ct. App. 1986) (cited with approval in *Modern Piping* and holding party waived right to arbitration by responding to and propounding interrogatories

because "[p]ursuing discovery is regarded as being inconsistent with demanding arbitration, since discovery is not generally available in arbitration").

3. The Raricks were prejudiced by DMOS's delay.

Under *S.K.*, courts consider prejudice to the nonmoving party in determining waiver by litigation conduct. 2024 WL 4714425, at *21. The prejudice suffered by the Raricks is as devastating as it is undisputed: During DMOS's delay, the Raricks' two-year statute of limitations expired on March 11, 2024—three months before DMOS filed its motion to dismiss. *See id.* ("Another form of prejudice to the nonmoving party is an intervening expiration of the statute of limitations.).

The Raricks' statute of limitations did not expire shortly after the Raricks served their certificate of merit. Rather, it expired a *full year* later. D0038 App. 15. This delay is unexplained, unexplainable, and inexcusable. *See LaLonde*, 593 S.W.3d at 229. This prejudiced the Raricks "because we have recognized the plaintiff's right to voluntarily dismiss without prejudice and refile within the statute of limitations to restart the clock for serving a properly sworn certificate of merit affidavit." *S.K.*, 2024 WL 4714425, at *21; *LaLonde*, 593 S.W.3d at 229 (delay allowing

the plaintiff's statute of limitations to expire before asserting a right that "significantly pre-existed the time bar" supports waiver); *Ferreira v. Rancocas Orthopedic Associates*, 836 A.2d 779, 780–81 (N.J. 2003) (affidavit-of-merit statute "was not intended to reward defendants who wait for a default before requesting that the plaintiff turn over the affidavit or merit."); *cf. Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir.1990); ("[a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect."); *Lybbert v. Grant Cnty., State of Wash.*, 1 P.3d 1124, 1132 (Wash. 2000) ("*French* does not remotely stand for the proposition that it is acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action.").

Meanwhile, the Raricks incurred substantial expert and litigation costs for fact and expert discovery and mediation—all of which was unnecessary. *See S.K.*, 2024 WL 4714425, at *21 (unnecessary added litigation costs constitute prejudice under section 147.140).

4. Conclusion.

This is a simple medical malpractice case. Mr. Rarick lost his leg because Smidt inadvertently cut an important artery during routine knee surgery. DMOS doesn't deny the Raricks' case is meritorious. A certificate of merit is meant to be a pre-discovery screening tool to quickly dismiss meritless medical malpractice cases before discovery begins. DMOS's conduct frustrated the purpose of section 147.140, was inconsistent with the absolute statutory right of dismissal, and prejudiced the Raricks. DMOS waived its unsworn certificate-of-merit challenge.

D. Consent, Estoppel, and Laches Prevent DMOS from Asserting a Certificate-of-Merit Challenge.

DMOS is also prevented from challenging the certificate of merit under the doctrines of consent, estoppel, and laches. *See S.K.*, 2024 WL 4714425, at *18 (section 147.140 "is neither jurisdictional nor self-executing."); *State v. Yodprasit*, 564 N.W.2d 383, 385 (Iowa 1997) (non-jurisdictional impediments "can be obviated by consent . . . or estoppel"). In addition to the facts set forth above in the discussion of waiver, it was the custom in the industry for medical malpractice defendants to accept certificates of merit lacking a notarial jurat. D0038 App. 4–6, 8, 46–74, 75–81. DMOS's actions, consistent with industry custom, led the Raricks to

reasonably believe it consented to their certificate of merit, which caused the Raricks' statute of limitations to lapse. Restatement (Second) of Torts § 892 (1979) ("Consent is willingness in fact for conduct to occur," and "[i]f words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.").

Further, Iowa law recognizes estoppel by acquiescence and equitable estoppel. *In re Thompson Trust*, 801 N.W.2d 23, 26–27 (Iowa 2011); *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005). A case with nearly identical facts as those presented here is *Knorr v. Smeal*, 836 A.2d 794 (N.J. 2003). In *Knorr*, the defendant waited fourteen months to file a motion to dismiss the plaintiffs' medical malpractice case due to the plaintiffs' failure to comply with New Jersey's certificate of merit statute. The New Jersey Supreme Court held equitable estoppel applied, explaining:

> As a result of defendant's forbearance in filing the dismissal motion, plaintiffs incurred significant expert and deposition costs, as well as emotional stress under the mistaken belief that their cause of action was still viable. It makes no difference that defendant did not intend to mislead or cause plaintiffs to continue with discovery. Moreover, if defendant's motion were to be granted, then the attorneys labored needlessly and the judicial system expended its resources on a case that should not have been on the calendar had defendant acted timely. As noted, equitable estoppel is founded on

> fundamental principles of justice and fair dealing. The grant of defendant's motion to dismiss would work an injustice by ridding the system not of an unmeritorious claim, but a meritorious one. Accordingly, because of defendant's belated filing of the motion, and plaintiffs' reliance on his failure to do so timely, defendant is equitably estopped from gaining a dismissal.

Knorr, 836 A.2d at 799–800. The facts in *Knorr* are nearly identical to those presented here. As in *Knorr*, equitable estoppel forecloses DMOS's reliance on section 147.140.[9]

Further, laches precludes DMOS's certificate-of-merit challenge. *See Knorr*, 836 A.2d at 800; *see also Markey*, 705 N.W.2d at 22 (defining laches). DMOS, like the defendant in *Knorr*, "slept on [its] rights" and unreasonably delayed in asserting section 147.140. *See Knorr*, 836 A.2d at 181–82. This delay prejudiced the Raricks because their statute of limitations expired and they needlessly incurred litigation costs.

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[9] A month before the Raricks' statute of limitations expired, *Jorgensen v. Smith*, 2 N.W.2d 868 (Iowa 2024) observed an expert's certificate stating the expert "affirms and states" his testimony was an "affidavit" that "was signed under oath" D00038 App. 86. This finding distinguished *Struck*. *Id.* at 878. *Miller* and *Shontz* were filed three months later. This, along with the fact that the medico-legal industry accepted the Iowa Practice Series certificate-of-merit form used in this case for many years before *Miller* and *Shontz*, shows that *Miller* and *Shontz* should apply prospectively to certificates served after those decisions. *See Hedlund v. State*, 991 N.W.2d 752, 757 (Iowa 2023); *Baldwin v. City of Estherville*, 929 N.W.2d 691, 700–01 (Iowa 2019).

II. The Raricks Substantially Complied with Iowa Code Section 147.140.

A. Standard of Review.

The Court reviews "rulings on motions to dismiss under Iowa Code section 147.140(6) and the district court's statutory construction for correction of errors at law." *Miller v. Catholic Health Initiatives-Iowa, Corp.*, 7 N.W.3d 367, 372 (Iowa 2024) (cleaned up).

B. Preservation of Error.

Error is preserved because the Raricks argued their certificate of merit affidavit substantially complied with Iowa Code section 147.140 because it subjected Gerlinger to criminal punishment under Iowa Code section 714.8(3) (fraudulent practices) and section 720.2 (perjury). D0038, at 35–53 & n.25; D0067, Tr. Hearing M.T.D. 24:5–25:12 (8/9/24). The district court rejected these arguments. D0053 at 4–10; D0060 at 1; *see also* D0058, Res. to Plf. 1.904 Motion at 8 (9/30/2024) (conceding error is preserved error on these issues).

C. Overview of the Substantial Compliance Doctrine.

Section 147.140, permits dismissal if the plaintiff fails to satisfy the doctrine of "substantial compliance." *See* Iowa Code § 147.140(6). The substantial compliance doctrine is satisfied when the party's " 'actions

fall short of strict compliance, but nonetheless *accomplish the important objective[s]' expressed by the particular part of [the statute] in issue*." *Dix v. Casey's Gen. Stores, Inc.*, 961 N.W.2d 671, 682 (Iowa 2021) (quoting *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) (emphasis added)). By incorporating the substantial compliance doctrine into section 147.140, the legislature intended to "mitigate[] the consequences of textual rigidity in order to avoid harsh, unfair, or absurd consequences." *See* 3 Sutherland Statutory Construction § 57:26 (8th ed.); *see also Dix.*, 961 N.W.2d at 682.

D. The Certificate of Merit Substantially Complies with Section 147.140 Because it is a "Certificate [ ] Required by Law" Subjecting Gerlinger to Criminal Liability for Fraudulent Practices Under Iowa Code Section 714.8(3).

Iowa Code section 714.8(3) states:

> A person who does any of the following acts is guilty of a fraudulent practice:
>
> . . . .
>
> 3. Knowingly executes or tenders *a false certification under penalty of perjury, false affidavit, or false certificate*, if the certification, affidavit, or certificate is required by law . . . .

Iowa Code § 714.8(3) (emphasis added). Section 714.8(3) places three categories of legally required documents on equal footing, namely, (1) false affidavits, (2) false certifications under penalty of perjury, and (3) false

certificates. *Id.* In *Miller*, this Court indicated that the first two categories (affidavits and unsworn certifications) substantially comply with section 147.140. 7 N.W.3d at 375. This is because, in either case, the "oath" requirement's objective to "secure the truth," *State v. Walker*, 574 N.W.2d 280, 285 (Iowa 1998), is satisfied when a person's conscience is bound by the prospect of criminal liability if the statements are false, *Miller*, 7 N.W.3d at 376; *see Walker*, 574 N.W.2d at 285. Relevant here, Iowa law "secure[s] the truth" of affidavits and unsworn certifications by subjecting the person to possible prosecution for fraudulent practices.[10]

Under section 147.140, a "certificate of merit" is a "certificate that is "required by law" under section 714.8(3). The legislature's use of the term "certificate" in Iowa Code section 147.140 is significant because under section 714.8(3) the term "certificate" has a specific, substantive

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[10] A person may also be subject to a prosecution for perjury by executing a false affidavit. *See* Iowa Code § 720.2. Unlike perjury, there is no "retraction" defense for fraudulent practices, and fraudulent practices occurs once the document is executed or tendered, regardless of whether it occurs "in a proceeding or other matter." Iowa Code § 714.8(3); *see Dunn v. United States*, 442 U.S. 100, 113 (1979) (sworn statement taken in an attorney's office was not ancillary to a court proceeding to support a perjury conviction under federal law); *People v. Hart*, 90 A.D.2d 856, 857 (N.Y. App. Div. 1982) (evidence insufficient to support a perjury conviction when the sworn statement was made during the early investigation phase and before formal criminal proceedings were filed).

meaning under longstanding Iowa law. *See* Iowa Code § 714.8(3); *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) (courts consider provisions of related statutes in determining the fair and ordinary meaning of the statutory language at issue); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012) ("If a word is obviously transplanted from another legal source, whether the common law or legislation, it brings the old soil with it." (citation and internal quotation marks omitted)). Importantly, executing a false "certificate" carries the same weighty criminal penalties that bind a person's conscience as false affidavits and false unsworn certifications under section 622.1.[11] *See* Iowa Code § 714.8(3).

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[11] Section 714.8 was adopted as a part of the 1976 comprehensive criminal code revision. 1976 (66 G.A.) ch. 1245 (ch. 1), § 1408, eff. Jan. 1, 1978. Notably, unlike other jurisdictions, when the Iowa legislature enacted section 622.1 in 1984, it did *not* amend Iowa's perjury statute to encompass false certifications under penalty of perjury. *See, e.g.*, 18 U.S.C. § 1621 (defining perjury to include a false unsworn statement under penalty of perjury under 28 U.S.C. section 1746); *see also* Uniform Law Commission, Uniform Unsworn Declaration Act, Legislative Note to § 2 ("An enacting state will need to ensure that its perjury law covers an unsworn declaration."). Instead, the legislature amended subsection 714.8(3) to include a "false certification under penalty of perjury" to the definition of a "fraudulent practice." 1984 Acts, ch. 1048, § 2 (entitled, "AN ACT relating to the certification of documents and providing *a penalty*."; S.F. 2137, Explanation, 70th G.A. sess., (Iowa 1984) ("The bill also

In DMOS's telling, the legislature's use of the term "certificate" is accidental. But that's wrong. Section 147.140 uses the term "certificate" *six* times. Iowa Code § 147.140; *Miller*, 7 N.W.3d at 373, 375 (noting section 147.140 uses the term "affidavit" six times); *see also* CERTIFICATE OF MERIT, Black's law Dictionary (12th ed. 2024) (defining "certificate of merit" as a "certificate"); *see State v. Gentile*, 515 N.W.2d 16, 19–20 (Iowa 1994). In doing so, the statute expressly contemplates the use of a "certificate," just as the statute also contemplates the use of affidavits and unsworn certifications under section 714.8(3). *See Gentile*, 515 N.W.2d at 19–20; *State v. Horton*, 509 N.W.2d 452, 454 (Iowa 1993). To hold otherwise would be to revise the statute by striking the word "certificate" six times.[12] *See* Scalia & Garner, *Reading Law* at 174 ("The surplusage

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amends a definition of fraudulent practice to extend its application to false certifications under penalty of perjury.").

[12] If the legislature intended to require an affidavit in all cases, it could have said so by describing the requirement as an "affidavit of merit" or use substantively similar language, as many other jurisdictions have done. *See, e.g.*, Del. Code tit. 18 § 6853 ("affidavit of merit"); Fla. Stat. § 766.203; Ga. Code § 9-11-9.1; Ill. Rev. Stat. ch. 735 § 5/2-622; Mich. Comp. Laws § 600.2912d ("affidavit of merit"); Minn. Stat. § 145.682; Mo. Rev. Stat. § 538.225; Nev. Rev. Stat. § 41A.071; N.J. Rev. Stat. § 2A:53A-27; N.D. Cent. Code § 28-01-46; Ohio Rev. Code § 2323.451; S.C. Code § 15-36-100; Tex. Civ. Prac. & Rem. § 150.002; *see also* Ariz. Rev. Stat. § 12-2603. In fact, other jurisdictions often use the terms "certify" and "certificate" in this context when the person signing the certificate is not

cannon holds that it is no more the court's function to revise by subtraction than by addition.").

Further, the text of section 147.140 makes plain the "certificate" is "required by law." Section 147.140 states a plaintiff "shall serve" a certificate for each "cause of action for which expert testimony is necessary to establish a prima facie case." Iowa Code § 147.140(1), (6). Where, as here, expert testimony is needed for the standard of care, a certificate of merit under section 147.140 is a "certificate [ ] required by law" for purposes of section 714.8(3).

This Court in *Miller* noted that a holding that an expert's unsworn letter substantially complies with section 147.140's affidavit requirement would undermine the ability of district courts "to enforce other statutes, such as Iowa Code section 598.13, requiring parties in marital dissolution cases to file financial affidavits. *Miller*, 7 N.W.3d 375. This concern, however, is inapplicable where an expert serves a "certificate" under section 714.8(3) in compliance with section 147.140. Unlike section 147.140, the

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required to be under oath. *See, e.g.*, Colo. Rev. Stat. § 13-20-602; Conn. Gen. Stat. § 52-190a; Haw. Rev. Stat. § 671-12.5; Md. Courts & Judicial Proceedings Code § 3-2A-04; Miss. Code § 11-1-58; N.Y. CPLR § 3012-a; Pa. R. Civ. P. 1042.3; Tenn. Code § 29-26-122; Vt. Stat. tit. 12, § 1042; Va. Code § 8.01-20.1.

text of section 598.13 does not describe the requirement as a "certificate" and does not expressly embrace the substantial compliance doctrine. *See* Iowa Code § 598.13.

The textual rigidity of section 598.13 and similar statutes to exclude a "certificate" is not altogether surprising. The failure to provide a valid affidavit under section 598.13 does not require the district court to impose any sanction at all. *See In re Marriage of Butterfield*, 500 N.W.2d 95 (Iowa Ct. App. 1993). In contrast, a plaintiff's failure to file a certificate of merit requires *dismissal with prejudice*, the most severe remedy available. *See* Iowa Code § 147.140(6); *Est. of Butterfield*, 987 N.W.2d at 838 ("noncompliance carries a 'harsh' consequence"). Given the harsh consequence of dismissal with prejudice, the legislature incorporated the "substantial compliance" doctrine and transplanted the term "certificate" from section 714.8(3) to ensure a certificate of merit that fails to strictly adhere to the technical formalities of an "affidavit" is not fatal to a plaintiff's case.[13] *See, e.g.*, 70 C.J.S. Perjury § 36 ("The offense of false swearing

[13] This interpretation of section 147.140 is supported by the presumption in Iowa that "[a] just and reasonable result is intended," "[t]he entire statute is intended to be effective," and "[p]ublic interest is favored over any private interest." Iowa Code § 4.4 (2)–(3), (5); *see* Iowa Code § 4.6.

may be defined to include signing documents that purport to be an acknowledgment of a lawful oath, regardless of whether an oath has actually been administered by an official."); *see also Martin v. State*, 896 S.W.2d 336, 338–39 (Tex. Ct. App. 1995) (amendment to perjury statute combining perjury and false swearing to "liberated the term [declaration or affidavit] from the restrictive formalities accompanying an 'affidavit' " and "expanded the category of utterances potentially criminal.").

At least one other statute in Iowa invokes the term "affidavit" while also allowing compliance with something other than a formal notarized document. *See, e.g.*, Iowa Code § 53.44 (stating "The affidavit . . . need not be notarized or witnessed)." The term "oath" has also been used to describe an unnotarized, unwitnessed, and self-administered statement in which the person states "I hereby affirm," Iowa Admin. Code r. 721-43.5(1) (stating an unnotarized and self-administrated affirmation in a notary application stating, in relevant part "I hereby affirm" constitutes "an executed oath"). Iowa's absentee ballot request form from the recent November election further illustrates the point, defining the "**REQUESTOR AFFIDAVIT,**" as an unnotarized and self-administered statement that "I swear or affirm that I am the person named above . . . ." State of Iowa Official Absentee Ballot Request Form, *available at https://sos.iowa.gov/elections/pdf/absenteeballotapp.pdf* (last accessed December 5, 2024). In addition, when the legislature intends to require an affidavit to be formally notarized, it says usually so by stating the document must be a "notarized affidavit" or using similar language. *See, e.g.*, Iowa Code §§ 2.32, § 43.14, § 43.18, § 44.3; § 45.3, § 45.5, § 97B.51, § 99B.1, § 207.23, § 144.23, §232C.1, § 232.158A, § 252A.4A, §252B.9, § 252B.20, § 252B.20A, § 97B.44, § 321.23A, § 321.50, 321I.34, 321G.32, § 453A.39, § 462A.84, § 538A.5, § 552.16, § 554.7601A, § 554.951A, § 624.37, § 633.535, § 714.18, § 714F.9, § 714G.1.

By doing so, the legislature expressly advanced the "longstanding policy in our state favoring resolution of legal disputes on the merits." *No Boundary, LLC v. Hoosman*, 953 N.W.2d 696, 699 (Iowa 2021) ("[T]here is a longstanding policy in our state favoring the resolution of legal disputes on the merits.") *see* Iowa Code § 619.16 ("The court, in every stage of an action, must disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party").

Miller confirms a certificate under section 714.8(3) substantially complies with section 147.140. In *Miller*, the court observed the "oath" requirement "can help weed out weak cases early when experts are deterred by the risk of criminal penalties for perjury and decline to sign the requisite certificate under oath." 7 N.W.3d at 376. Similarly, where, as here, the expert subjects himself to fraudulent practices in violation of section 714.8(3) by signing a "certificate [ ] required by law" pursuant to section 147.140, the expert is deterred from making false statements due to the same robust criminal penalties as if the expert had signed an affidavit or unsworn certification. *See* Iowa Code 714.8(3). This is particularly true where, as here, the expert believes he is under oath and subject

to criminal penalties when he signs his certificate of merit and his report. *See Dix*, 961 N.W.2d at 682.

In this case, unlike the expert's unsworn letter in *Miller*, Gerlinger's certificate of merit is—at a *minimum*—a certificate under section 714.8(3). Gerlinger used the formal certificate-of-merit form recommended by the Iowa Practice Series.[14] D0038 App. 4, 82; Certificate of Merit Affidavit, 10 Ia. Prac., Civil Practice Forms § 78:12. The certificate states it is a "Certificate of Merit Affidavit by Dr. Tad L. Gerlinger Pursuant to Iowa Code Section 147.140." D0038 App. 25. The certificate states Gerlinger is making his statements "on oath" and that he "deposes" his statements. *See* CERTIFICATE, Black's Law Dictionary (defining "certificate" as "A document in which a fact is formally attested."); Webster's Third New International Dictionary 367 (unabr. ed.2002). (defining "certificate" as "a document containing a certified and usu[ally] official statement: a signed, written, or printed testimony to the truth of

[14] The Iowa Practices Series, including the civil practice formbook, is the leading treatise on Iowa law and is frequently cited with approval by Iowa appellate courts. *See, e.g.*, *Borst Brothers Constr., Inc. v. Fin. of Am. Com., LLC*, 975 N.W.2d 690, 705 (Iowa 2022); *Iowa S. Ct. Atty. Disc. Bd. v. Atty. Doe*, 878 N.W.2d 189, 200 (Iowa 2016).

something."); ATTEST, Black's Law Dictionary (defining "attest" as "to bear witness, testify," and "to affirm to be true or genuine").

Gerlinger's certificate incorporates by reference his certified report, which concludes by formally certifying its contents, stating: "I hereby *certify* that this report conveys an accurate statement of my opinions to which I will testify under oath."[15] D0038 App. 26, 29. This Court has held that a signed document containing the formal phrase, "I certify," is a certificate for purposes of section 714.8(3). *See Horton*, 509 N.W.2d at 454 ("I certify" language on an unsworn, unnotarized application for a commercial mussel license certifying the application's residence was a

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[15] The expert's letter in *Miller* did not contain language formally certifying the contents, did not use the Iowa Civil Practice Series form, did not state the expert signed the documents "on oath," and did not state the expert "deposes" her statements. The expert did not testify she knew she was under oath or was subjecting herself to criminal penalties by signing the letter. The plaintiff did not argue—and therefore the Court did not decide—whether the expert's letter substantially complied with section 147.140 because it was a "certificate [ ] required by law" that subjected the expert to a prosecution for fraudulent practices under section 714.8(3). Similarly, in *Shontz v. Mercy Medical Center-Clinton, Inc.*, the plaintiff did not argue—and thus the Court did not decide—whether the plaintiffs' certificate of merit constituted a "certificate [ ] required by law" under section 714.8(3) that substantially complied with section 147.140. No. 23-0719, 2024 WL 2868931 (Iowa June 7, 2024). In fact, the plaintiff in *Shontz* did not assert the document substantially complied with Iowa Code section 622.1 and did not present any evidence aliunde.

certificate required by law under section 714.8(3)); *State v. Morse*, 52 Iowa 509, 509, 3 N.W.498, 499 (1878) (holding the phrase, "This is to certify . . ." constitutes a "certificate" supporting conviction for executing a false certificate under Iowa law); *see also Walker*, 574 N.W.2d at 287 (holding, under Iowa law, "certify" means to "testify to a thing in writing" and to "authenticate or vouch for a thing in writing, To attest as being true or as represented.").

Under these circumstances, at a *minimum*, Gerlinger's certificate of merit, which incorporated a certified expert report, is a certificate under section 714.8(3), which subjected him to prosecution for fraudulent practices. *See Gentile*, 515 N.W.2d at 19–20 (holding a notary's acknowledgement is a "certificate" " under Iowa Code section 714.8(3); *Horton*, 509 N.W.2d at 454; *Walker*, 574 N.W.2d at 287; *Morse*, 52 Iowa at 509, 3 N.W.at 499; *see also State v. Toben*, 2009 WL 3337669, at **4–5 (Iowa Ct. App. Oct. 7, 2009) (holding unnotarized and unsworn claim forms are "certificates" under section 714.8(3)). Because Gerlinger's certificate bound his conscience both subjectively and objectively by subjecting him to the same potential criminal penalties as affidavits and certifications under penalty of perjury, Gerlinger's certificate of merit substantially

complies with section 147.140. *See Miller*, 7 N.W.3d at 376; *Dix*, 961 N.W.2d at 682.

E. The Circumstances Surrounding Gerlinger's Certificate And Report Demonstrate Substantial Compliance With The Requirements of an Affidavit.

Under Iowa law, a valid oath does not require the person authorized to administer the oath actually recite a formal oath to the affiant. *Walker*, 574 N.W.2d at 285. It is not a magic-words test. Instead, Iowa courts evaluate the totality of the circumstances surrounding the execution of the affidavit to determine if the evidence aliunde shows the person's conscience was bound to his or her statement. *See id.*; *see Miller*, 7 N.W.3d at 377 (citing with approval *Mountain View Hosp., Inc. v. Eight Jud. Dist. Ct.*, 273 P.3d 861, 866 (Nev. 2012), which held in a certificate-of-merit case that extrinsic evidence may be considered in determining whether "the expert's statements were made under oath or constitute an unsworn declaration made under penalty of perjury); *State v. Phippen*, 244 N.W.2d 574, 576 (Iowa 1976); *Dalbey Bros. Lumber Co. v. Crispin*, 234 Iowa 151, 157, 12 N.W.2d 277 (1943). If so, the "oath" requirement is met.

1. An expert's objectively reasonable subjective belief that he is under oath and subject to criminal penalties meets

the substantial compliance requirement of section 147.140.

Unlike the expert in *Miller*, Gerlinger testified he knew he was signing under oath and was subject to criminal penalties when he signed his certified report and certificate of merit affidavit. D0038 App. 18–22. In the district court proceedings, DMOS stated it "do[es] not question Gerlinger's veracity." D0032 at 13. The district court nevertheless held courts are *not* to look "to the subjective belief of the expert who signed the certificate." D0053 at 5. In *Walker*, however, this Court discussed in detail the defendant's prior experience with signing similar documents and noted that the notary testified "that she had notarized nearly one hundred documents for [the defendant] and *in the past she had informed [the defendant] of the legal significance of having a document notarized.*" 574 N.W.2d at 287 (emphasis added).

More importantly, the subjective belief of the expert is especially significant under section 147.140 because "substantial compliance" is the central issue. The "reasonable objective" of the oath requirement for purposes of substantial compliance is to ensure the expert's conscience is bound. *See Miller*, 7 N.W.3d at 374; *Walker*, 574 N.W.2d at 286. When Gerlinger testified that he firmly believed and understood he was under

oath, subject to the penalty of perjury, and that his conscience was bound to the accuracy of his statements, the "reasonable objective" of the oath requirement in the statute—namely, to bind the expert's conscience—was satisfied. The substantial compliance doctrine requires no more, especially where, the expert's subjective belief is objectively reasonable. *See Miller*, 7 N.W.2d at 374; *Walker*, 574 N.W.2d at 286; *United States v. Brooks*, 285 F.3d 1102, 1105 (8th Cir. 2002) (noting the individual's "evident *state of mind* when he signed the affidavit and application for a warrant *ensured that the purpose of the fourth amendment's 'Oath or affirmation' requirement was fulfilled.*" (emphasis added)).

2. Gerlinger's belief that he was under oath is objectively reasonable and, in any case, the totality of evidence aliunde shows he was in fact under oath under Iowa law when he signed his certificate of merit and report.

Gerlinger's testimony that he was under oath is confirmed by totality of the circumstances of this case. This evidence aliunde includes the following:

- Gerlinger presented his certificate of merit affidavit and his certified expert report to a notarial officer of the State of Iowa who was also an officer of the court. D0038 App. 2; *see Walker*, 574 N.W.2d at 284–288. This fact, alone, has been held

sufficient to establish a valid oath under Iowa law.[16] *See Swanson v. Pontralo*, 238 Iowa 693, 696, 27 N.W.2d 21, 23 (1947) (oath requirement satisfied where affiant presents document to notary for an acknowledgment); *Dalbey Bros.*, 234 Iowa at 155–58, 12 N.W.2d at 280 (same); *see also* Iowa Secretary of State Notarial Acts FAQs, ("An acknowledgement does not need to be signed in your presence.", *available at https://sos.iowa.gov/notaries/pdf/notfaq.pdf* (last accessed Sept. 19, 2024).[17]

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[16] In *Miller*, the Court cited the New Jersey intermediate appellate court's decision in *Tunia v. St. Francis Hospital*, 832 A.2d 936 (N.J. Super. App. Div. 2003), which held presenting a document to a notary for an "acknowledgment" was insufficient to satisfy the "oath" requirement of an affidavit observing, under New Jersey law, "the failure to place a declarant under oath' is not 'a mere 'technical' deficiency,' rather 'it goes to the very nature of what an affidavit is." However, the holding in *Tunia* Court's is irreconcilable with established Iowa law. *See Swanson v. Pontralo*, 238 Iowa 693, 696, 27 N.W.2d 21, 23 (1947) (holding an affidavit is sufficient where a notary signs an acknowledgement); *Dalbey Bros.*, 234 Iowa at 155, 12 N.W.2d at 279 (same); *Walker*, 574 N.W.2d at 285; *Phippen*, 244 N.W.2d at 576.

[17] Iowa law permits notarial acts to be done remotely. Iowa Code §§ 9B.6(2), 9B.14A. In this case, although the notarial officer communicated via email, the officer had previously retained Gerlinger as an expert witness and personally interacted with Gerlinger before, proximately to, and after Gerlinger signed his certified report and certificate of merit. D0038 at 39–40 & n.20 (7/19/24).Accordingly, the notarial officer was able to "assess the competency of the individual" and determine "the individual's

- Gerlinger's certificate of merit states it is an "affidavit" and that "The undersigned, being first duly sworn on oath, deposes and states as follows." D0038 App. 25; *see Brooks*, 285 F.3d at 1105 ("a person who manifests an intention to be under oath is in fact under oath."); *Robidoux v. Oliphant*, 775 N.E.2d 987, 998 (Ill. 2002) (holding the lack of notarization did not render the affidavit insufficient because "the affidavit was signed, and his name appeared as one having taken an oath" when the where the rule, like section 147.140, set out specific requirements of the contents of the affidavit and omitted reference to notarization); *In re Paternity of H.R.M.*, 864 N.E.2d 442, 449–50 (Ind. App. 2007) (concluding the language "duly sworn upon his oath" would be sufficient to support a perjury charge "[e]ven if the affidavit . . . was not notarized").
- Dr. Gerlinger and the officer communicated in real-time via email messages on devices capable of audio and visual communication when he signed his expert report and certificate

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acts [were] knowingly and voluntarily made," thereby satisfying the purpose of synchronous visual and audio communication. *See* Revised Uniform Notarial Act, Prefatory Note to 2018 Amendments, at p. 3–4.

of merit. In both the expert report and certificate of merit, Dr. Gerlinger formally certified to the officer in writing that his statements were true and accurate. This is the same statement he would have made had the oath been orally administered by the notarial officer. *See* Iowa Code § 9B.2(18).

- Dr. Gerlinger was asked to perform a corporal act and he did it by signing his report and certificate of merit at the request of the officer for submission as his testimony in a legal proceeding. *See Walker*, 574 N.W.2d at 287 (affiant's "signature at the bottom of the proof of service constituted a corporal act recognizing the import of the information provided in the document.").
- Based on the multiple references in the certificate of merit affidavit and the certified expert report to an *oath* and the fact that he was *certifying* and *deposing* to the statements therein, Dr. Gerlinger knew he was swearing under oath and under penalty of perjury that the content of the certificate of merit and expert report was true and correct. D0038 App. at 19. This knowledge was formed based on Dr. Gerlinger's prior

experience with signing documents under oath for legal disputes, his prior experience as an expert witness in legal disputes, and the fact that he knew he was sending the certificate of merit and expert report as testimony to an officer of the legal system. *Id.*; *see Walker*, 574 N.W.2d at 287.

- Dr. Gerlinger knew that his conscience was bound to the truthfulness and accuracy of the statements in the Certificate of Merit and Expert Report. D0038 at 19.
- Dr. Gerlinger's certificate of merit and certified expert report subjected him to professional disciplinary action. D0038 App. at 19–20. *See* 225 Ill. Comp. Stat. 60/22 (identifying conduct warranting disciplinary action against physicians under Illinois law).

F. Gerlinger's Certificate and Report Substantially Comply with the Requirements for an Unsworn Declaration.

Iowa Code section 147.140 is also satisfied when the plaintiff substantially complies with Iowa's unsworn certification statute. *See* Iowa Code §622.1; *see Miller*, 7 N.W.3d at 375. Section 622.1 states, "the person may attest the matter by an unsworn written 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. . . ."

In *Miller*, the Court observed that " 'under penalty of perjury' language" must be included in a section 622.1 certification because such language "acts to bind the conscience of the person and emphasizes the obligation to be truthful." 7 N.W.2d at 376. The Court, citing the Iowa Court of Appeals, observed the litigant make an "an effort at compliance with the 'under penalty of perjury' requirement" to satisfy section 622.1. *Id.*

Dr. Gerlinger's use of the phrase "sworn *on oath*, *deposes* and states" and his formal certification that his report is an accurate statement of the opinions to which "I will testify under oath,"[18] constitutes "penalty of perjury" language for purposes of substantial compliance with section 622.1 and section 147.140. The word "oath" literally means the person is subject "to penalties of perjury if the testimony is false" and the person "invites punishment if the statement is untrue." OATH, Black's Law Dictionary.[19] Dr. Gerlinger testified he knew this meaning of the

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18 D0038 App. 25, 29.

19 Like affidavits, extrinsic evidence—such as the dictionary definition of words used in an unsworn declaration and other evidence showing compliance with section 622.1—may be introduced to show the requirements of Iowa's unsworn declarations statute has been satisfied. *See*

word "oath" when he signed his certificate of merit and report, D0038 App. at 18–20, 21–22. In addition, the word "depose" means "[t]o testify; to bear witness." DEPOSE, Black's Law Dictionary, and Dr. Gerlinger also understood this meaning when he signed his certificate of merit. D0038 App. 8–20, 21–22. *See Walker*, 574 N.W.2d at 287. Dr. Gerlinger's belief that he was subjecting himself to the penalty of perjury is objectively reasonable, particularly considering his prior experience as an expert.[20]

Several courts have held an unsworn declaration stating the person is making the statement upon his "oath" and "deposes" the statement satisfies similar unsworn certification statutes. *See Ag Tech Resources, Inc. v. Land O'Lakes*, 2024 WL 1236396, at *8 (S. D. Iowa 2024); *Ultegra*

Miller, 7 N.W.2d at 377 (citing with approval *MountainView Hosp.*, 273 P.3d at 865); *see also Trevino v. Lockheed Martin Corp.*, 2008 WL 11333529, at *3 (N.D. Ga. 2008) (undated declaration is acceptable where extrinsic evidence establishes the approximate date in which the declaration was executed); *Chicago Regl. Council of Carpenters Pension Fund v. Longshore/Daly, Inc.*, No. 08 C 359, 2014 WL 716223, at *3 (N.D. Ill. 2014); *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 475 (6th Cir. 2002); *Grand Fabrics Intl. Ltd. v. Melrose Textile, Inc.*, 2018 WL 6118439, at *7 (C.D. Cal. 2018); *State Farm Fire and Cas. Co. v. Greichunos*, 2017 WL 1856687, at *2 (N.D. Ind. 2017).

[20] Gerlinger signed the certificate of merit on February 11, 2023, and he signed his expert report on August 13, 2022. D0038 App. 6–7. This testimony is undisputed. D0032 at 13.

Fin. Partners, Inc. v. Marzolf, 2020 WL 1036045, at *1 (D. Colo. 2020); *Gilman v. Walters*, 2013 WL 1819097, at *1 (S.D. Ind. 2013); *McCoy v. SC Tiger Manor, LLC*, 2022 WL 621000, at *2 (M.D. La. 2022); *Eveleigh v. Conness*, 933 P.2d 675, 683–84 (Kan. 1997); *see also Robidoux*, 775 N.E.2d at 998. These courts had little difficulty holding the terms "oath" and "deposes" satisfies unsworn declaration statutes that are substantively identical laws to section 622.1. *See, e.g.*, 28 U.S.C. § 1746 (federal unsworn declaration statute).

The Court's unpublished decision in *Shontz v. Mercy Medical Center-Clinton, Inc.*, No. 23-0719, 2024 WL 2868931 (Iowa June 7, 2024) is inapposite. First, the plaintiff in *Shontz* did not argue that its certificate of merit substantially complied with Iowa Code section 622.1, so the references to section 622.1 in the Court's unpublished *Shontz* decision are dictum. *See S.K.*, 2024 WL 4714425, at *20 n.5 (noting the Court's statements in opinion pertaining to issues not raised by the parties are dictum). Second, and more importantly, unlike the certificate in *Shontz*, Dr. Gerlinger's certificate states his statements were made "on oath" and the expert "deposes" his statements, whereas the certificate in *Shontz* states the expert "affirms and states." Unlike the term "oath"—which is

expressly defined to mean the person is subject to "penalties of perjury," OATH, Black's Law Dictionary, the term "affirm" means:

> *vt* **1 a** : VALIDATE, CONFIRM . . . : **b** : to state positively or with confidence : declare as a fact : assert to be true . . . opposed to *deny* **c** : to assert as valid or confirmed . . . **d** : to testify or declare by affirmation – distinguished from *swear* ~ *vi* **1 a** : to declare or assert positively . . . **b** : to testify or declare by affirmation . . . **2** : to uphold a judgment or decree of a lower court . . . **syn** see ASSERT, SWEAR

AFFIRM, Webster's Third New International Dictionary (unabr. Ed. 1981). Courts, too, give the term "affirm" various interpretations that fall short of "penalties of perjury." *See, e.g.*, *State v. Hostetter*, 222 S.W. 750 (Mo. 1920) ("The use of the word 'alleges,' is "synonymous with 'affirms,' 'asserts,' or 'declares,' or that of the more archaic 'allegiare,' which simply means 'to define or justify by due course of law.' "); *Leopold v. Civil Service Comm'n*, 20 A.2d 612, 615 (N.J. 1941) ("affirms" has "substantially the same meaning" as "approved"); *see also* Iowa Code § 4.1(19).[21]

Given the notable differences between the definitions of "affirms" and "oath," at least one court has expressly distinguished the term "affirms" and the term "oath," holding the statement "duly sworn upon his

[21] At most, *Shontz* stands for the proposition that in the *absence of evidence aliunde* an expert stating "affirms and states" falls short. *See Shontz*, 2024 WL 2868931, at **1–2.

oath" "provides a stronger intention to be bound by the penalty of perjury" than the phrase "being duly sworn." *In re Paternity of H.R.M.*, 864 N.E.2d at 449– 50; *cf. Robidoux*, 775 N.E.2d at 998. *Shontz* itself draws the important distinction between the terms "affirms" and "oath," noting "[n]either certificate contained a jurat *nor was there any indication that [the expert] had signed under oath*." *Shontz*, 2024 WL 2868931, at *1 (emphasis added).[22]

III. DMOS's Proposed Application of the Certificate of Merit Statute is Unconstitutional.

A. Error Preservation.

Error is preserved because the Raricks challenged the

[22] Even if the original certificate was deficient, the Raricks cured the deficiency by filing an amended certificate before DMOS filed a motion to dismiss. *See Edelman v. Lynchburg College*, 535 U.S. 106, 115–16 (2002) ("Where a statute or supplemental rule requires an oath, courts have shown a high degree of consistency in accepting later verification as reaching back to an earlier, unverified filing."); *Ferreira v. Rancocas Ortho. Assoc.*, 836 A.2d 779, 784 (N.J. 2003); *Frame v. Millinocket Regl. Hosp.*, 82 A.3d 137, 143 (Me. 2013); *Dishmon v. Fucci*, 32 A.3d 338 (Del. 2011); *Westmoreland v. Vaidya*, 664 S.E.2d 90 (W. Va. 2008); *Story v. Sunshine Foliage World*, 120 F. Supp. 2d 1027, 1031–32 (M.D. Fla. 2000); *Sloun v. Agans Bros.*, 778 N.W.2d 174, 184 (Iowa 2010) (non-jurisdictional affidavits may be cured); *Bd. of Directors v. Bd. of Ed.*, 109 N.W.2d 218, 222 (Iowa 1961); *Lowenstein v. Monroe*, 3 N.W. 51, 52 (Iowa 1879); *Faivre v. Manderschied*, 90 N.W. 76, 78 (Iowa 1902); Wright & Miller, 5A Fed. Prac. & Proc. Civ. § 1339 ("[A]n imperfect verification of a pleading or its absence may be corrected by any amendment permitted").

constitutionality of section 147.140 in the district court proceedings, which the district court denied. D0038 at 76–81.

B. Standard of Review.

The Court reviews constitutional challenges to statutes de novo. *Kluender v. Plum Grove Invests., Inc.*, 985 N.W.2d 466, 469 (Iowa 2023).

C. Discussion.

Article I, section 6 of the Iowa Constitution provides that "[a]ll laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. Art. I, § 1. Likewise, "Article III, section 30 contains a similar requirement that all laws be general and operate uniformly." *City of Coralville v. Iowa Utilities Bd.*, 750 N.W.2d 523, 530 (Iowa 2008).

Section 147.140 treats similarly situated plaintiffs differently. Medical malpractice defendants receive special privileges not afforded to other professional malpractice defendants, or to other negligence defendants more generally. *See Kennis v. Mercy Med. Ctr.*, 491 N.W.2d 161, 167 (Iowa 1992); *Thomas v. Fellows*, 456 N.W.2d 170, 172 (Iowa 1990).

Second, section 147.140 implicates the fundamental right of access to the courts. *See Olsen v. State*, 9 N.W.3d 21, 27 (Iowa 2024); *Beeler v. Van Cannon*, 376 N.W.2d 628, 630 (Iowa 1985). Indeed, the right of access to the courts is all but express in article I, section 9, Iowa's due process clause. Laws burdening fundamental rights are subject to strict scrutiny. *See Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009). "Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." *Id.* Here, section 147.140 is putatively designed to "enable early dismissal of meritless malpractice actions." *Struck*, 973 N.W.2d at 536. Favoring or disfavoring a particular class of litigation, or a particular type of insurer or professional, is not a compelling state interest of the type that can survive strict scrutiny.

The statute is underinclusive in that an expert filing the bare-bones certificate of merit does not imply that the claim is actually meritorious; that is why so much additional litigation is required before judgment.

The statute is overinclusive in that a failure to satisfy section 147.140 only very weakly indicates a case is not meritorious, especially in cases—like this case—that turn on the technical rather than

substantive aspects of the certificate. This case—in which liability on the merits is essentially a foregone conclusion due to the nature of the injury and the fact that DMOS does not have a retained standard of care expert to refute Dr. Gerlinger's opinions—provides a perfect example of the irrelevance of section 147.140 to the substantive strength or weakness of a case. Further, even when a plaintiff fails the statutory bar, the goals of the statute do not require the statute's remedial abnormalities—dismissal with prejudice, among other things.

The Oklahoma Supreme Court has held its equivalent of section 147.140 unconstitutional on similar grounds. *See John v. Saint Francis Hospital, Inc.*, 405 P.3d 681 (Okla. 2017). The Oklahoma Constitution, like the Iowa Constitution, prohibits special legislation. *See id.* at 688; *see also* Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6 of the Iowa Constitution*, 66 Drake L. Rev. 147, 178 (2018) (noting the similarity between the Iowa and Oklahoma provisions). The court held that that state's equivalent was prohibited special legislation because it protected only medical malpractice defendants, not similarly-situated negligence defendants. *See id.* at 688–692. Moreover, the statute impermissibly burdened the fundamental

right of access to the courts—even though it only required dismissal *without* prejudice. *See id.* at 687–89; *see also Putman v. Wenatchee Valley Med. Ctr.*, 216 P.3d 374, 376–77 (Wash. 2009).[23]

IV. Conclusion.

For the reasons stated above, the district court's order dismissing the Raricks' case with prejudice pursuant to Iowa Code section 147.140 should be reversed and the case remanded.

REQUEST FOR ORAL ARGUMENT

The Raricks respectfully request this case be submitted with oral argument.

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[23] Even if rational-basis review applies, neither the requirements nor the remedies of section 147.140 bear a rational relationship to its purpose of early dismissal of meritless cases. *See LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860–61 (Iowa 2015). In the alternative, section 147.140 is unconstitutional based on the original meaning of Article I, section 6, which was to "serv[e] a majoritarian or populist end," "prevent[ing] the powerful from getting special treatment" through "forms of special status . . . bestowed by the government to which a person would not otherwise be entitled." *See* Mansfield & Wasson, 66 Drake L. Rev. at 152–57; *see also id.* at 177 (noting that the privileges and immunities clause was uniquely targeted at "better treatment[] for a specific line of business"); *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 247 (Iowa 2018) (Mansfield, J., dissenting). Section 147.140 is straightforward special-interest legislation; it provides special (and abnormally powerful) litigation advantages to a particular favored industry not afforded to typical tort defendants, even in otherwise-similar professional malpractice cases.

Respectfully Submitted,

/s/ *Scott M. Wadding*

Scott M. Wadding, AT0010447
SEASE & WADDING
104 SW 4th St. Suite A
Des Moines, Iowa 50309
Telephone: (515) 883-2222
Facsimile: (515) 883-2233
swadding@seasewadding.com

Attorneys for Appellants
Richard Rarick and Teresa Rarick

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I, Scott M. Wadding, certify that there was no cost to reproduce copies of the preceding brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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/s/ *Scott M. Wadding*
Scott M. Wadding, AT0010447
SEASE & WADDING
104 Southwest Fourth Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
swadding@seasewadding.com

Attorneys for Appellants
Richard Rarick and Teresa Rarick